AN

APPENDIX

TO

BACON'S

L.S. Dabney.

NEW ABRIDGEMENT

OF THE

LAW,

ALPHABETICALLY DIGESTED UNDER PROPER TITLES.

BY

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VOL. VI,

DUBLIN:

LUKE WHITE.

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ADVERTISEMENT.

As a new Edition of Bacon's Abridgment of the Law has been lately publiſhed in London, with conſiderable additions and containing the lateſt authorities, under the ſanction of Henry Gwillim, Eſq. Barriſter at Law; and as the Editor of the Iriſh Edition of that Work is anxious that the numerous purchaſers of it ſhould be accommodated with thoſe improvements, he has, at a heavy expence, comprehended in two ſupplemental volumes, which he now preſents to them, the whole of the new matter to be found in Mr. Gwillim's Edition.

There being introduced under ſome of the general titles in the new work, diviſions, not correſponding with any in the original compilation, it is proper to be obſerved, that ſuch new diviſions, in the ſupplemental volumes, are noticed with literal references immediately after the general title to which they belong, and the matter relating to each of thoſe diviſions, is afterwards introduced in its order.

It is fit alſo to be obſerved, that as the literal references in the new Edition have been made without any regard to thoſe in the old work, the order of the

alphabet being followed in both, it has been thought expedient, to prevent confuſion, that in thoſe caſes, where the new diviſions are marked with literal references found in the original work, the ſame references ſhall be preſerved with the variation of the Italick inſtead of the Roman Capital; and where the ſame literal references do not occur in the old work, that are found in the new, the Roman Capital is adhered to. The new matter is all brought in, and coupled with the correſpondent matter of the former volumes, by inſerting within parentheſis, in its proper place, the initial words of the *placitum* or paragraph of the original Text: the whole of the Appendix in Mr. Gwillim's Edition is incorporated under the general Titles, and in each of them follows the other matter. The preſent Editor takes this opportunity of informing the reader, that as Mr. Gwillim has in ſome places totally omitted, and others altered, paſſages which appeared in the former Editions of this Work, the laſt Iriſh Edition with theſe ſupplemental volumes, compriſes the whole of every former edition and includes all Mr. Gwillim's improvements.

PREFACE

TO THE

FIFTH EDITION.

IT was the hard fate of the excellent writings of the late Chief Baron GILBERT, to loſe their Author, before they had received his laſt corrections and improvements, and in that unfiniſhed ſtate to be thruſt into the world, without even the common care of an ordinary editor. Thoſe invaluable tracts were for the moſt part publiſhed not only with all their original imperfections, without any attempt to ſupply their defects, or explain or correct what ſeemed in them perplexed or erroneous, but with all the improprieties and inaccuracies which the ignorance and neglect of the amanuenſes, whom the Author's infirmities compelled him to employ, could accumulate upon them.

Some of thoſe tracts, it is well known, fell into the hands of the Compiler of the preſent work, and from them the materials of the greater part of it, as far as the title "*Simony*," were collected. Unfortunately, our Compiler had not the moſt happy diſpoſitions for the work he had undertaken, nor were thoſe parts of the learned Judge's writings which appeared in the New Abridgment much better prepared to meet the publick eye, than the other tracts which had been publiſhed by perſons

perſons to whom chance or an undiſtinguiſhing choice had committed the inſpection of the preſs.

In the courſe of the work, Mr. *Bacon* ſeems to have made different uſe of the materials that lay before him, ſometimes taking the tracts at length, ſometimes giving only extracts from them: but whether he inſerted the whole of any tract, or only a part of it, we have reaſon to think, he inſerted it juſt as he found it. If the Author in different treatiſes, in order to make each treatiſe perfect within itſelf, introduced the ſame matter conveyed in the ſame expreſſion, the Compiler implicitly copied it, and under different titles of his work introduced the ſame paſſages to the extent of ſeveral pages. If the manuſcripts were in any part defective, if the ſubjects were but partially treated of in them*, the titles which related to thoſe ſubjects were left equally defective in the Abridgment. The Compiler ſeemed to have as little inclination to ſupply the deficiencies of his Author, as he had ſagacity to mark or correct his errors.

With theſe defects and redundancies the work has paſſed through three ſubſequent editions; the only anxiety diſcoverable in the later editors being to crowd it with references to caſes inappoſite to the point in the text, and which, at the beſt, had only ſome relation to remote branches of the general ſubject.

In preparing the preſent Edition for the preſs, it has been the firſt care of the Editor to retrench what was redundant in the work, and to expunge what appeared

* It ſhould ſeem from ſome manuſcript treatiſes of this author in the poſſeſſion of Mr. *Hargrave*, which have never appeared in print, that he had formed and actually executed the comprehenſive plan of writing diſtinct treatiſes upon every branch of the law, except the criminal juriſprudence.

to

to him impertinent. In retrenching, he has ſubſtituted reference for repetition; and where the ſame matter which had occurred under one title ſeemed naturally to fall under and belong to another, he has referred to the preceding title inſtead of introducing it again. In expunging, he has not indulged himſelf in any arbitrary or capricious licence; nor has he preſumed to ſtrike out one ſupervenient authority of a later editor, before he had ſatisfied himſelf by careful examination that it had no pretenſions to the place it affected to occupy.

In the original text he has rarely ventured to make any alteration, except where it was manifeſtly corrupted by the careleſſneſs of the copyiſt or of the preſs, or rendered perplexed by the want of due attention to punctuation. One or two paſſages indeed, where the meaning could not be collected either from the expreſſion or the references, he thought himſelf at liberty to expunge. Conjectural emendation is not admiſſible in a work of this kind; and he truſts, no man will complain of the loſs of nonſenſe.

He has attempted to mark, and guard his readers againſt, the miſtakes of the author; but he is ſenſible that many, too many, erroneous paſſages have been ſuffered to paſs without obſervation. In the courſe of ſo long a work it cannot be expected that the exertions of the mind ſhould be always equal, or that it ſhould always be alike diſpoſed to proceed in the taſk it had undertaken. It muſt occaſionally ſicken at ſome parts of the labour as beneath its attention, and ſhrink from others as beyond its powers. It is well know that the moſt obvious errors ſometimes moſt eaſily eſcape detection. In reading, every man muſt have felt that his mind is ſometimes more attentive to its own preconceptions on the ſubject, than to the ideas of the author, and the better it is ſatisfied with the rectitude of the former, the more ſteadily it purſues them, and the leſs

ſenſible

ſenſible it is of the aberrations of the latter. The form too in which error preſents itſelf to us may help to facilitate its eſcape; it is more likely to paſs ſilently and unobſerved when propoſed in the form of a ſimple affirmation, than when it challenges our inquiry in that of an interrogation. We often readily admit upon a ſtatement what we ſhould inſtantly deny, if it were offered to us in the way of queſtion.

It ſhould be obſerved, that even where the Editor has detected error, he has not always immediately appriſed his reader of it: he has ſometimes ſubjoined his remarks upon the erroneous paſſage at the end of the diviſion where it has occurred: he has at other times left its confutation to its inconſiſtency with the better-conſidered and more recent determinations which he has afterwards introduced.

In the additions he was to make, he found it neceſſary to preſcribe to himſelf ſome limitations: he therefore in general attempted no more than to fill up the chaſms that were left under thoſe general diviſions into which he found the work already diſpoſed, and then to engraft upon the whole the later deciſions. He has indeed given two new titles, viz. "*Piſcbary*" and "*Set-off*;" and he knows that he might have given others, as the work is at preſent far from a complete Abridgment of the Law. But he had neither time nor encourgement to go farther. Beſides, much of the learning which is wanting, is to be met with in books that are in every one's hand; and what was to have been gleaned from other writings of the ſame kind, though it might have increaſed the bulk of the work, would not have added to its intrinſick value, or have done any credit to the induſtry or integrity of the Editor. If there ſhould be ſome who complain that more might have been done, there will be others, he fears, who will ſay, perhaps with more juſtice, that much of that which has been done might have been ſpared.

As

As the Abridgment is written in the ſtyle of diſſertation, he has in his additions availed himſelf largely of thoſe tracts which have been publiſhed upon different parts of the Law, and received the approbation of the Profeſſion. He has been in general careful, whenever he has made an extract from any of thoſe tracts, to acknowledge the obligation by reference to the work itſelf. If he has in any inſtance (and he may have done ſo in many) neglected to make ſuch reference, the author may be aſſured, that it was by mere accident or inadvertency, and not from any deſign to take to himſelf the credit of another man's labours. But whereever ſuch omiſſion may have been made, let not the author be under any uneaſineſs: the world will too eaſily diſtinguiſh what properly belongs to the Editor.

He thought himſelf at full liberty to tranſplant into the work as much of the Chief Baron *Gilbert*'s tracts as he had occaſion for: it was in truth only re-uniting diſjointed members, many parts of the work itſelf being only parts of ſeveral of thoſe tracts. One of the learned Judge's treatiſes, *viz.* the Treatiſe upon the Doctrine of Remainders, from which the collections in the Abridgment under that title were extracted, he has been enabled to give entire by the kindneſs of Mr. *Hargrave*. The manuſcript had been purchaſed by that gentleman at no inconſiderable price: but, diſdaining all private conſiderations where the intereſts of that Profeſſion, of which he is ſo diſtinguiſhed an ornament, ſeemed in any degree concerned, he made a voluntary tender of it to the Editor, as ſoon as he was informed that he was engaged in preparing another edition of the preſent work. By this generous act, Mr. *Hargrave* has highly flattered the Editor, and has added one more to the many obligations his Profeſſion were already under to him.

HENRY GWILLIM.

Boswell-Court,
Michaelmas Term 1797.

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APPENDIX.

ABATEMENT. Vol. I. Page 1

Abatement In The) For the derivation and different ſenſes of the word Abatement in our law, 3 Bl. Comm. 168. Co. Litt. 134. b. 181. a. 242. b. 271. a. 277. a. Finch's L. 195. Pleas to the ſdiction, and to the perſon of the plaintiff, are pleas in diſability, and only in the nature of s in abatement. Pleas in abatement, ſtrictly called ſuch, are pleas to the writ. Finch. L. . 3. Bl. Comm. 301.

) By a Defect in the Writ.
) By the Writ not agreeing with the Count.
) Dilatory Pleas, how reſtrained.
) Of the Writ by Journies Accompts.
) Foreign Plea.

(A) Of Pleas to the Jurisdiction of the Court. Page 2

A Plea To) But after a general ſpecial imparlance, that is, an imparlance with a general ng of all manner of exceptions, it ſeems that it may be pleaded; but the granting of ſuch an arlance is diſcretionary in the Court, and it cannot be had but by ſpecial motion. Grant v. d Sondes, 2 Bl. Rep. 1094. Wentworth v. Squib, 1 Lutw. 46. 12 Mod. 529. S. C. Clapham enthal, Hardr. 365. Barrington v. Venables, Raym. 34.

t muſt be pleaded within the firſt four days, unleſs the defendant come voluntarily before the regular appearance day, in which caſe it may be ded afterwards. Doe v. Robinſon, 2 Str. 1120.

The Defendant) But ancient demeſne cannot be pleaded without leave of the Court, and is in by attorney. Doe ex dim. Raſt. v. Roe, 2 Burr. 1046. Raſt. 58. b. See too, in other , Robinſ. Entr. 1. Clift. 17. p. 44.

A plea that the ſuit is of viſitatorial cognizance, muſt ſhew the extent the viſitor's authority, and aver that he is able to do complete juſtice. Attorney General v. Talbot, 1 78. 3 Atk. 662. S. C. Green v. Rutherforth, 1 Vez. 474. and Rex v. Bland, B. R. M. 14 there cited.

(B) To the Perſon of the Plaintiff.

1. Of Outlawry.

(*Nor When He*) But lord Bacon thinks that the plea of another outlawry may be admitt in this caſe; for that the plaintiff in error may avoid the concluſion which it is ſuppoſed wo follow from its admiſſion, by bringing a writ of error to reverſe that other outlawry, and r plying the pendency of ſuch writ. Bac. Max. Reg. 2.

Page 3 Outlawry cannot be pleaded without concluding *prout patet per rec*
3 Lev. 29. *dum.*
Com. 307. An expreſs averment that the plaintiff and perſon outlawed are t
Draycote v. Curzon. ſame perſon is not neceſſary: it is ſufficient if the identity be apparent
Lutw. 40. the face of the plea.
Atkins v. Bayles, 2 Mod. 267.

2. Excommunication.

(*When Excommunication*) So in equity, he may, in ſuch caſe, ſue out freſh proceſs, and c pel the defendant to anſwer the bill. Mitf. Eq. pl. 187.

(*Excommengement*) Excommunication is no plea to the next friend of an infant. Pr. Reg. 278.

Moor, 775. But the abſolution muſt be by the ſame biſhop who excommunicat or by the archbiſhop upon appeal.

(*The Court Will Not*) Where the excommunication is by delegates, a certificate of it u their ſeal muſt be produced. Lutw. 17. An excommunication may be certified *per literas tamentarias ſub ſigillo*, as well as by direct certificate. 1 Ventr. 222. Milf. Eq. pl. 186. in both theſe caſes the certificate muſt be pleaded *ſub ſigillo*, as well in equity as at law. Eq. pl. 186.

Baker v. Gough, Cro. Ja. 82. The plea of excommunication muſt ſtate the preciſe time when party was excommunicated.

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3. Alienage.

(*An Alien Enemy*) That is, *proprio jure*; for, it ſeems, he may ſue *en autre droit* as exec nor is it any exception that the teſtator was an alien enemy, unleſs it be ſhewn that he w at the time of his death. And if he be reſident here when he died, the court will intend he was ſo with the king's licence. Villa v. Dimock, Skin. 370. Lutw. 35.

Brandon v. Neſbitt, 6 Term Rep 23. And as he cannot ſue directly in his own name, ſo neither can he indirectly in the name of a truſtee.

Wells v. Williams, Ld. Raym. 282. Salk. 46. Lutw. 34. But if he comes here under letters of ſafe conduct, or reſides her the king's licence, he is to be deemed an alien friend in effect, and titled to the ſame privileges.

Openheimer v. Levy, 2 Str. 1082. Burk v. Brown, 2 Atk. 397. It is neceſſary, therefore, in pleading allegiance to a perſonal a to aver, that the plaintiff is an alien enemy; when ſo pleaded, the p tiff, if he has a protection, muſt ſtate (*a*) it in his replication, whet be general or ſpecial, and ſhould conclude (*b*) with an averment.

(*a*) Fort. 221. 7 Mod. 150. (*b*) Wells v. Williams, Lutw. 34. Ld. Raym.

The old notion that Turks and infidels were perpetually to be consider- Salk. 46.
as alien enemies, hath been long exploded; and such aliens may sue 1 Atk. 51.
equity, as well as at law, for a personal demand.
See further, tit. Aliens, (D).

(C) Of Pleas in Abatement with respect to the Person of the Defendant; and herein of privileged Persons.

Whenever therefore an attorney is sued out of his own court, he may Page 5
that he is attorney, &c. of another court, and conclude with *unde non* Lutw. 44.
dit quod cur', &c. hic placit' predict. versus eum cognoscere velit aut de- 639.
, &c. But the plaintiff may reply that he is a husbandman, &c. in Br. Traverse, 27.
country, and traverse his being an attorney.

This privilege is not the privilege of the officers, but of the suitors, 2 Wilf. 42.
d attendance is the ground and foundation of it; it must therefore be 228. 1 Str.
ged that the officers are actually attendant in their respective courts, 546. 4 Bur.
herwise the plea will be disallowed. 2109. Andr. 45.

The jurisdiction of the court of conscience for *Westminster* extends to Gardner v.
ornies; but not that of the county-court of *Middlesex:* and a defen- Jessop,
nt who resides within the jurisdiction of this last court is not entitled to 2 Wilf. 42.
e benefit of the statute of 25 G. 2. c. 33., if the plaintiff is an attor- Wiltshire
y. v. Lloyd,
Dougl. 381.

Hussey v. Jordan, *ibid.* *Vid. contr.* Silk v. Kennet, 3 Burr. 1583. and 382. notes.

(*So If An Officer*) If privilege be pleaded to privilege, the court will not determine it on otion to set aside the plea, but oblige the party to demur. 2 Str. 837. 1 Bl. Rep. 34.

So in equity, if a suit be instituted against different persons, some of Mitf. Eq.
hom have privilege, and some not, (*b*) or if one defendant be not pl. 183.
nesnable to the particular jurisdiction, the plea of privilege will not be Vin. Abr.
llowed. tit. *University*, (K.) p.
3. (*b*) Hutton, 59.

(*After a General Imparlance*) By a special imparlance in this case, must be understood a general special imparlance, *Vide supra*, (A), notes. Plea of privilege without affidavit set aside. Str. 738. It must be pleaded: it cannot be allowed on motion. 2 Salk. 544. 1 Wilf. 366.

An attorney who is arrested by capias on a special original out of the 2 Bl. Rep.
me court, is not entitled to his discharge on serving the sheriff with a 1085.
rit of privilege, but must plead the privilege in abatement. Crosley v.
Shaw.
He may plead it as well to an action on a bill of exchange, as to any Comerford
ther personal action. v. Price,
Dougl. 312.

An attorney has not any privilege to be sued in Middlesex only; it is Forteſc.
nough that he be sued in his own court. 343, 344.
4 Burr. 2027.

See further tit. Attorney and Privilege.

Page 6 (D) Of Miſnomer, and want of Addition.

(*Miſnomer Is a Good*) It is pleadable only in abatement. 2 Bl. Rep. 1120.

(*But Though*) So if he plead a miſtake in the addition, he muſt ſet forth his right additio
2 *Str.* 816. 10 *Mod.* 208. 2 *Ld. Raym.* 1178. 1541.

Page 7 (F) Of Abatement by the Death of Parties.

(*The General Rule To Be*) The rule in a court of equity in this reſpect, is ſimilar to th which is here ſtated to prevail at law. If the intereſt of a party dying ſo determines that can no longer affect the ſuit, and no perſon becomes entitled thereupon to the ſame inter the ſuit does not abate. Or if the intereſt of a party dying ſurvives to another party; as, if bill is filed by or againſt truſtees or executors, and one dies; or by and againſt huſband and w in right of the wife, and the huſband dies, the proceedings do not abate. So if a ſurvivi party can ſuſtain the ſuit, as in the caſe of ſeveral creditors plaintiffs on behalf of themſel and other creditors. For the perſons remaining before the Court in all theſe caſes, either h in them the whole intereſt in the matter in litigation, or at leaſt are competent to call upon t Court for its decree. Mitf. Eq. pl. 56. 3 Ch. Rep. 40. 2 Vern. 249. 3 Atk. 726.

(*But In a Writ of Error*) But ſee Penoyer v. Brace, Ld. Raym. 244. where the doctrine a vanced in the text is admitted by the Court.

Middleton and Wife v. Crofts, Andr. 57. Caſ. Temp. Hardw. 395.

Upon the ſame principle it was holden, that a prohibition by huſba and wife to a ſuit in the ſpiritual court did not abate by the death of t huſband.

2 Str. 1056.

The death of the leſſor of the plaintiff in ejectment (though only nant for life) is no abatement.

Clerk v. Withers. 2 Ld Raym. 1072. 1 Salk. 322. S. C. 6 Mod. 290. S. C.

A fieri facias doth not abate by the death of the plaintiff *after* t ſeizure of the goods, for by the ſeizure the property is changed. Bu the goods ſeized are not ſufficient to ſatisfy the debt, a ſecond fieri fac cannot iſſue without a revivor of the judgment. (*a*) An extent aba where the death happens *before* the *liberate*; for until that is awarded, t execution is incomplete. So a ſequeſtration to compel performance o decree, when the party dies before order for ſale of the goods.

(*a*) Wharam v. Broughton 1 Vez. 180.

8 & 9 W. 3. c. 31. ſ. 3. 27 Eliz. c. 13. ſ. 13.

A ſuit for partition of lands is not abated by the death of one of t tenants. Nor is a ſuit on the ſtatute of hue and cry, commenced in t name of the clerk of the peace, abated by his death or removal.

1 Burr. 147. 219. 4 Burr. 2277. Bates v. Lockwood, 1 Term Rep. 637.

If the plaintiff or defendant die whilſt the Court are conſidering their judgment, they will permit the judgment to be entered up as of t term in which it *regularly* might have been; ſo perhaps, if there be a frivolous delay by the other party; but where the proceedings are in t common courſe of law, they cannot interfere.

Sir Thomas Waller v. Hanger, 2 Buſſtr. 261. Morby v. Urlin, Hardr. 161.

An information does not abate by the death of the attorney-gene nor by the death of a relator who proſecutes for the king; (*a*) nor, ſeems, by the death of an informer, qui tam, &c. for in ſuch caſe the torney-general may proceed for the king's moiety.

(*a*) Hammon v. Gryffith, Cro. El. 583. Anon. Moor. 541.

The proceedings upon an information in equity can only *abate* by the th or determination of intereſt of the defendant. But if there are ſe- l relators, the death of any of them, while there ſurvives one, will in any degree affect the ſuit: but if all the relators die, or if there is one, and that relator dies, the Court will not permit any further pro- ding till an order has been obtained for liberty to inſert the name of a relator, and ſuch name is inſerted accordingly; otherwiſe there ld be no perſon liable to pay the coſts of the ſuit, in caſe the informati- hould be deemed improper, or for any other reaſon ſhould be diſmiſſed. Mitf. Eq. pl. 91. Pr. Ch. 13. 2 Eq. Caſ. Abr. 1. 1 Vez. 71. 2 Vez. 327.

The benefit of a decree in equity may be had, notwithſtanding the h of ſome of the parties, provided that nothing be requirable of their ſentatives. Eq. Caſ. Abr. 2. p. 7.

After a cauſe has been heard on a bill of interpleader, and a trial at law been directed to ſettle the right between the defendants, the death of laintiff does not abate it, for his intereſt is at an end. 1 Vern. 351.

y 17 *Car.* 2 *C.* 8.) And in the former caſe the Court ſaid that it was in their diſcretion whe- they would arreſt the judgment. Salk. 8. p. 21. But in Lord Raym. 1415. it was holden aſſignable for error, it being ſtated on the record that the defendant appeared *per attorna- tum*. Judgment entered according to this ſtatute, after the plaintiff's death, ſhall relate in reſpects to his life. 1 Lev. 278. Raym. 210. Where the jury found a ſpecial verdict, and plaintiff died in the term in which it was to be argued, the judgment was by conſent en- d up as of the firſt day of that term. Pond v. King, 1 Wilſ. 124. Where the plaintiff dies een the verdict and the entry of the judgment, his repreſentative cannot take out execu- without a *ſcire facias*. Earl v. Brown, 1 Wilſ. 302.

An information for a penalty under the French act was adjudged not to within this ſtatute, but to abate by the death of the defendant between verdict and the judgment; for, in the firſt place, it is not an action l, perſonal, or mixt; ſecondly, the king cannot be properly ſaid to be arty; thirdly, it is not a duty, or in lieu of cuſtoms, or any revenue the crown; and laſtly, actions do not comprehend informations be- en party and party, or include the king. A ſuggeſtion of the death n the roll confeſſed by the attorney-general was thought ſufficient with- a writ of error. Attorney General v. Buckley, Parker, 264.

The rule laid down by the Lord Chief Baron Gilbert in the preceding t of this chapter reſpecting the non-abatement of a ſuit by the death of of the plaintiffs or defendants, when ſuch death made no alteration in proceedings, though founded in reaſon, was not uniformly ſupported authorities, but the aid of the legiſlature was requiſite for the purpoſe enforcing it; accordingly, it was enacted by the 8 & 9 W. 3. c. 11. ſ. 7. hat if there be two or more plaintiffs or defendants, and one or more f them ſhould die, if the cauſe of action ſurvived to the ſurviving plaintiff r plaintiffs, or againſt the ſurviving defendant or defendants, the writ or ction ſhould not be thereby abated; but ſuch death being ſuggeſted on he record, the action ſhould proceed at the ſuit of ſuch ſurviving plain- iff or plaintiffs againſt ſuch ſurviving defendant or defendants.

The formal ſuggeſtion of the death need be only on the plea-roll; hing more is neceſſary on the niſi prius roll than merely to point out to judge what he is to try, and between whom. Farr v. Denn, 1 Burr. 362.

Although the ſtatute make mention only of *actions at law*, yet it hath n conſtrued to prevent the abatement of a ſuit in equity, provided that ſubject matter of the ſuit be not affected by it. Brown v. Higden, 1 Atk. 291.

(*By the* 8 & 9 *W.* 3.) Where a defendant died before the expiration of the time to plead der a judge's order, it was holden that the plaintiff could not, under this act, ſign judgment d ſue out a ſcire facias thereon. 1 Wilſ. 315. Wallop v. Irwin.

Where

Turner v. Cowper, Barnes, 210. Where plaintiff died after a rule by consent to refer to prothonotary and before the report, the Court allowed his executor to be made a party to the rule, and directed the prothonotary to proceed without the defendant's consent.

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(G) By Reason of Coverture.

(*Coverture Is a Good*) But 2 *Ld. Raym.* 1525. 2 *Str.* 811. *Barnard K. B.* 70. are all express that coverture in the defendant after action brought cannot abate plaintiff's writ. See too, to the same effect, 2 Rolle's Rep. 53.

(*If a Writ Be Brought Against*) The plea of coverture, whether in plaintiff or defendant, can only be in abatement, Milner v. Milnes, 3 Ter. Rep. 627. See tit. Baron and Feme.

(*If An Action*) But the plea of coverture in this case hath been disallowed. Haddock v. Howard, Barnes, 355.

1 Vez. 182. In equity, a suit does not abate by the marriage of a female defendant, but the plaintiff may proceed, only entering the name of the husband and wife in the subsequent proceedings.

Though a suit in equity regularly become abated by the marriage of a female plaintiff, yet if she afterwards proceed in the suit as a feme sole, the mere want of a bill of revivor is not error upon which a decree can be reversed upon a bill of review by the defendant (*a*). And if the husband die before revivor, she may proceed without it, for then her incapacity to prosecute the suit is removed; but the subsequent proceedings are in the name and description she has acquired by the marriage.

Lady Cramborne v. Dalmahoy, 1 Ch. Rep. 231.

(*a*) Godkin v. Earl Ferrers, 1772, cited in Mitf. Eq. Pl. 57.

If the plaintiff take husband after suing out the writ, and before declaration, the defendant cannot give the coverture in evidence under the general issue, but must plead it in abatement.

Morgan v. Painter. 6 Term Rep. 265.

(H) By a Defect in the Writ.

THE foregoing objections, such as want of jurisdiction, disability in the plaintiff, or privilege in the defendant, &c. being matters *debors* must be shewn to the Court, and must be pleaded in proper time and manner; but for defects in the writ itself the Court may *ex officio* abate it.

9 H. 7. 16. 10 E. 3. 1. pl. 2. 2 Inst. 662. Hob. 1. 51, 52. 84. Carth. 172. Cro. Jac. 576-7. Hob. 84.

And herein we must observe, that the law hath been very strict in obliging men to keep to the legal forms it prescribes; and therefore in the writ which is the foundation of the whole proceeding, requires such certainty and exactness, as that no person be arrested or attached by his goods, unless there appear sufficient grounds to warrant such proceedings; so that if the writ vary materially from that in the register, or be defective in substance the party may take advantage of it.

But though the writ vary from the register, yet if it be warranted by the modern precedents, this shall not abate it.

(I) By

By the Writ's not agreeing with the Count.

IF the count or declaration varies in form, the defendant may plead it in abatement (*b*), for the plaintiff has abated his own writ by profe-ing it in a different manner; but if it varies in ſubſtance, the defendant y move it in arreſt of judgment, becauſe the Court has no authority to ceed, a different matter being proſecuted from that which the writ has en authority to the Court to take cognizance of. Cro. Eliz. 722. Cro. Jac. 651. Jon. 304.

(*b*) The defendant cannot plead a va- ce between the writ and count, without praying oyer of the writ, and ſhewing it to the rt. 2 Wilſ. 85. 395.

The declaration varying from the writ (*c*), as by laying the cauſe of ac- in the reign of a preſent king, where the writ ſuppoſed it to have been he reign of a former king, or by giving the defendant a name different m that in the writ (*d*); as where the writ calls him *A. B.* of *London*, erman, and the plaintiff declares againſt him, as *A. B.* of *London*, q.; or where the declaration is otherwiſe defective in not purſuing the it, or not ſetting forth the cauſe of action with that certainty the law re- ires, or in (*e*) laying the offence in a different county from that in which e writ was brought; in all ſuch caſes the defendant may plead in abate- ent. (*c*) Fitz. *Brief*, 219. 231. (*d*) Yelv. 120. Finch of Law, 357. Latch. 173. (*e*) Allen, 17, 18.

(H) Where the Writ is abated *de facto*, or is only abateable.

SO if the matter in queſtion appear to be *excluſively* of eccleſiaſtical cog- nizance; (*b*) or if an appeal of death be brought by a woman of the death of any one elſe than her huſband; (*c*) or the debt be laid to be un- er forty ſhillings. Page 10 Br. Office, &c. p. 16. 22 E. 4. 23. (*b*) 10 E. 4. b. (*c*) 3 Burr. 1592. 4 Term Rep. 495.

So in equity, if a bill of appeal and review be brought of a decree in he court of a county palatine. Jennet v. Biſhopp, 1 Vern. 184. Hob. 280. 3 Co. 85.

And as in theſe caſes a fatal objection to the proceeding appears upon he very face of the record, the Court may, and ought *ex officio* to abate he ſuit at any time, and in any ſtage of it. For the Court, who are to judge according to law, are not concluded by the admiſſion of the parties of any thing that judicially appears to be contrary to it.

Regard to public decorum and their own dignity ſometimes calls upon the Court to interfere in this manner; as, where the queſtion propoſed on the record is idle in itſelf, and involves no civil right or injury, and would introduce in its diſcuſſion indecent or improper evidence. Dacoſta v. Jones, Cowp. 729. Brown v. Leeſon, 2 H. Bl. Rep. 43.

The Courts having a general and neceſſary control for the purpoſes of juſtice over all cauſes depending before them, will occaſionally interpoſe on the *motion* of a defendant, and ſtay the proceedings. Thus, though upon the face of the record the demand exceed the ſum of forty ſhillings, yet, if upon affidavits on the part of the defendant, uncontradicted by the plaintiff, it be ſhewn that in fact it do not amount to that ſum, the cauſe will Steane v. Holmes, 2 Bl. Rep. 754. Kennard v. Jones, 4 Term Rep. 495.

Wellington v. Arten, 5 Term Rep. 62. will not be permitted to proceed any farther in the ſuperior court. (a) So if in an action for bribery on the ſtatute of 2 Geo. 2. c. 24. it appear that the plaintiff was guilty of *wilful* delay in the proſecution of his ſuit, which fact the defendant could not introduce either on the record, or at the trial, the Court will ſtay the proceedings; for *wilful* delay is expreſsly prohibited by the ſtatute.

(a) Petrie v. White, 3 Term Rep. 5.

(b) Peſhall v. Layton, 2 Term Rep. 712. (b) So where they find that actions have been brought againſt ſeveral upon a penal ſtatute which makes only one offence; they will ſtay the proceedings upon payment of one penalty.

Rees v. Abbott, Cowp. 832. If one only be ſued on a joint note, it muſt be pleaded in abatement; it will not be error. So in actions againſt partners. But where an action is brought by a joint covenantee, advantage may be taken of it by demurring generally.

Abbot v. Smith, 2 Bl. Rep. 947. Rice v. Shute, 5 Burr. 2611. 1 Bl. Rep. 695. S. C. Cabel v. Vaughan, 1 Saund. 291. 1 Sid. 420. S. C. 1 Ventr. 34. S. C. B. N. P. 158. 5 Co. 119.

Sayer v. Chaytor, 1 Lutw. 696. In ſuch a plea to an action on a bond, it muſt be ſtated that the other obligor executed the deed, and that he is ſtill alive. It is not ſufficient to ſay that another, not named, was jointly bound. But if it appear on the face of the declaration that both obligors have ſealed, and both are living, the objection is good in arreſt of judgment.

1 Saund. 291. Horner v. Moor, M. 2. G. 2. cited in 5 Burr. 2614.

11 H. 7. 6. But in treſpaſs it is no plea in abatement, that there is another joint-treſpaſſor not named.

Anon. 2 Atk. 15. A bill in equity is not diſmiſſed for want of parties; but ſtands over for amendment on paying the coſts of the day. The want of parties may be pleaded in abatement; but upon allowing the plea, the Court will give the plaintiff leave to amend.

Gwinn v. Poole, 4 Br. P. C. 122. Fawkes v. Pratt, 1 P. Wms. 593. Mitf. Eq. Pl. 241.

(I) Where the Writ ſhall abate in toto, or in Part.

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THE bankruptcy of the plaintiff or defendant happening in any ſtage of a ſuit either at law or in equity is no abatement. Nor is the diſcharge of the plaintiff after action brought under an inſolvent act, and an aſſignment of his property for the benefit of his creditors.

Hewitt v. Bibbins, 2 Wilſ. 374. Kretchman v. Beyer, 1 Term Rep. 463. Waugh v. Auſten, 3 Term Rep. 437. Anon. 1 Atk. 263. Butler v. Davidſon, Exchequer, Eaſt. 33 Geo. 3. But contr. per Lord Thurlow, where it happens before decree or judgment. Sellas v. Dawſon, in Chancery, Dec. 8th, 1790. Co. Bpt. Laws, 622. 3d edit. Hedley v. Brown, Barnes, 389.

(*So If An Ejectment*) So if the leſſor of the plaintiff die. 2 Str. 1056.

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(K) Where it ſhall abate by reaſon of another Action brought for the ſame Thing.

(*The Law Abbors*) Foſt. Cr. Law, 104. Dougl. 227. Q. Whether it be ſo in any informations but informations *qui tam?*

(*In General Writs*) Upon an indebitatus aſſumpſit, the defendant pleaded in abatement another action depending for the ſame matter in the Exchequer, and did not alledge that the

ntiff had declared in it; and by the Court, this is bad, becauſe it cannot be traverſed, whe- it be for the ſame matter or not. 7 W. B. R. Lill. Prac Reg. 8. Mitchell and King, 2 nard, K. B. 143. S. P.

An Action Depending) The plaintiff counted upon ſeveral promiſes for work and labour in the ſh of St. Mary Le Bow, London; the defendant pleaded in abatement, that before this action ght the plaintiff had libelled in the Admiralty for the ſame cauſe of action. Upon de- rer it was inſiſted for the plaintiff, that this was within the rule in Sparry's caſe, and the le court gave judgment againſt the defendant, *quod reſpondeat ouſter*. Fitzgib. 313. 5 Geo. 2. B. Ludfield v. Warden.

The Law Is So) A replevin depending in the ſheriff's court, it ſeems, cannot be pleaded to naſs for taking cattle. 2 Wilſ. 87. White v. Willis.

f two actions be brought at the ſame time for the ſame thing, with e trifling variation, they may be pleaded each in abatement of the r, averring that the cauſe of action in both is the ſame. Mayor, &c. of London v. B. Freem. 401.

To defeat an informer by a plea of this kind of his right of ſuing, a endant muſt ſhew a prior right attached in ſomebody elſe, and therefore he pendency of another action by another perſon for the ſame offence, ought in the ſame term, be pleaded in abatement, it muſt be ſhewn on at particular day ſuch other action was commenced, that its priority may aſcertained. So if both actions were commenced on the ſame day, the fendant, it ſeems, may ſhew that the action which he ſtates was prior in int of time on that day, notwithſtanding it was formerly holden that in at caſe the right was attached in neither, and the Court could give no dgment. Comb v. Pitt, 3 Burr. 1423. 1 Bl. Rep. 437. S. C. Hutchinſon v. Thomas, 2 Lev. 141. Jackſon v. Giſling, 2 Str. 1269.

L) Where a Defendant may plead either in Abatement, or in Bar.

(*Alienage May*) But qu. of this difference; for in either caſe the ground of the plea is the capacity of an alien to take, or at leaſt to hold, that which is the object of the ſuit.

The pendency of a prior action may be pleaded either in bar, or in batement; though it is ſaid in the caſe of Baines v. Blackbourne (*b*) to e pleadable only in bar. Page 15 Combe v. Pitt, 3 Burr. 1423.

(*b*) Sayer's Rep. 216.

(*In An Action*) But Q. & *vide* 10 Mod. 17. Ld. Raym. 47.

In replevin, if the defendant will take advantage of a variance in the place where the taking is laid, from that in which it really was, he muſt plead it in abatement. 6 Mod. 103. ——*Priſal in auter lieu* muſt be

pleaded in abatement, and cannot be pleaded in bar. Salk. 3. pl. 8. 2 Ld. Raym. 1016. Carth. 444. Show. 98. But in Barnes, 353. it is ſaid that it is conſidered as a plea in bar, and not in abatement, it not being neceſſary to file any affidavit with it, or to plead it within four days after the delivery of the declaration.

In debt on a bond the defendant pleads the condition for the payment of three ſeveral ſums at three ſeveral days, and that he hath paid two of them at the days limited, and the third is not yet come, and concludes in abate- ment; and it was argued, that this ought to be pleaded in bar, and not in abatement; for in every plea in abatement the defendant ought to ſhew the plaintiff how to bring a better writ, and here he ſhews that he ought to have none at all, the day of payment of the third ſum not being yet come; as in an action for an attorney's fees, if the defendant pleads that the plaintiff delivered no bill of them to him, he ought to conclude in bar; and of this opinion were the Court. Comb. 483. *Owen* v. *Bulkley*, Ld. Raym. 345.

The

Comb. 375. *Sully* v. *Arundel.* The plaintiff in bar to an avowry pleaded a diſtreſs for the ſame duty in other lands chargeable: and *Holt* ſaid the plea was naught; for it ſhould have been pleaded in abatement of the avowry, that a former replevin was depending, (if the truth was ſo), or if determined, then levied by diſtreſs, & *iſſint riens arere.*

(O) Dilatory Pleas, how reſtrained.

AS theſe pleas enter not into the merits of the cauſe, but merely tend to delay, the following reſtrictions have been laid upon them.

By the ſtatute 4 & 5 Ann. cap. 16. for amendment of the law, no dilatory plea is to be received, unleſs on oath, (*a*) or probable cauſe ſhewn to the Court.

(*a*) An affidavit required to a plea in abatement that the writ was never returned, though in giving oyer plaintiff had not ſet it out. Sherman v. Alverez, 1 Str. 639. Ld. Raym. 1409. S. C. So to a dilatory plea in the Crown Office to an indictment. Rex v. Grainger, 3 Burr. 1617. but not if pleaded at bar. Foſt. 16. Want of addition requires none. Pr. R. 5. Affidavit to the truth of it by the attorney ſufficient. Lumley v. Foſter, Barnes, 344. Where the affidavit and plea were wrong entitled, the plea was ſet aſide. Clixby v. Dines, Barnes, 348. So where the affidavit to an information in the Crown-Office was without any title. Rex v. Jones, 2 Str. 1161. The affidavit muſt be poſitive as to the truth of every matter of fact contained in the plea: it muſt leave nothing to be collected by inference; for per Deniſon J. the words *probable cauſe* in the ſtatute only extend to a matter of record, or to ſome other collateral matter, as to the truth of which there cannot be a poſitive affidavit. Pearce v. Davis. Say. Rep. 293. For the form of the affidavit, ſee Lill. Entr.

Hetly, 126. 2Saund. 41. No plea in abatement ſhall be received after a *reſpondeat ouſter*, elſe they would be *in infinitum.*

But it was formerly holden that more dilatories than one might be pleaded. Thel. D. 163. a. p. 6. Brad. 400. b. Finch. L. 363.

Yelv. 112. Lutw. 124. 1 Str. 520. They are to be pleaded before imparlance.

Caſ. Tem. 2 Hardw. 135 They cannot be pleaded at the ſame time with a plea in bar.

2 Show. 42. 2 Wilſ. 367. When iſſue is joined on them, if found againſt the defendant, it ſhall be peremptory.

Salk. 2. p. 5. Nothing ſhall be pleaded in abatement of a *ſcire facias* upon a judgment that was pleadable in the original action; for it would be unreaſonable that the defendant ſhould diſable the plaintiff from having his execution, after he has admitted him able to have his judgment.

Cro. Jac. 82. 3 Term Rep. 185. Though a plea in bar, being certain to a common intent, is good; yet every dilatory plea muſt be certain to every intent.

Imp. K. B. 239. C. P. 519. A dilatory plea muſt be pleaded within four days (the firſt and laſt both incluſive) (*a*) after the declaration is delivered, if it be in term time; but if in vacation, or within leſs than four days from the end of the term, it may be pleaded (there being a ſpecial imparlance) within the firſt four days incluſive of the next term, *as of the preceding term*; and within that time it muſt be *filed*, (for it is not ſufficient that it be *delivered only*,) whether a rule to plead be given or not (*b*). Sunday is reckoned as one of the four days, though it happen to be the laſt, in which caſe the plea muſt be filed on the Saturday (*c*).

(*a*) Jennings v. Webb, 1 Term Rep. 1.

(*b*) Doughty v. Laſcelles, 4 Term Rep. 277.

(*b*) Brandon v. Payne, Ibid. 689. Term Rep. 642.

(*c*) Harbord v. Perigal, 5 Term Rep. 210. but contra Lee v. Carlton, 5

It

It is inadmiſſible after the rule for pleading is expired, (*d*) or after forfeiture of a bail-bond. Humphreys v. Ward, Barnes, 331. (*d*) 2 Salk. 519.

It is not an iſſuable plea within an order for time to plead upon the uſual terms. Kilwick v. Maidman, 1 Burr. 59.

But whilſt a too eaſy admiſſion of theſe pleas is thus anxiouſly guarded againſt, the Court on the other hand are bound *ex debito juſtitiæ*, to compel the plaintiff to entitle his declaration of the true day on which it was filed, in order to give the defendant an opportunity to avail himſelf of them. Wilkes v. Earl of Halifax, 2 Wilſ. 256.

IF a plea in abatement be pleaded after a general imparlance, the plaintiff may either demur to it generally, or he may treat it as a nullity, and ſign judgment as for want of a plea. For ſuch a plea can only be received after a ſpecial imparlance, which muſt be ſtated on the record. Buddle v. Wilſon, 6 Term Rep. 369. Doughty v. Laſcelles, 4 Term Rep. 520.

If one of two part-owners of a chattel ſue alone for a tort, and the defendant do not plead in abatement, the other part-owner may afterwards ſue alone, and the defendant cannot plead the joint-ownerſhip in abatement to ſuch action. Sedgworth v. Overend, 7 Term Rep. 279.

A declaration is only well filed from the time of notice, whether it be a declaration in chief or *de bene eſſe*; and therefore the defendant has four days after notice in which to plead in abatement. Hutchinſon v. Brown, 7 Term Rep. 298.

(M) Of the Manner of pleading in Abatement, and the Proceedings and Judgment on ſuch Plea.

IF a defendant plead matter in abatement and conclude in bar, this ſhall be eſteemed a plea in bar, and the Court will give final judgment thereupon; becauſe by pleading to the action the writ is admitted to be good, and he puts the whole matter upon his plea*. Page 16 2 Roll. Rep. 64. Lev. 312. Mod. 214. 2 Saund. 128.

* In the caſe of *Medina* and *Stoughton*, 1 Ld Raym. 593. *Holt* ſaid, that if a man plead matter which goes in bar, but *begin and conclude* his plea in abatement, it will be a plea in abatement; for it is the beginning and concluſion that make the plea. See 1 Sid. 189, 190. But if he begin in bar, though he conclude in abatement, or conclude in bar, though he begin in abatement, it will be a plea in bar. *Vide* alſo 1 Ld. Raym. 694.

So if a man plead in bar, and conclude in abatement, this ſhall be eſteemed a plea in bar; becauſe he could have no writ, if he could have no action; and where there could be no action, the diſpute about the writ would be inſignificant*. 6 Mod. 103. Lutw. 34. 36. 10 H. 7. 11. * See *infra*.

A plea in abatement may be good, though it contains matter in bar; but this is to be underſtood of ſuch pleas as may be pleaded either in diſability or in bar; as alienage, outlawry, &c. Mod. 214. 10 H. 7. 11.

If a matter, which may be pleaded either in abatement or bar, be pleaded in abatement only, if the plaintiff reply or demur in bar, this will be a diſcontinuance (*a*); becauſe the plaintiff does not maintain his writ, and the defendant may have other matter in bar, of which he would hereby be excluded. Salk. 177. 10 Mod. 112. Carth. 107. Salk. 218. Gilb. Hiſt. C. P. 259.

See 2 Ventr. 179. amend. 1 Wilſ. 302. (*a*) But it is aided by verdict. Salk. 218. So the Court will give leave to

But

Vent. 36. Lutw. 136, 3 Mod. 281. But if the defendant begin ſuch plea in bar, and conclude in abatement, or plead in abatement, and conclude in bar, there the plaintiff may reply or demur to it, either as a plea in abatement or in bar; and if he demur, or plead to it as a plea in bar, then the judgment is final (*b*); for he has cloſed with the defendant to put the plea to the judgment of the Court, as a bar to the action.

(*b*) Q. If in this caſe the plea be not imperfect, and then, though the plaintiff have diſcontinued, he is entitled to judgment of *reſpondeat ouſter*. Bonner v. Hall, Ld. Raym. 339. Lug. v. Godwin, Ibid. 393. Marſhal v. Charleton, 1 Barnard, K. B. 468.

3 Lev. 120. 6 Mod. 103. But if he demur, or reply in abatement, as he may, then the judgment is *quod defendens reſpondeat ouſter*; for then only the writ is put in judgment before the Court; and the plaintiff, by putting the writ in judgment only to the Court, has waved the benefit of putting that matter in judgment to the Court as a plea to the action; and if the judgment were not in abatement, it would not be purſuant to the defendant's prayer.

These caſes do not warrant the doctrine in the text.

5 Mod. 132. ſaid *arguendo*. Every plea in abatement is either to the writ or count; if the action is brought by original, then the plea is *petit judicium de brevi*, and it muſt conclude in the ſame words; if it is to the declaration, then it muſt be *petit judicium de billa & narratione*, for *billa* and *narratio* are the ſame (*c*).

(*c*) All pleas to the juriſdiction conclude to the cognizance of the Court, praying "judgment whether the Court will have further cognizance of the ſuit." pleas to the diſability conclude to the perſon, by praying "judgment if the ſaid A., the plaintiff ought to be anſwered:" and pleas in abatement (when the ſuit is by original), conclude to the writ or declaration, by praying "judgment of the writ or declaration, and that the ſame may be quaſhed," *caſſetur*, made void, or abated; but if the action be by bill, the plea muſt pray "judgment of the bill," and not of the declaration, the bill being here the original, and the declaration only a copy of the bill. 3 Bl. Comm. 303.

10 Mod. 112. Show 4. It is ſaid to be the concluſion of a plea, and not the matter of it, that makes a plea in abatement; ſo that ſhould a man plead a plea that for the matter of it might have been pleaded in bar, and conclude *petit quod breve caſſetur*, it would be but a plea in abatement, and the judgment would be no other than a *reſpondeat ouſter*; ſo *vice verſa* a (*d*) plea in abatement, pleaded in form of a plea in bar, would be a plea in bar, though an ill one.

(*d*) After a plea that another ought to be a co-defendant, concluding *ſi actionem verſus eum ſolummodo*, there ſhall be only a *reſpondeat ouſter*. 1 Ventr. 135.

6 Mod. 236. *per* Holt. If a dilatory plea be pleaded, and the plaintiff take iſſue upon it, he may conclude with a *petit judicium & damna*, becauſe there final judgment ſhall be; but if a dilatory plea be pleaded, which the plaintiff does not deny, but confeſs and avoid, he muſt conclude in maintenance of his writ; as if the defendant plead an attainder in diſability of the plaintiff, and he plead a pardon, he muſt not conclude with a *petit judicium* & (*a*) *damna*, but in maintenance of his writ.

(*a*) 3 Mod. 281. S. P.

3 Lev. 120. If there are four defendants, and after ſeveral continuances three of them plead the death of one of them in abatement, *viz. petunt judicium de breve et quod breve illud caſſetur*; this is ill in its concluſion, and ſhould have been *petunt judicium ſi curia ulterius procedere velit.*

Salk. 220. pl. 9. 6 Mod. 195. 198. If the defendant demur in *abatement*, the Court will give final judgment, becauſe there can be no demurrer in *abatement*; for if the matter of *abatement* be *dehors*, it muſt be pleaded; if intrinſick, the Court will take notice of it themſelves.

In Wimbiſh v. Willoughby, Pl. Comm. 73. there is an inſtance of a demurrer in abatement of a writ for an inſufficiency appearing on it, which authority is countenanced by Theol. Dig. l. 15. c. 9. ſ. 1. Dy. 341. Lutw.

1. Lutw. 1644. This precedent from Plowden was cited by Eyre J. when the judgment in e text was given. The judgment upon the demurrer, if againſt the defendant, will be final. Lev. 222. But a demurrer in *abatement* to an indictment for a capital offence, or appeal of ath, ſhall not conclude the party, but he ſhall have leave to anſwer over to the offence. 2 wk. P. C. 334.

(*The Judgment*) In an action that ſounds in damages, the jury who try this iſſue muſt aſſeſs e damages: their omiſſion to do ſo cannot be ſupplied by a writ of inquiry, but a *venire facias novo* muſt be awarded. Eichorn v. Le Mairre, 2 Wilſ. 368.

But on a demurrer to a plea in abatement, the judgment againſt the fendant ſhall only be *to anſwer over*, becauſe, though iſſues in fact are thin the conuſance of the party, iſſues in law are not. Theol. Dig. l. 16. c. 11. ſ. 12. 1 Lev. 163.

And the ſame judgment ſhall be given, though the defendant join in murrer to it, as to a plea in bar, becauſe the fault originates with the aintiff. Putt v. Noſworthy, 1 Ventr. 135.

But ſee Lutw. 197. 1643. 1665. But ſee above, whether this be not a diſcontinuance?

In a plea in abatement in C. P. the plaintiff may enter a *nil capiat per breve*, without leave of the Court. Oſborne v. Haddock, Barnes, 257.

If a plea in abatement profeſs to anſwer the whole declaration, and yet in truth anſwer only part of it, it will be bad. Thus, on a writ in debt for 1066*l.*, the plaintiff declared for 1000*l.* borrowed by the defendant of the plaintiff, and in a ſecond count for 66*l.* for intereſt of money lent by the plaintiff to the defendant. The defendant pleaded in abatement of the writ, that "*the ſaid ſum of money in the ſaid writ mentioned, and thereby ſuppoſed to be borrowed of the plaintiff*," was borrowed by the defendant and others, and not by the defendant ſeparately. The plea was demurred to, becauſe it anſwered only one of the cauſes of action, *viz.* that mentioned in the firſt count, and the court for that reaſon held it bad. Herries v. Jamieſon, 5 Term Rep. 553.

(Q) Of the Writ by Journies Accompts.

WHEN an abatement of a ſuit happens without any fault imputable to the plaintiff, he is permitted to ſue out a freſh writ by journies accompts; which is *quaſi* a continuunce of the firſt writ, and placeth him in the ſituation in which he would be ſuppoſing that he were ſtill proceeding on that writ; for the defendant can avail himſelf of no matter which ariſeth ſubſequent to the time of the firſt writ, and could not have been pleaded to it. Spencer's caſe, 6 Co. 10.

But this ſecond writ is not ſuable at any diſtance of time after the abatement of the firſt, but muſt be proſecuted *per dietas computatas*, that is, recently, as ſoon after as reaſonably may be. What is a reaſonable time is a matter in the diſcretion of the Court. 6 Co. 11. a. 1 Salk. 393. Cro. Car. 294.

This writ being in a manner a continuance of the firſt, muſt of courſe be brought in the ſame court, and for the ſame matter. It ought regularly too to be between the ſame parties; but it may be ſued by another perſon than the original plaintiff, if there be a privity between them; as if the original plaintiff be executor until his ſon come of age, the ſon upon coming of age may take out this writ, but not ſo, if he be adminiſtrator *durante* 6 Co. 10. b. Lutw. 296. 1 Salk. 393.

rante minore ætate of the ſon; for in that caſe, as they derive their titles from different perſons, the one from the ordinary, the other from the teſtator, there can be no privity.

Br. Journ. Acc. p. 23. Qu. Imp. 160. If the plaintiff in *quare impedit* die pending the writ, and after the ſix months have elapſed, his executors are not entitled to this writ.

6 Co. 10. a. A judicial writ ſhall never be by journies accompts, becauſe it never abates for want of form.

(R) Foreign Plea.

2 Lil. Pr. Reg. 374. Carth. 402. A (*a*) FOREIGN plea is when the defendant pleads ſuch plea as carries the cauſe out of the court wherein it is laid, by ſhewing that the matter alledged is not as to its trial within the juriſdiction of that court.

(*a*) Muſt be ingroſſed on parchment, and ſigned by counſel. 2 Lil. Reg. 374.

Lit. Rep. 236. Style, 225. 435. Sand. 97. (*b*) Vent. 180. As this plea is merely dilatory, and ouſts the court of its juriſdiction, it was holden, even before the ſtatute of 4 & 5 *Anne*, *c.* 16. that it muſt be on oath, and (*b*) before imparlance; and if the defendant refuſe to make oath of the truth of his plea, the plaintiff may ſign judgment as upon a *nihil dicit*.

Hetl. 126. Lit. Rep. 236. S. C. *verbatim.* If a defendant in a corporation court plead a foreign plea, which is collateral; as, in debt upon a bond, if he plead a releaſe made in a place out of the juriſdiction of the court, it need not be received without oath: but, if in covenant, or debt for money to be paid at another place, he plead payment accordingly, or covenants performed in the place limited, which was out of their juriſdiction, it ought to be received without oath.

Paſch. 26. Car. 2. in B. R. Browne— Mod. 118. S. C. If there be a cauſe removed from *Canterbury* into *B. R.* by *habeas corpus*, and the plaintiff declare here upon a demiſe in *London* of a houſe in *Canterbury*; if the defendant plead an entry and *ouſter* in *Canterbury*, ſo that this cannot be tried here; this is not a foreign plea, becauſe it ariſes naturally upon the caſe: ſo, if matter ariſe within two counties, and the plaintiff lay it in one, it is not a foreign plea for the defendant to plead any matter in the other.

3 H. 4. 12. (*c*) How foreign pleas in Wales ſhall be tried, *vide* the ſtatute 34 & 35 H. 8. c. 26. In real actions in (*c*) *London* if a (*d*) foreign plea be pleaded, it ſhall be ſent into the Common Pleas to be tried; but otherwiſe it is in perſonal actions.

(*d*) This is within the equity of the ſtatute of Glouc. c. 12. which *vide* expounded 2 Inſt. 324-5. which extends to real actions only wherein voucher lies, and not to perſonal. 2 Leon. 37. Sand. 58.

6 Mod. 335. Ancient demeſne, and all pleas of privilege, are pleas to the juriſdiction, but not foreign.

Stile 225. Dudney v. Collyer. If a perſon be ſued in an inferior court on an obligation conditioned to pay money out of the juriſdiction of ſuch court, and the defendant plead payment according to the condition; this is not ſuch a foreign plea as need be on oath.

So, if in covenant brought in *London* for payment of a certain ſum of money on the return of a ſhip, the defendant plead, that the ſhip returned to ſuch a place in *Cornwall*; and thereupon the plaintiff demur; this plea is not good; for the matter being tranſitory, the defendant cannot oblige the plaintiff to change his action, but muſt plead to it in ſuch place as he

Sid. 234. Collins v.

has

laid it; and had the matter been local, then it would have amounted to foreign plea, which must have been put in on oath. Sutton; but *vide* Mod. 81.

But, where a prohibition was prayed for to the court of the *Compter* in *Wood-street*, *London*, to an action of debt there commenced, for that the defendant had pleaded before the imparlance, that the cause of action did arise at a place out of their jurisdiction, and offered to have sworn his plea, and they refused to accept this plea; upon this matter a prohibition was granted; for (*a*) inferior courts have not cognizance of transitory things which arise in places out of their jurisdiction: but then it is not sufficient to surmise such matter for a prohibition; but a plea to that effect must be tendered in the inferior court, and that before imparlance, and it must be on oath, and then, if refused, a prohibition shall be granted, or upon such refusal a bill of exception may be made. Vent. 180. St. Aubin v. Cox.

(*a*) For this *vide* title Courts, letter (D)

In debt brought in *B. R.* the plaintiff laid the *visne* in such a place within the county palatine of *Chester*, which county was also in the margin of the declaration: the defendant without imparling pleaded by attorney, that he is, and at the time of the action brought was, resident at the said place within the said county; and so prayed judgment, if the court of *B. R.* ought to hold plea of this matter. The plaintiff taking this to be a foreign plea rejected it, as not being on oath, and signed judgment: but *per Holt*, Ch. J.—A foreign plea is where the action is carried out of the county where it is laid, which in this case was not done; so that this is only a plea to the jurisdiction of the court, which is never sworn; so the judgment was set aside. Carth. 402. 3 Mod. 335. S. C. Chumley v. Broom.

In debt brought in *London*, a prohibition was moved for, and ruled *nisi*, upon suggestion, that the defendant had tendered for plea below, that the cause arose out of their jurisdiction, and offered to make oath of the truth of his plea; and it was shewn, that he tendered his plea after the court was up; whereas it should be *in propriâ personâ*, and in court; and though an *affidavit* was offered in *B. R.* of the truth of his plea; and one *Turner*'s case was quoted, where a prohibition had been granted upon such an *affidavit* here above without oath of it below; yet *per Powell*, *Gould*, and *Powis*, *absente Holt*, the rule was discharged; for in all pleas that oust a court of jurisdiction, whether inferior or superior, there must be oath in that very court of the truth of the plea. 6 Mod. 148. Sparks v. Wood.

If one be sued in an inferior court for a matter out of the jurisdiction, the defendant may either have a prohibition from one of the law courts of *Westminster-hall*; or, in regard this may happen in a vacation, when only the Chancery is open, he may move the court for a prohibition: but then it must appear by oath made, that the fact arose out of the jurisdiction, and that the defendant tendered a foreign plea before imparlance, which was refused. And if a prohibition has been granted out of Chancery *improvidé*, and without these circumstances attending it, the court will grant a *supersedeas*. 1 P. Wms. 476. pl. 135.

If it appear on the face of the declaration, that the matter is out of the jurisdiction of the court, then a prohibition will be granted without oath of having tendered the foreign plea. And in these cases equity imitates (*a*) the common law. *Id.* 477. (*a*) In a motion for a prohibition to an

ecclesiastical court, as to more than appears on the face of the libel, there must be an affidavit of the truth of the suggestion. 2 Salk. 549.

On a rule to shew cause why an attachment should not be granted against the mayor of *Marlborough* for refusing to accept the defendant's plea in his court, it was holden that it was not sufficient for a defendant in a court Hil. 12 G. 2. in B. R. Vokens v. Cull.

court below to bring in his plea into court, and offer to make oath of the truth of it, but that he muſt tender his plea with an affidavit annexed of the truth thereof, and that this muſt be done before a general imparlance, but he may pray a ſpecial imparlance, and then come at the next court and plead. It was alſo holden, that the proper way of proceeding was not by attachment, but that a prohibition ſhould be moved for. And ſo, in the principal caſe, the rule for an attachment was diſcharged.

ACCOMPT.

(*The Proceedings In*) From the experiment made of this action in the caſe of Godfrey v. Saunders, 3 Wilſ. 94. its proceedings ſeem not to deſerve the character here given of them. A matter which had been fruitleſsly depending in Chancery upwards of twelve years, was thoroughly examined, and finally determined in this form of action in the courſe of two years.

(G) Of the Judgment, and ſubſequent Proceedings.

Page 17 (A) Againſt whom, either by the Common Law, or by Statute, this Action lies.

(*By The Common Law*) The ſtatute of Marlebridge, 52 H. 3. cap. 17. is uſually recited in the writ, as if the writ were warranted by that ſtatute only. Mayn. 487. F. N. B. 118. A. but accompt lay againſt the guardian in ſocage at common law, and the ſtatute was merely in affirmance or declaration of it. Co. Litt. 89. Cro. Car. 229. By the prerogative perſons could be charged as accomptants, notwithſtanding a want of privity. 11 Co. 89. 2 Roll. Abr. 161.

(*The Statute of Edward*) But if two guardians were in common, and one took the entire profits to his own uſe, accompt lay, and the count was to be againſt him as receiver to their common uſe. So of co-partners; but not ſo of tenants in common, for they might have an aſſiſe. F. N. B. 118. J. One joint leſſee for years might have accompt againſt the other, if he took the iſſues and profits to his own uſe; for he would otherwiſe be without remedy, as he could not bring an aſſize. 39 E. 3. 27. b. But not as receiver. Com. Rep. 272.

(*If I Make*) But he muſt diſcloſe this matter in his anſwer. Vern. 136. But where on a bill for an account, and diſcovery of money received by defendant on the behalf of one who became a bankrupt, he pleaded that he received it only as a menial ſervant to the bankrupt, and had accounted for it to him already, and that the commiſſioners had examined him on interrogatories: the plea was over-ruled. Wagſtaff v. Bedford. Vern. 95. 2 Ventr. 358. S. C. Eq. Caſ. Abr. 6. p. 5, S. C. cited with a query, whether there were not circumſtances of fraud in the caſe, or a combination between the bankrupt and ſervant.

(*An Apprentice*) Chancery will decree an account againſt the adminiſtrator of an apprentice employed as a factor. Eq. Caſ. Abr. 6. p. 2.

(B) Of

) Of the Manner of bringing Accompt, with reſpect to the Perſons againſt whom it is brought; and herein of charging one as Baiſiff when Receiver, & *vice verſâ*.

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ut The Chancery) It is generally true, that a court of equity will not decree an account of e profits where the title is merely legal or the plaintiff is out of poſſeſſion. Tilly v. ges, Pre. Ch. 252. Norton v. Frecker, 1 Atk. 524. Sayer v. Pierce, 1 Vez. 232. But this rule muſt be excepted all thoſe caſes where the plaintiff is an infant, or has been pre- d from aſſerting his title by truſt, miſtake, or fraud and concealment on the part of efendant. Duke of Bolton v. Deane, Pre. Ch. 516. Bennett v. Whitehead, 2 P. Wms. Dormer v. Forteſcue, 3 Atk. 130. And in ſuch caſes the Court will direct the account taken from the time the plaintiff's title accrued, unleſs ſpecial circumſtances require that uld commence from the time of entry, or filing the bill. Ibid.

t equity will give relief in the caſe of dower beyond that which can be obtained at law, if ecovery of the demand be unconſcientiouſly obſtructed; and has in ſuch caſe decreed in fa- of the widow's repreſentative, againſt the perſonal repreſentative and deviſee of the heir, an unt of the meſne profits from the time of the death of the huſband. Curtis v. Curtis, 2 Ch. Rep. 620. The ſame account has been directed in favour of the repreſentative where widow has died before ſhe had eſtabliſhed her right to dower. Wakefield v. Child, cited in blanque's Notes on Eq. Tr. p. 147. Wherever a widow reſorts to Chancery for her dower, as ems ſhe may now do in all caſes, the general courſe of that court is to give her an account n the time her title accrued. The meſne profits are there conſidered, as, what they really the widow's ſubſiſtence, and not in the nature of vindictive damages. 2 Br. Ch. Rep. 620. rmer v. Forteſcue, 3 Atk. 130, 1.

Courts of equity, when reſorted to for the purpoſe of an account of meſne profits, will in many caſes conſult the principle of convenience; and therefore Lord *Hardwicke* held in *Townſend* v. *Aſh*, 3 Atk. 386. That though the party claiming a ſhare in the *New River* water-works had not eſtabliſhed his right at law, yet, as ſuch right appeared to the Court, he ought to have an account of the meſne profits; for though ſhares in water-works are a legal eſtate and corporeal inheritance, yet no one proprietor could receive the profits himſelf; but the company, or their officers, are the common hand to receive the profits; and that it would be abſurd to ſend the plaintiffs to law, for it would be difficult to bring ejectment for a thirty-ſixth part, and bits of land in ſeveral counties, and to bring actions of treſpaſs againſt the terre-tenants would be very extraordinary; and therefore in point of remedy there could not be a ſtronger caſe for an account of meſne profits." Fonbl. Notes on Eq. Tr. 147.

In caſes of hardſhip, as where an heir at law is diſinherited on a nice conſtruction of words, the Courts deem it inequitable to lend their aſſiſtance if there is no infant concerned, and leave the party to his remedy at law by entry and ejectment. Sympſon v. Hornſby, Pr. Ch. 453.

Nor will they interpoſe in favour of judgment creditors upon a bill to ſet aside a fraudulent conveyance, and decree an account againſt the debtor and owner of the eſtate, of rents and profits received *pendente lite* from the filing of the bill; nor in favour of a mortgagee againſt a mortgagor, left in poſſeſſion, for any of the years back during that poſſeſſion. In the former caſe the plaintiffs have their legal remedy *by elegit*; and in the latter, where intereſt is not regularly paid, the mortgagee has a legal remedy to get poſſeſſion of the eſtate, which, if he does not avail himſelf of, it is imputable to his own laches. Higgins v. York Buildings Company, 2 Atk. 107.

Gould v. Tancred, 2 Atk. 534.

But where the mortgagee enters, and takes poſſeſſion, he is ſubject to an account, being in the nature of a bailiff to the mortgagor.

Fonbl. 149.

The caſes decreeing an account of rents and profits where the legal title is not previouſly eſtabliſhed, proceed upon that reſpect, which, in juſtice, is due to the intereſts of perſons, who, by infancy, fraud, &c. have been prevented from purſuing their legal right; but it muſt not be inferred from the extreme anxiety of courts of equity to protect ſuch rights, that they will, at any period (*a*), or under any circumſtances, act upon ſuch indulgent diſpoſition; for if an infant neglect to enter within ſix years after he comes of age, he is as much bound by the ſtatute of limitations from bringing a bill for an account of meſne profits, as he is from an action of account at common law; or if there be a verdict at law againſt the infant's title, courts of equity will not direct an account of meſne profits, but will merely retain the bill, for the purpoſe of giving the infant an opportunity to eſtabliſh his title at law.

Lockey v. Lockey, Pre. Ch. 518.

Earl of Newburgh v. Bickerſtaffe, 1 Vern. 295.

(*a*) But if plaintiff has been kept out of poſſeſſion by fraud, Q. Whether equity will not relieve at any diſtance of time, as no length of time will bar a fraud? Cottrell v. Purchaſe, Ca. Temp. Talbot, 63.

Ferrers v. Ferrers, Caſ. Tem. Talb. 2, 3.

It is very ſeldom, even in the moſt favoured caſes, that intereſt is allowed, in taking the account of rents and profits.

Robinſon v. Cumming, 2 Atk. 409.

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(E) What ſhall be a good Bar to this Action.

R. Abr. 119. 2 Lev. 126.

IN accompt againſt one as bailiff, he cannot plead judgment againſt him as receiver.

49 E. 3. 10. 41 E. 3. 3. 9. 45 E. 3. 14. Lutw. 58. 3 Wilſ. 113.

Nonage is a good plea in bar of this action. So is *plene computavit*, and an account before the plaintiff would be ſufficient. *Plene computavit* and a releaſe are the only pleas which admit the plaintiff to be accountable that can be pleaded in bar to the action; and theſe are allowed, becauſe they are total extinctions of the right of action. This being a matter for the Court to judge of, they muſt be pleaded ſpecially, and cannot be given in evidence on *ne unque receivour*.

Southcot v. Rider, Raym. 57.

If the plaintiff charge the defendant as receiver for a particular time, he muſt anſwer that time preciſely.

St. 21 Ja. 1. c. 16. l. 3. *Vid.* Entr. 76. Pr. Ch. 518. Bul. Ni. Pri. 127. 4th edit.

The defendant may plead the ſtatute of limitations in this action; but if the plaintiff reply that it was an account between merchants, the plea will not avail him.

If the defendant plead that he has accounted before *R.* and *W.*, evidence that he accounted before *R.* only, will be ſufficient, for the accounting is the ſubſtance.

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(F) Of the Auditors, and what ſhall be a good Diſcharge before them.

(In An Action) Where the auditors are not aſſigned by the Court, the remedy for not making ſuch allowances to the accountant as they ought to do, is by writ of *ex parte talis*, which is a commiſſion to the treaſurer and barons of the Exchequer to take the account. F. N. B. 129. 2 Inſt. 381. All articles of account, though incurred ſince the writ, ſhall be included, and the whole

whole brought down to the time when the auditors make an end of their account; *per* Ld. Mansfield. 2 Burr. 1086.

(*Whatever May*) 3 Wilſ 113. The reaſon is to avoid trouble and charge to the parties.

Nothing can be pleaded before auditors contrary to what has been pleaded to the action, and been found by verdict: where, therefore, a defendant charged as ſurviving bailiff of goods delivered to him and his co-bailiff to be merchandized, and to render an account, had gone to iſſue upon this fact, namely, whether upon his delivering over the goods to the deceaſed bailiff, all his (the defendant's) concern in the truſt, care, and management thereof ceaſed and was at an end; which iſſue was found againſt him; it was holden that he could not plead afterwards before auditors that he delivered the goods over to the co-bailiff with the conſent of the plaintiff; for this matter might have been given in evidence upon the former iſſue; and the conſequence of admitting it to have been put in iſſue before auditors would have been, either two verdicts the ſame way, which would have been nugatory, or two contradictory verdicts, which would have entangled the Court ſo much that they would not have known what judgment to have given. Godfrey v. Saunders, 3 Wilſ. 114.

The defendant may plead payment to the plaintiff without ſhewing an acquittance. 41 E. 3. 25.

(*It Is A Good*) It ſeems that the defendant may, in ſome caſes, purge himſelf by his own oath. The ſtatute of 4 Ann. c. 16. ſ. 27. gives the auditors a power in the caſes there provided for, of adminiſtering an oath, and examining the parties. Fitz. Abr. Accompt, p. 40. Br. Accompt, p. 66 2 Mod. 101.

The defendant cannot in an action of account pay money into court, as he may in an aſſumpſit. Bul. Ni. Pri. 128.

If the plea of *plené computavit* be found againſt the defendant, he ſhall account before the auditors for the whole money he is charged with, for this plea admits the receipt of the whole. 1 Lutw. 63.

(G) Of the Judgment, and the ſubſequent Proceedings.

IN this action, as is above mentioned, there are two judgments; the firſt is *quod computet*; and afterwards, when the account is finiſhed, the ſecond judgment is, that the defendant pay the plaintiff ſo much as he is found in arrear (*a*). Upon the firſt judgment a *capias ad computandum* lies, and if a *non eſt inventus* be returned upon it, an *exigent* iſſues. It is uſual to bail the defendant, if he be taken on the *capias*, though, by the rigour of the law, he is to account in priſon. 1 Brownl. 24. Cro. El. 806. 3 Bl. Com. 163.

(*a*) Where final judgment was entered in the firſt inſtance, the Court ſet it aſide upon motion, as irregular. Hughes v. Burgeſs, B. R. H. 394. Andr. 19 S. C.

If the defendant make default after the interlocutory judgment, at the day aſſigned by the auditors, final judgment ſhall be entered for the ſum demanded by the plaintiff. So if there be judgment on demurrer to an inſufficient plea before the auditors. Cro. El. 806. 3 Wilſ. 117. Co. Lit 139. b. 11 Co. 39. 27 E. 3 87. 2 R. A. 131. p. 4.

Jenk. 288. 1 Rol. Abr. 575. 1 Leo. 302. 2 Leo. 118. 3 Wilf. 117. 21 E. 3. 9. 32. 41 Aſſ. 11.

It ſeems to be queſtionable, whether, in all caſes, damages are recoverable in account; but it is clear that if the defendant reſiſt the plaintiff's claim by pleading, or where an increaſe is received by a receiver *ad merchandizandum*, there ſhall be judgment for damages.

It hath been holden, that the firſt judgment is not ſuch as can be revived by *ſcire facias* upon the death of the plaintiff, before the account taken (*b*), or as a writ of error can be brought upon; and yet the plaintiff cannot be nonſuited after it.

(*b*) Vide Danv. 233. Lutw. 51.

After final judgment, the plaintiff ought to pray that the defendant's body may be taken in execution; or he may pray an *elegit*, if he refuſes the body. See the writ to the gaoler to receive the defendant after final judgment. Reg. 137.

Accord and Satisfaction.

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(A) What ſhall be deemed a good Accord and Satisfaction.

(*An Accord Muſt*) Vide Perk. ſ. 749. Dy. 75. In the caſe of Cumber. v. Wane, Str. 426. it was ſaid by the Court, that the ſatisfaction muſt appear to them to be a reaſonable one; at leaſt, that the contrary muſt not appear; that, conſequently, payment of a leſs ſum could never be admitted as an accord and ſatisfaction for a greater. But the contrary hath been ſince adjudged; and upon this ground, that it may be a particular convenience to the creditor to receive money at a particular time. Hardcaſtle v. Howard, B. R. Hil. 26 G. 3. Where the thing given in ſatisfaction differed in quality from the thing demanded, the Courts never felt any difficulty to allow it to be a good ſatisfaction; as where a robe, or hawk, were pleaded to have been given in ſatisfaction of a pecuniary demand; becauſe the value of theſe things was in ſome meaſure arbitrary, and they might poſſibly be an equivalent to the plaintiff for his money: and the Court would *intend* that there was *ſome circumſtance* which ſtampt a value on them in the eye of the plaintiff beyond that which they might ſeem to bear. But they thought it too much for them to intend that a leſs ſum could be a ſatisfaction for a greater, a part for the whole, unleſs ſome circumſtance that might make it ſo were ſtated. Where indeed any circumſtance of that kind was ſtated, the plea was allowed; thus, payment of a *leſs ſum before the time*, or *at a different place* from that at which it was to be paid, was admitted as a ſatisfaction for a larger ſum; becauſe the accelerating the day, or varying the place of payment, might be a ſufficient reaſon with the plaintiff to abate ſo much of his demand. Pinnel's caſe, 5 Co. 117. Abbot v. Chapman, 2 Lev. 81.

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(*Debt Upon*) One ſimple contract debt cannot be pleaded in bar of another. Roades v. Barnes, Barr. 9. Bl. Rep. 65.

Preſton v. Chriſtmas, 2 Wilſ. 86.

A releaſe of an equity of redemption is no ſatisfaction, becauſe of no value in the eye of the law.

Q. of this, and whether courts of law do not look at mortgages now with the ſame eyes as the reſt of the world?

(*If An Accord*) And ſee Allen v. Harris, Ld. Raym. 122. Lutw. 1537. S. C. James v. David, 5 Term Rep. B. R. 141.

Lewis v. Shepherd, Sir T. Jones, 6.

So performance of part, and tender of performance of the reſidue, is no good plea.

Where

Where to debt upon bond the defendant pleaded payment of part before the day on which the bond became due, *and a promiſe to pay the reſt at a day to come*, to which the obligee had agreed; the Court held it no bar, being executory. (*a*) For the ſame reaſon a plea to an action of trover that the plaintiff agreed to diſcharge the defendant of the trover in conſideration of his undertaking to pay a ſum of money, was holden bad. (*b*) So a plea that the plaintiff and defendant agreed to ſettle all matters in diſpute, and to bind themſelves in a penalty not to ſue each other.

Balſton v. Baxter, Cro. El. 304.
(*a*) Allen v. Harris, Ld. Raym 122. Lutw. 1537. S. C.
(*b*) James v. David, 5 Term Rep. 141.

So where a defendant pleaded that his ſeveral creditors, one of whom whom was the plaintiff, had come to an agreement to accept a compoſition ſatisfaction of their reſpective debts to be paid within a reaſonable time, which he tendered and was ready to pay; it was holden that this was no plea to the action for the whole demand; for the agreement is unexecuted, and the promiſe a mere *nudum pactum* for want of a conſideration. But per Buller J. if the defendant had aſſigned over all his effects to a truſtee in order to make an equal diſtribution among all his creditors, and theyhad been bound by the agreement to forbear, it might have been a good plea.

Heathcote v. Crookſhanks, 2 Term Rep. 24.

(C) Of the form and manner of pleading Accords.

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It hath been ſince ſettled that this is the proper method of pleading; for there are two requiſites to a diſcharge, namely, payment, and acceptance; and a traverſe of the acceptance is an argumentative denial of the payment.

Hawkſhaw v. Rawlings, Str. 23. Paine v. Maſters. Ibid. 573.

Actions in general.

(A) Of the different Kinds of Actions.

(*Actions Real*) This is not the true diſtinction between *droitural* and *poſſeſſory* actions. Whether the action be *droitural* or *poſſeſſory* depends not upon whether it complain of an injury to the demandant himſelf or to his anceſtor, but, whether it ſeek to recover the *property* or the *poſſeſſion*. If the former, the action is *droitural*; if the latter, it is *poſſeſſory*. *Finch* has ſtated this correctly. "Real actions," ſays he, "where a freehold ſhall be recovered, are *poſſeſſory*, or *in the right*. *Poſſeſſory*, which are "to recover a poſſeſſion, as all aſſizes, writs of ayel, beſayel, and coſenage *In the right*, which "are to recover a poſſeſſion mixt with the right. And both theſe may either be of a poſſeſſion "or right in himſelf, or deſcended from his anceſtors, which we call *anceſtral*. Real actions in the right, are either founded on the right, or for the mere right." Finch's Law, 257, 8. Note—The part referred to in the firſt Inſtitute in ſupport of the doctrine of the text, viz. 1 Inſt. 164. is not at all referable to it, nor is the editor aware, that it is warranted by any paſſage in that book.

(B) In what Caſes an Action will lie, and for whom, and againſt whom.

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IF I throw out windows in my houſe which overlook my neighbour's houſe, and break in upon that privacy which he before enjoyed, yet no action lies.

Norris v. Royle, Tr. 27 Geo. 3. C. P. The caſe of Cherrington v. Abney, 2 Vern, 646. was cited in the argument, but the Court thought it deſerved no attention.

No

3 Bl. Comm. 28. Chorley v. Bolcot, 4 Term Rep. 317. 2 Atk. 332.

No action lies for the fees of a counſel, or phyſician; they being given as a mere gratuity.

Ruſſell v. the Men of Devon, 2 Term Rep. 667.

(*a*) Such are the ſtatutes of hue and cry, &c.

The parties to civil ſuits are, individuals, who muſt be particularly named; bodies corporate, and perſons *quaſi* incorporated, rendered liable to be ſued, and capable of ſuing by the proviſions of particular acts of parliament (*a*). The inhabitants of a county or diſtrict, unleſs ſo embodied, cannot be called upon to anſwer *civiliter* for an injury ſuſtained in conſequence of any breach of their public duty; for collectively, and *qua* inhabitants, they are not otherwiſe objects of civil juriſdiction.

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(C) In what Caſes diſtinct Things may be laid in the ſame Action.

(*In Perſonal*) The difficulty as to what Counts may be joined in the ſame declaration hath at length met with an eaſy ſolution: *any counts that admit of the ſame plea, and are followed by the ſame judgment, may be included in the ſame declaration*; but counts which require a *different* plea, or receive a *different* judgment, cannot be joined; and yet the cauſe of action comprized in ſuch counts may in both caſes be identically the ſame. Thus, a count againſt a carrier on the cuſtom of the realm and one in trover may be joined, becauſe the plea and the judgment proper to both are the ſame; but, inſtead of the count upon the cuſtom of the realm, ſubſtitute a count in aſſumpſit againſt the carrier, and trover cannot be joined with it; becauſe the plea to each is different. Brown v. Dixon, 1 Term Rep. 276. Maſt v. Goodſon, 3 Wilſ. 354. Dickon v. Clifton, 2 Wilſ. 319.

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Hancock and others, aſſignees, v. Hayward, 3 Ter. Rep. 433.

Where the ſame perſons are aſſignees of two bankrupts under ſeparate commiſſions, they cannot join in the ſame action a joint debt due to both the bankrupts with ſeparate debts due to each.

Streatfield and others, aſſignees, v. Haliday, 3 Ter. Rep. 779.

But where the ſame perſons were aſſignees of *A.* and *B.* and likewiſe aſſignees of *C.* and they declared as *ſuch* for a joint demand due to all the bankrupts, ſuch declaration was holden good upon a motion in arreſt of judgment.

(*But If One*) 2 Burr. 984. Action againſt huſband and wife, for words ſpoken by wife; and action againſt huſband *only* for words ſpoken by him, cannot be conſolidated. Swithin v. Vincent, 2 Wilſ. 227.

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Schuldam v. Bunniſs, Cowp. 192.

Where there are two or more bailiffs, *&c.* of a borough, a joint action will lie againſt them under the ſtat. of 3 *Geo.* 3. *c.* 15. for refuſing inſpection of the books and papers wherein is entered the admiſſion of freemen, though the words of the ſtatute are in the ſingular number, "mayor, or bailiff, *&c.*" for the breach of truſt in one, is a breach of truſt in both, they being in law but one officer.

Freem, 191.

One action, it ſeems, will lie againſt all the coroners of a county for a falſe return to a *capias utlagatum*.

Byers v. Dobey, 1 H. Bl. 236.

Where two partners contract to pay a certain ſum of money *equally* out of *their private caſh*, to a third perſon, they muſt be jointly ſued upon this contract, for it is joint.

Actions

Actions Local and Tranſitory.

That 6 *R.* 2. *Cap.* 2.) In the following reign by ſtatute 4 H. 4. c. 18. it was particularly acted that attornies ſhould make no ſuit in a foreign county.

(A) What Actions are Local or Tranſitory. Page 34

All Actions) If not laid ſo, it is cauſe of demurrer. 2 Bl. Rep. 1070.

AN action againſt the ſheriff for a falſe return is tranſitory; for that which is falſe, is univerſally ſo. Page 35 Griffith v. Walker, 1 Wilſ. 336.

The aſſignee of a bail-bond may bring an action upon it, either in the county where it is taken, or in that where it is aſſigned. Gregſon v. Heather, 2. Str. 727. Ld. Raym. 1455. S.

An action for breach of cuſtoms of a town is local; the averment of an immaterial fact will not in ſuch caſe warrant the laying the *venue* out of the proper county. Mayor of Berwick v. Ewart, 2 Bl. Rep. 1068.

An action may be maintained in *England*, to recover money borrowed at *Amſterdam*, and covenanted to be paid in bank there. Dutch W. I. Company v. Moſes, 1 Str. 612. Ld. Raym. 1352. S. C.

Treſpaſs and falſe impriſonment will lie in this country for an injury of that nature, committed abroad in an *Engliſh* ſettlement. Moſtyn v. Fabrigas, Cowp. 161.

It was formerly thought that an action ariſing abroad, though in its nature local, as treſpaſs *quare clauſum fregit*, might be maintained in this country, *if the ſatisfaction ſought were merely perſonal and for damages, and there would be otherwiſe a failure of juſtice:* but that opinion hath been once over-ruled, being found to be inconſiſtent with the ſettled and acknowledged diſtinctions between actions local and tranſitory. Cowp. 180. Doulſon v. Matthews, 4 Term Rep. 503. See too 1 Str. 646.

(B) In what Caſes the Court will change the Venue.

(*The Defendant*) The Courts will not change it to any of the four northern counties, previous to the ſpring circuit; becauſe there the aſſizes are holden only once a year, at the time of the ſummer circuit. 3 Bl. Comm. 294. 1 Wilſ. 138. But they will move it into ſome other county, when it appears from the circumſtances laid before them, that there is a probable ground to apprehend that a fair, impartial, or at leaſt a ſatisfactory trial cannot be had where it is laid. 1. 874. 3 Burr. 1564. 4 Burr. 2447. This power in the courts of common law is derived from the ſtatute of 6 R. 2. and is therefore limited to tranſitory actions, that ſtatute making mention only of *debt*, *account*, and *other ſuch* actions; for though in *local* actions the venue is occaſionally changed by the courts of law, yet this is only indirectly and by mutual conſent; it cannot be done directly and abſolutely in ſuch caſes without the aid of a court of equity. 3 Bl. Comm. 384. (*a*) Lutw. 1437. Co. Lit. 282. (*b*) The affidavit is neceſſary, becauſe the motion ſucceeded, and was equivalent to a plea in abatement. 2 Bl. Rep. 1033. It muſt ſtate

poſitively

positively that "the cauſe of action (if any) aroſe in A. (the county to which it is prayed to change the *venue*) and not in B. (the county where it is laid in the declaration) or elſewhere out of A." This is the eſtabliſhed form, with which the courts exact a ſtrict compliance. Cole v. Goring, Barnes, 477. Belſhaw v. Porter, Ibid. 478. 4 Burr. 2452. Allen v. Griffiths, 3 Term Rep. 495. It hath been queſtioned, though it is frequently done, whether the *venue* can properly be changed into Wales: certain it is, from the terms of the affidavit, that it cannot be directly changed into the next Engliſh county, though the proceſs may be afterwards awarded into it. 4 Burr. 2452. Dougl. 262. In the caſe of a libel diſperſed in ſeveral counties, the *venue* cannot be changed, becauſe the affidavit cannot be made in the preſcribed form, the publication of the libel being co-extenſive with its circulation. Pinkney v. Collins, 1 Term Rep. 571. Cliſſold v. Cliſſold, Ibid. 647. S P. But if the printing and publiſhing were both in the ſame Engliſh county, or if the libel were written here, and ſent abroad, there is then only *one Engliſh county* in which the cauſe of action aroſe. Freeman v. Norris, 3 Term Rep. 306. Metcalfe v. Markham, Ibid. 652. One only of ſeveral defendants may make the affidavit. Box v. Reed, Barnes, 482. Where it appears on the face of the declaration that the cauſe of action is *local*, no affidavit is neceſſary. Mayor of Leiceſter v. Green, Ibid. 492. ſupra (A). It may be made afterwards, 1 Term Rep. 781. So it may, after an order for time to plead, though upon the terms of pleading iſſuably; but not after an order for time to plead, upon the terms of pleading iſſuably, and taking ſhort notice of trial at the firſt ſittings in London or Middleſex, becauſe *there* a trial would be loſt. Petyt v. Berkley, Cowp. 510. Hunter v. Gray, Barnes, 493. S. P. Contr. Wightman v. Thompſon, 1 Wilſ. 245. A judge's order for an imparlance is no bar to it. Blackſtock v. Payne, Barnes, 487. Nor is the putting in a plea after a rule to ſhew cauſe any waver of it. Herbert v. Flower, Ibid 492. But ſuch undertaking is indiſpenſable, the want of it cannot be ſupplied by an affidavit that the cauſe of action aroſe where laid. French v. Coppinger, 1 H. Bl. Rep. 216. The undertaking, however, is ſatisfied by very ſlight local evidence, or by proof that the cauſe of action aroſe abroad. Watkins v. Towers, 1 Term Rep. 275 Gerard v. De Roebuck, 1 H. Bl. Rep. 280. But evidence merely that the plaintiff's witneſſes reſide in the county where he has laid the action is not ſufficient. 2 Bl. Rep. 1031. If the plaintiff fail, it ſeems by the better opinion that he ſhall be nonſuited by analogy to the ſtatute of R. 2. Ibid. 1031. 1 H Bl. Rep. 280. Cowp. 410. 2 Term Rep. 275. After the *venue* hath been changed, the Court have refuſed to bring it back upon an affidavit that the witneſſes live in Scotland, and will not come farther than Carliſle. Fogoe v. Gale, 1 Wilſ. 161.

(*A Serjeant*) But Q of this? On motion by Mr. Spelman to re-change the venue to Middleſex on the ground of his being a barriſter, the Court obliged him to make affidavit that Mr. Spelman the plaintiff and Mr. Spelman the barriſter were the ſame perſon. 2 Bl. Rep. 1067. 1 Bl. Rep. 19. An attorney does not loſe his privilege to change or retain the venue by reſiding in the country. 2 Bl. Rep. 1065.

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(*If Material*) The like law in penal actions. 2 Term Rep. 238.

Shirley v. Collis, 2 Bl. Rep. 940.

But where the cauſe of action ariſes in two counties, the Court will not change it to a third.

Dupleſſis v. Chalk. Str. 878. Fitzgib. 166.

Nor will they change the venue in debt for rent on a parol demiſe of lands in one county, and the action laid in another.

Meritt's caſe, 1 Freem. 260.

But where an action of debt for rent by the leſſor againſt the original leſſee was brought in *London*, and the lands lay in *Glouceſterſhire*; on affidavit made that the defendant would plead a ſpecial plea, whereby the title of the eſtate would come in queſtion, the Court ordered the venue to be changed into *Glouceſterſhire*.

Foſter v. Taylor, 1 Term Rep. 781.

It is a pretty general rule not to change the venue in debt; yet it has been done upon certain terms impoſed upon the defendant, on a ſuggeſtion that both the plaintiff's and defendant's witneſſes reſided in the county in which it was prayed it might be changed; but ſeveral ſimilar applications have been rejected.

Barnes. 480. 483. 485. 487. 2 Bl. Rep. 993. 1 Wilſ. 41. Say. Rep. 7. Andr. 65.

The Court of Common Pleas refuſe to change the venue in an action on a bill of exchange, or promiſſory note (*a*), where the cauſe of action is confined to the bill or note only; but the practice of the Court of K. B. in this reſpect ſeems to be different.

(*a*) They conſider theſe in the nature of ſpecialties.

Though

Though the plaintiff cannot regularly move to change the venue, yet he may do it in effect by moving to amend, and ſtriking out the name of the county, and inſerting the other; and as he may make this motion at any time, therefore where the venue has been changed by the defendant, the Court will permit him at any time to bring it back on the uſual undertaking. Stroud v. Tilly, Str. 1162. Hallet v. Hallet, 1 Wilſ. 173. Brucksham v. Hopkins, Cowp. 409

ACTIONS *Qui tam.* Page 37

(*Actions*) Penal actions, though the judgment may in ſome caſes be followed by legal diſabilities, are conſidered as civil proceedings. They are founded upon the implied contract which every one is under by the fundamental conſtitution of government, to obey the directions of the legiſlature, and to pay the forfeiture incurred by his diſobedience to ſuch perſons as the law requires. 3 Bl. Com. 159. Therefore the affirmation of a Quaker is admiſſible in them; Cowp. 382. the proceedings may be amended; 1 Str. 136. 2 Str. 1227 1 Wilſ. 125. and a new trial may be had after a verdict for the defendant. Wilſon v. Raſtall, 4 Term Rep. 753.

(A) In what Caſes they lie.

(*Wherever*) It hath been determined however, that where an informer, entitled to no part of the penalty, ſues for the king and himſelf, the information is not void, but the whole ſhall be adjudged to the king. Parker, 105. Hardr. 185. But an act which gives a remedy only to the party grieved, is not to be conſidered as a penal act. Caſ. Temp. Hardw. 412. Andr. 115. S. C. Vin. Abr tit. Robbery, (U) p. 2. S. C. 2 Term Rep. 148. for the king cannot diſcharge it, or proceed in it after the death of the party. Wood's Inſt. 535.

(B) What ought to be the Form of them. Page 38

(*By The*) The later caſes ſupport this doctrine. See Leigh v. Kent, 3 Term Rep. 365. n. a.

(C) In what Courts they may be brought, and where laid. Page 40

(*That Where*) The King v. Gaul. 1 Salk. 372. Ld. Raym. 370. S. C. Hick's caſe. 1 Salk. 373. But this was merely the private opinion of Holt; and the caſes here referred to have been confirmed by a ſubſequent caſe of Harris v. Reyney, B. R. P. 1734, cited in Parker, 186; and the reaſon of the judgment, as there ſtated, is, that the preamble ſpeaks of offences againſt divers and ſundry penal laws and ſtatutes of the realm; and the enacting clauſe of or concerning offences committed or to be committed againſt any penal ſtatute, muſt relate to a ſtatute in being, for there can be no offence againſt a ſtatute which does not exiſt. However the offence muſt be laid within the proper county. 1 Salk. 373.

(*That The Statute*) It is only where there is a concurrency of juriſdiction in the ſuperior and inferior courts, both as to *the ſubject matter, and as to the mode of proceeding*, that the ſtatute excludes the juriſdiction of the former. Therefore a ſuit may be maintained in the courts at Weſtminſter for the recovery of penalties incurred againſt the ſtat. of 1 Jac. 1. c. 22. notwithſtanding a ſubſequent clauſe of that ſtatute which authorizes juſtices of aſſize, of gaol delivery, and of the peace, to inquire of the premiſes, and to hear and determine the ſame; the mode of proceeding under that clauſe being merely by indictment or preſentment.

That

(*That The Said*) It is now settled, though formerly doubted, that an appeal lies from the K. Bench to the Exchequer Chamber in a *qui tam* action of debt. This question was determi by the Exchequer Chamber, the courts of King's Bench and Chancery having previously ref to entertain it. Lloyd v. Skutt. Dougl. 353. n.

(*That On The*) This oath is not necessary where the action is in the superior courts, the stat not extending to any actions which may be brought in those courts. Leigh *qui tam* v. Kent, Term Rep. 362. Balls *qui tam* v. Atwood, 1 H. Bl. Rep. 546.

Cates *qui tam* v. Knight, 3 Term Rep. 442.

Where an offence is created by a statute under a penalty, the penal may be sued for in the superior courts; for the jurisdiction of those cour is not to be taken away but by express words or necessary implication. B the statute of 25 *G.* 3. *c.* 51. having imposed penalties of 50*l.* and of 10 and having enacted that the former should be sued for in any of the cour of *Westminster*, but having provided that it should be lawful for justices the peace, *&c.* to hear and determine the latter, with a power to mitiga the penalties; it was holden, that such proviso ousted the jurisdiction the superior courts as to the penalties of 10*l.*

(D) Of the Proceeding and Pleadings in such Actions and Informations.

(*By The* 18 *Eliz.*) Therefore an infant cannot be a common informer, for he must sue b guardian. Maggs v. Ellis, M. 25 G. 2. Bull. *Ni. Pri.* 196. 4th ed. and he cannot be an a torney, because he must be sworn. March, 92.

(*Any Informer*) Moulton *qui tam* v. Bingham. 2 Term Rep. 511. n, a. But the act of 14 2. c. 17. for judgment as in case of a nonsuit, does not extend to an information *qui tam* f the king and party. Parker, 92.

4 Term Rep. K. B. 224. 459.

Where the moiety of a penalty is given by a statute to the treasurer o a county, riding, or *division*, the word division does not apply to any sma districts, or to any arbitrary divisions of the county made for the conveni ence of the magistrates, and to which separate treasurers are appointed but must be taken in its legal sense, and therefore an action cannot be sup ported in the name of the treasurer of such districts, *&c.*

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(*If The Defendant Plead a Special*) The stat. 4 Ann. c. 16. does not extend to penal actions see sect. 7. 2 Str. 1044. 2 Wils. 21. 4 Term Rep. K. B. 701. A *qui tam* information can not be quashed upon motion. Str. 953.

Hob. 218. 1 Term Rep. 462.

It seems that *nil debet*, or not guilty, are either of them good pleas.

(*Wherever*) The day of suing it forth is the commencement of the suit. 3 *Bur.* 1423. *Combe* v. *Pitt*. The plea *must* aver the priority of the suit, and the very hour of its commencement may be shewn, if necessary. Jackson v. Gisling. Str. 1169. 3 Burr. 1423.

Breden *qui tam* v. Harman, 1 Str. 701. Bull. *Ni. Pri.* 197. 4th ed.

The record of a recovery in another action cannot be given in evidence on *nil debet*; for if it be pleaded, the plaintiff may reply *nul tiel record*, or that the recovery was by fraud to defeat a real prosecutor, which he can not be prepared to shew upon the general issue.

If the defendant plead a prior recovery, and the plaintiff reply *per fraudem*, and such recovery be found to be fraudulent, the defendant is liable to two years imprisonment by 4 H. 7. c. 20.

(*If The Defendant Be*) The defendant cannot avail himself under the general issue of any matter that goes to the jurisdiction of the Court. 4 Term Rep. 169.

Where

ere an offence made penal by ſtatute is in its nature *ſingle*, and can- Rex v. Clarke. Cowp. 610. Cro. Eliz. 480. Moor 453. Noy, 62.
ſevered, there the penalty ſhall be only ſingle, though ſeveral per-
ay join in committing the offence. But where the offence is in its
ſeveral, there every offender is ſeparately liable to the penalty.
impounding a diſtreſs in a wrong place, againſt the ſtatute of 1 & 2
M. c. 12. though done by many, is but *one* act, and ſhall be ſatisfied
forfeiture. So under the *ſtat.* 5 *Ann. c.* 14. killing a hare, though
l be concerned in it, is but one offence. But the offence againſt the
1. *c.* 18. *ſ.* 25. of obſtructing a cuſtom-houſe officer in the executi-
his duty, is *ſeveral*; and every offender is *ſeparately* liable to the pe-
which the act impoſes.

Of the Judgment on ſuch Actions or Informations. Page 42

ere) Wherever the act expreſſes the amount of the penalty, or leaves it to the diſcretion magiſtrate, there muſt be a judgment of forfeiture as well as a conviction. Rex v. Hawks, 8. Fitzgib. 124. Barnard, K. B. 212. But where the act, as 9 Ann. c. 14. ſays, "*That the ſhall forfeit five times the value, &c.*" all the judgment the Court can give is, *quod convic-* and a new action muſt be brought upon that judgment for the forfeiture. In recuſancy s no other judgment. Rex v. Luckup. Str. 1048.

judgment in a popular action may be affirmed as to one part, and ed as to the other; as where damages and coſts were given on 9 c. 14., it was reverſed as to the damages and coſts, and affirmed as debt. 4 Burr. 2018. Frederick v. Lookup, *qui tam.*

the jury find a general verdict with one penalty for the plaintiff, and ly it to one count, he ſhall not be permitted afterwards to apply it to er count, though the former were bad in law, and the evidence would warranted the application of it to any other count. 3 Ter. Rep. 448.

(F) In what Caſes there ſhall be Coſts. Page 42

The 18 *Eliz.*) For this reaſon the coſts of a nonſuit were awarded to the defendant in an by the party grieved, on the ſtatute of 9 Geo. 1. c. 22. Greetham v. the Inhabitants Hundred of Thiale, 3 Burr. 1723. That the plaintiff is in ſuch caſe entitled to coſts, itham v. Hill, 2 Wilſ. 91. and Jackſon v. the Inhabitants of Caleſworth, 2 Term Rep. 71. h denied by Aſton J. in giving judgment in the caſe of Wilkinſon *qui tam* v. Allott, Cowp.

here is a *proviſo* in this act, that it ſhall not extend to any officers are uſed to exhibit informations: but it muſt appear on record that are ſuch officers, elſe they will be conſidered as common informers, ffidavits to the contrary will not be admitted. 2 Ld. Raym 1333. Bull. *Ni. Pri.* 334.

a proſecutor *qui tam* for killing game, does not reply, defendant ſhall coſts, for this ſtatute extends to informers on all penal ſtatutes. Law *qui tam* v. Worrell, 1 Wilſ. 177.

proſecutor not going on to trial ſhall pay coſts. Caſ. Temp. Hardr. 159. 3 Burr. 1304.

an action *qui tam* on the 5 *Eliz. c.* 4. the plaintiff ſhall pay coſts. Elde *qui tam* v. Stephens, Ld. Raym. 1333. Jeynes *qui tam* v. Stephenſon, Barnes, 124.

here there is any reaſon to ſuſpect that the defendant may loſe his if the plaintiff ſhould fail in the ſuit, he will be permitted to pay ſſue money into court to abide the event. Whether the plaintiff can Parker *qui tam* v. Macfarlane, 3 Term Rep.

in

137. Field *qui tam* v. Carron, 2H. Bl. 27. Vide tit. Coſts, *infra.* Engliſh *qui tam* v. Cox, Cowp. 322.

in ſuch caſe be compelled to give ſecurity for the coſts, is a point not ſettled, there being a difference of opinion in this reſpect betwee courts of *Weſtminſter-hall*, the courts of Common Pleas and Exche holding the negative; whilſt the affirmative is maintained by the cou King's Bench.

The courts have refuſed to ſtay proceedings in an action for uſury, the coſts of a *nonpros* in a former action by a different plaintiff againſt ſame defendant were paid.

Page 43 **(G) Whether the Penalty of a Penal Statute m be compounded or granted over.**

Page 44

(*By The* 21 *Jac.*) It is the rule of the Court of King's Bench, that where they give lea compound, the king's half of the compoſition ſhall be paid into the hands of the maſter of Crown Office for the uſe of his majeſty. 4 Burr. 1929. The giving leave to compou diſcretional in the courts. 1 Str. 167. 1 Wilſ. 79. 130. It hath been given after ve for the plaintiff. 5 Term Rep. 98. If a defendant obtain a rule to ſtay proceedings upon p ment of a ſum agreed upon between him and the plaintiff, the Court will enforce the pay of that ſum by attachment. 5 Term Rep. 257.

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Actions on the Caſe.

(*Theſe Actions*) They ariſe ſimply from tort or wrong, where no breach of any contract is ſu geſted, and no forcible violence imputed to the defendant. 3 Wooddes, 167.

Page 46 **(A) What Perſons, with reſpect to the Injur may bring an Action on the Caſe.**

Davis, v. Jordan, 5 Burr. 2680. Moor v. Wilſon, 1 Term Rep. 659.

An action on the caſe for goods loſt may be maintained againſt carrier either by the conſignor or conſignee; and it may be brought by former, notwithſtanding a private agreement between him and the c ſignee, that the carriage ſhould be paid by the latter, for the carrie liable upon his agreement.

Page 47 **(B) Againſt whom ſuch Action lies.**

(*If Two Are*) The opinion of the three judges hath been confirmed in a late caſe of Whit v. Lord Le Deſpenſer, in which it was decided that the poſt-maſter was liable only for act perſonal neglect or miſconduct. Cowp. 754. And caſe lies againſt a deputy poſt-maſter a perſonal miſfeaſance. Rowning v. Goodchild. 3 Wilſ. 443. 2 Bl. Rep. 906. S. C.

Cheetham v. Hampſon. 4 Term Rep. 318.

An action for not repairing fences, whereby a party is damnifi cannot be brought againſt the owner of the fee, who is not in poſſeſſi but lies only againſt the occupier.

(C) f

For what Injuries an Action on the Case will lie; and herein of those Cases wherein a Man may be said to suffer *Damnum absque injuriâ*. Page 49

If I sustain an injury by the act of commissioners appointed by an act of parliament, without any excess of their jurisdiction, no action lies against the commissioners or the persons acting under them. Governor, &c. of the British Cast Plate-glass Manufactory v. Meredith. 4 Term Rep. 794.

Of Actions on the Case for Fraud and Deceit Contracts on an express or implied Warranty. Page 51

(*A. Being*) An affirmation at the time of a sale is a warranty, provided it appear in evi- to have been so intended. 3 Term Rep. 57. *supra*, [E.]

Page 52

(*If A Man*) If sold at the price of a sound horse, case in the nature of deceit would lie. ccey v. Dymock, sittings after Easter term 1789, *coram* Ld. Kenyon. See too 3 Wooddes. 199.

(*A Man Knowing*) Where a treaty for the sale of a commodity had been entirely broken off, rranty made at the time of such sale was holden not to extend to a subsequent sale of the commodity at a reduced price. Anon. Str. 414.

If there be an express warranty not respecting the soundness of horses ly, but some distinct matter, as their age; and it be a condition of that the horses, if conceived to be unsound, shall be returned in a ed time; an action may be maintained by the buyer if the horses are of the age they are warranted to be, though they are not returned till such time has elapsed, for the condition of sale applies only to the undness; nor does the buyer lose his remedy, though upon the seller's ing to take them back, he sells them again to a third person. Buchanan v. Parnshaw, 2 Term Rep. 745.

It has been determined by the court of Common Pleas, that the seller of unsound horse warranted sound, if it can be clearly proved that the e was unsound at the time of the sale, is liable to an action on the war- y, without notice or return. Fielder v. Starkin, 1 H. Bl. Rep. 17.

Of Actions on the Case for Injuries to a Man's Person, Property, Right, or Privilege. Page 53

(*If A. Rides*) But in such case it must be alleged in the declaration that the defendant *knew* the bull was mad. Ibid. In all cases where the mischief is done by animals *mansuetæ naturæ*, owner must be shewn to have had notice of their viciousness before he can be charged, and notice must be set out in the declaration; but as to animals *feræ naturæ*, the person who s them is liable for any damage they may do, *without notice*. Ld. Raym. 606. 1583. 2 662.

(*If A Parishioner*) The parson is not obliged to take tithe of grass the day it is cut, but may let there long enough to make it into hay. Stra. 245.

(*If A Man Who*) The action can be brought only against the tenant in possession. 4 Term 318. *Supra* (B).

If

Page 54
1 R. Abr. 109. Cro. El. 84. 466. 2 R. Abr. 140. 1 Ventr. 274. Com. 7.

If a man have a private way over the land of another, and be obst ed in the enjoyment of it, this action lies, whether he claim it by ex reſervation in any modern deed, by grant, by preſcription, or by op on of law. This eaſement may be obſtructed in an actionable ma not only by ſtopping up the way or paſſage, but by ploughing up the over which the road lies. It is ſufficient as againſt a wrong doer, ſu declaration to allege generally that the plaintiff was lawfully poſſeſſed certain tenement, and by reaſon thereof entitled to the way in que without deducing a regular title from any perſon ſeiſed in fee.

In an action againſt a man for not repairing a private road leading through his grounds, it is ſufficient to charge him as occ upon his poſſeſſion merely. Rider v. Smith. 3 Term Rep. 766.

1 R. Abr. 89. Rex v. White, 1 Burr. 333.

If any perſon erects a ſmelting-houſe, or works for making aquaf or ſuch like, the vapour and ſmoke of which ſpoil the graſs or corn, jure the cattle of his neighbour, it is a nuiſance to the land for whic action lies.

Brown v. Beſt, 1 Wilſ. 174.

If a man have ancient pits which are repleniſhed by a rivulet, he cleanſe, but cannot change or enlarge them, if he does, he is liable action on the caſe for diverting the water.

Bliſſet v. Hart, M. 18 Geo. 2. C. B. Bull. *Ni Pri.* 76.

If a man have an ancient ferry, and another ſet up a new ferry ſo to it as to draw away the cuſtom, caſe lies; for he who has an a ferry is compellable by law to keep boats, *&c.* and therefore the law ing impoſed an obligation upon him, protects him in the excluſive ment of the right.

Tripp v. Frank, 4 Term Rep. 666.

But an excluſive right to a ferry from *A.* to *B.* does not prevent ſons from going by any other boat from *A.* directly to *C.* though it be to *B.* provided it be not done fraudulently, and merely for the purp avoiding the regular ferry.

Page 55
(*If A Man Hath*) 1 Str. 643. Forteſc. 212. S. P.

Stocks v. Booth, 1 Term Rep. 428. Gibſ. Cod. 643. 1 B. E. L. 329. Kenrick v. Taylor, 1 Wilſ. 326.

If a man have a right to ſit in a particular pew in a church, a diſturbed therein, he may have an action on the caſe. Such right m claimed either by preſcription as appurtenant to a meſſuage from kee in repair; or under a faculty (*a*) from the ordinary; or perhaps und allotment and agreement with the miniſter and churchwardens, eſpe where the church is rebuilt. In all caſes it ſeems neceſſary to clai pew as appurtenant to a meſſuage in the declaration (*b*). Where t tion is brought againſt a ſtranger or wrongdoer, it is ſufficient for the tiff to allege in his declaration that he is entitled by preſcription to th in queſtion, as appurtenant to his meſſuage, without farther ſtating th ticulars of his claim (*c*). But againſt the ordinary, who has *primâ* the diſpoſal of all the ſeats in the church, a title or conſideration m ſhewn in the declaration and proved; as a faculty from one of his pre ſors having built at a diſtant period, or by due authority, ſuch pe having conſtantly repaired the ſame.

(*a*) From long uninterrupted uſage, a faculty may be preſumed, 5 Term Rep. 298. A faculty to a man and his heirs is not good; nor is a preſcription as appurtenant to land. 1 Term Rep. 428. 1 L. 331. See Croſs v. Salter, 3 Term Rep. 630. in which caſe the King's Bench held, th ſentences in the eccleſiaſtical courts were not concluſive evidence of the right. But th does not ſeem to afford any general rule, for the two ſuperior eccleſiaſtical juriſdictions not to have decided poſitively on the right. 3 Wooddeſ. 196. (*b*) 1 Wilſ. 326. 1 Rep. 431. (*c*) An uninterrupted poſſeſſion of the pew for thirty years is preſumptiv dence of a preſcriptive right; but that preſumption may be rebutted by proof of the n iſtence of the pew before that time. Griffith v. Matthews. 5 Term Rep. 296.

a parſon deface a grave-ſtone or coat armour in a church, this action notwithſtanding the injury be wilful and direct: for in this caſe, as in immediately preceding, treſpaſs *vi et armis* cannot be brought; becauſe freehold of the church is in the rector. Godb. 200. Cro. J. 367.

aud and deceit in the defendant, and damage to the plaintiff, are a ient foundation for this action, though no benefit accrue to the defen- ; therefore it was holden by three Juſtices of the Court of K. B., ſt *Groſe* J. that it would lie for a falſe affirmation reſpecting the cre- f a third perſon, made with intent to deceive the plaintiff, and by h he was injured, though it did not appear that the defendant was be- d by the deceit, or that he colluded with him of whom he gave the ous character. Paſley v. Freeman, 3 Term Rep. 51.

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lſo For Injuries) Or by ſeducing his daughter, *per quod ſervitium amiſit.* If the daughter age, acts of ſervice muſt be proved. 2 Term Rep. 166. 3 Burr. 1878. In actions of adultery, roper form is treſpaſs: and for the other injuries adverted to in the text, ſatisfaction may be that form of action. Cowp. 54. 3 Wilſ. 18. See 2 Term Rep. 167. Ld. Raym. 1032. and emarks thereon in 3 Wooddeſ. 243, 246, *n.* But where a ſervant had covenanted to at a trade for a limited time, under a penalty, and having quitted his place, the maſter im and recovered the penalty; this was holden to diſcharge the ſecond maſter from an ac- or hiring him, the penalty being deemed full ſatisfaction for the loſs of ſervice. Bird v. ll. 3 Burr. 1345. 1 Bl. Rep. 373. S. C.

it was holden, that this action would lie where the defendant falſe- d maliciouſly wrote a letter to a perſon who was engaged to take the iff as his wife, ſuggeſting, that he was her huſband, by means eof the intended marriage was fruſtrated. Sheperd v. Wakeman, 1 Sid. 79. 1 Lev. 53. S. C. 1 Keb. 255. 269.

. C. It ſeems, unleſs ſome ſpecial damage could have been proved, that this cauſe would been proper only for the eccleſiaſtical court, under the name of a ſuit for jactitation of age. 3 Wooddeſ. 211.

A Man Ought) It is the proper remedy for a fraud upon the toll of a market. Cowp. 664

n action on the caſe will not lie againſt juſtices of the peace for re- to grant a licence to keep an inn or ale-houſe. Baſſett v. Godſchall, Eſq. and others, 3 Wilſ. 121.

a bailiff remove goods off the premiſes under a *fieri facias* before Page 58 landlord is paid his year's rent purſuant to the ſtatute 8 *Ann. c.* 17., lies againſt him; and the action may be brought at the ſuit of an ad- ſtrator. Palgrave v. Windham, Str. 212.

a gaoler ſuffer a priſoner upon *meſne proceſs* to eſcape, he is liable to tion on the caſe, though the priſoner return the ſame day to the pri- and the plaintiff proceed to final judgment againſt him. Ravenſ- croft v. Eyles, 2 Wilſ. 294.

Upon) And *note*, that regularly an action on the caſe is the proper remedy for all falſe s. Dougl. 153, 4.

Page 60

A Man) The carrier is liable for every accident except by the act of God, or of the king's es. 1 Term Rep. 33.

if a man ſuffer materially from the neglect or ignorance of a *com-* Ld. Raym. *urgeon or* apothecary; *aliter*, if of a perſon not making public profeſſi- 214. 1 Danv. 77. So ſuch buſineſs, for it was the plaintiff's own folly to truſt to one who was

was unskilled: however, upon an expreſs undertaking, the action would lie, even in that caſe. where a ſurgeon and an apothecary broke the callous of the plaintiff's leg after it was formed; it appearing that it was done by their going out of the common courſe of practice, and in making an experiment with a new inſtrument. Slater v. Baker and Stapleton. 2 Wilſ. 359.

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(*So If a Farrier*) An action cannot be maintained againſt a carpenter ſimply as ſuch, and without any expreſs conſideration, for an injury ſuſtained in conſequence of his not entering upon a piece of work he had engaged to perform. Elſee v. Gatward, 5 Term Rep. 143.

Ruſſell v. Palmer, 2 Wilſ. 325. It was holden to lie againſt an attorney for not charging a perſon in execution at his client's ſuit according to the terms of a rule of court, though it ſeemed to be rather an error of judgment than any actual negligence.

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(H) Where an Action on the Caſe will lie for a Conſpiracy, and oppreſſive Proceedings in Proſecutions and Suits at Law.

(*It Seems*) A copy of the record of the acquittal granted by the court muſt be produced in order to ſupport an action for a malicious proſecution of a *felony*; but in the caſe of miſdemeſnors the practice is different. 1 Bl. Rep. 385. Gilb. Caſ. 185, Str. 651, 977, Ca. Temp. Hardw. 54, 4 Term Rep. 247. acc. It may be brought by a huſband for the expence of defending his wife. 2 Str. 977.

Carth. 416. Bull. *Ni. Pri.* 14. But ſee a doubt in this caſe by Saunders, where the declaration ſtated the injury to have been committed *per conſpirationem eos habitam*, Saund. 230. If the action be brought againſt ſeveral, and one only be found guilty, it is ſufficient; for there is a great difference between the action on the caſe in the nature of conſpiracy, and the writ of conſpiracy at common law; for in this caſe the damage ſuſtained is the ground of the action.

In actions for proſecutions or oppreſſive proceedings, it is indiſpenſably neceſſary to make out two grounds; *malice* and *want of probable cauſe*. 4 Burr. 1974. From the latter, the former may be implied, but not *e converſo*. Where there had been a condemnation of goods by the commiſſioners of exciſe for not entering and paying the duties, which was afterwards reverſed by the commiſſioners of appeal, it was adjudged that an action for a malicious proſecution did not lie againſt the informer, for the judgment of the ſub-commiſſioners ſhewed that there was foundation for the proſecution. 1 Wilſ. 232. 1 Term Rep. 506. In actions of this kind the plaintiff muſt allege that the original ſuit, wherever inſtituted, is at an end; Dougl. 205. otherwiſe the point would come to be tried too ſoon and diſorderly. Yelv. 117. it muſt be *legally* at an end; and therefore in an action againſt a juſtice for an illegal commitment on a ſuppoſed charge of felony, the Court held an allegation that the plaintiff was *diſcharged* from his imprisonment, to be inſufficient; becauſe there are various ways by which a *diſcharge* may be had without putting an end to the ſuit; it ought to have been ſhewn *how diſcharged*. 2 Term Rep. 225. Str. 114. Hob. 206. 266. 10 Mod. 245. So in an action for maliciouſly holding to bail, it muſt be ſhewn what is become of the original action. 1 Salk. 15. Dy. 285. If it has been abandoned, it ſhould ſeem that an action will lie; for abandonment is an indication of it being falſe and hopeleſs. W. Jones, 93. So where the plaintiff ſuffered himſelf to be nonſuited. Bull. *Ni. Pri.* 13. 4th ed. But a *nolle proſequi* by the attorney general, is not ſuch a termination of a criminal ſuit as will authorize an action. 6 Mod. 261. See 10 Mod. 219. Gilb. Caſ. 185, *&c.* Q. Whether the defect of ſtating the original action to be determined, may not be cured by a verdict or plea in bar? Raym. 418. 2 Keb. 456. 753. 3 Keb. 781. Saund. 228.

(*If A Juſtice*) This caſe of Windham v. Clere is not law; for the immediate act of impriſonment proceeded from the juſtice; and therefore the action ſhould have been treſpaſs, and treſpaſs only: but where the act of impriſonment by one perſon is in conſequence of information from another, there an action on the caſe is the proper remedy, becauſe the injury is ſuſtained in conſequence of the wrongful act of that other perſon. Morgan v. Hughes. 2 Term Rep. 2[illegible]

ot v. An action on the case is the proper remedy against excise officers who
per and enter a house under a legal warrant to search for concealed goods, when
ther, there are none.
25 G. 3.
R.

Term Rep. 535. See the case of Bostock v. Saunders and others. 2 Bl. Rep. 912. 3 Wils.
. where the court of Common Pleas, after hearing two arguments, held, that trespass
uld lie in such a case.

age 62

If A. Exhibits) *Aliter*, if it had been dispersed abroad, before it had been presented. Hardr.
C. 2 Keb. 832. 1 Hawk. P. C. c. 73. f. 8. 12. 15. Case will not lie for words spoken or
orn in a legal and judicial way. 2 Burr. 810.

If one hold another to bail in an inferior court, when the sum actually Smith v. Cattle, 2 Wils. 376.
e would not require bail, this action may be maintained against him.

In Case) It is now settled that an action of the case will lie for maliciously suing a person in an
erior court, when that court has no jurisdiction of the cause: and the court of Common Pleas,
r due consideration, refused a new trial in such a case, though the declaration did not allege
t ought to have done, that the defendant knew that the inferior court had no jurisdiction.
Wils. 302.

An action on the case is maintainable for a malicious abuse of delegated Sutherland
hority of the highest nature; as where the governor and vice-admiral v. Murray, Sittings at Westminster after Easter 1783.
one of his majesty's islands suspended the judge of the vice-admiralty
rt from the exercise of that office, maliciously and without any reason-
e cause.
cor. Eyre, B. 1 Term Rep. 538.

But this action will not lie for a malicious prosecution before a naval Johnstone
rt martial, for an offence cognizable therein (*a*): nor for delaying to v. Sutton, 1 Term Rep. 493.
ng an officer under arrest to a court-martial, it being a military offence.
r will it lie (*b*) against a commanding officer for an improper exercise of (*a*) Particularly if the defendant has not been tried for it by a court-martial.
power, *flagrante bello*, and out of the British dominions. (*b*) Barwis v. Keppel. 2 Wils. 314.

) Where Case will lie, though the Party injured has another Remedy. Page 63

AN action on the case in the nature of waste, as well as an action of Kinlyside v. Thornton and others, 2 Bl. Rep. 1111.
covenant, will lie against a tenant for years after the expiration of
term.

If A Parson) This action lies for the neglect of repairing a *prebendal* house, by a succeed-
prebendary against the predecessor, or his personal representative, as well as in the case of
rochial preferments. Radcliffe v. D'Oyley. 2 Term Rep. 630. 3 Wooddes, 206. n.

If A. And) Against an archdeacon for refusing to induct. F. N. B. 47 H. Forteſc. Rep. 291.

Case will lie for falsely and maliciously suing out a commission of Chapman v. Pickersgill, 2 Wils. 145. 3 Burr. 1418.
nkrupt, though the chancellor has power under the statute of 5 Geo. 2.
give 200*l.* damages.

Page 64 (K) **Where Caſe will lie though the Wrong-doer be puniſhable criminally.**

(*In Caſe Againſt*) See St. 1. J. 1. c. 11. That if ſeven years have elapſed without the former husband or wife having been heard of, the guilt of felony is not incurred. However, where a man falſely pretending himſelf ſingle, only ſolicits, but does not actually contract a ſecond marriage with the plaintiff, and ſhe ſuſtains ſpecial damage in conſequence of ſuch deceit, as, by rejecting other offers, there can be little doubt of her right to ſue this action. 3 Wooddeſ. 201,

AFFIDAVIT.

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(A) The Taking and Filing of Affidavits.

(*Affidavits were*) By the 4 Geo. 3. c. 21. a ſimilar power is given to the chancellor and juſtices of the court of Pleas in the county Palatine of Durham.

By a rule of the Court of King's Bench E. 31 Geo. 3. it is ordered "That where any affidavit is taken by any commiſſioner of that court made "by any perſon, who from his or her ſignature appears to be illiterate, the "commiſſioner taking ſuch affidavit ſhall certify or ſtate in the jurat, that "the affidavit was read in his preſence to the party making the ſame, and "that ſuch party ſeemed perfectly to underſtand the ſame, and alſo that "the ſaid party wrote his or her ſignature in the preſence of the commiſ- "ſioners taking the ſaid affidavit."

3 Atk 813. 3 Term Rep. 403. Affidavits taken before a perſon who is ſolicitor in the cauſe are not allowed to be read either at law or in equity.

2 Term Rep. 644. If an affidavit in a cauſe have no title, it cannot be received, though the adverſe party is willing to wave the objection.

1 Str. 704. An affidavit upon a motion for a *certiorari* to remove an indictment is properly entitled, the King v. A. B. (the defendant)."

Bevan v. Bevan, 3 Term Rep. 601. The affidavits on which to apply for an attachment for diſobeying an award, where the ſubmiſſion is made a rule of Court under the ſtatute need not be entitled in any cauſe: but thoſe in anſwer muſt.

The ſame practice prevails in affidavits to move for informations. Rex v. Pierſon. Andr. 2 Str. 1107. S. C.

Wood v. Webb 3 Term Rep. 253. Affidavits for attachments in civil ſuits are to be entitled, with the names of the parties, but as ſoon as the attachments iſſue, the king is to be named as proſecutor.

2 Will. 371. Where an affidavit has been read and filed, it cannot be taken off the file.

Rex v. Joliffe 4 Term Rep. 285. Affidavits made for one purpoſe may occaſionally be uſed for another. Thus an affidavit taken before a judge at *niſi prius* upon an information of the King's bench, and afterwards returned into that court and filed, was admitted as a ground on which to grant another information, the Court conſidering the authority of the judge at *niſi prius* in that caſe as a emanation of their own. So, affidavits upon which a defendant hath obtained

ned his diſcharge in one cauſe, have afterwards been admitted for a ſi- Cooke v. Schmoll.
lar purpoſe in another cauſe. Ibid.

An affidavit on a motion for leave to file a criminal information ought not Rex v. Robinſon, cited in Rex v. Cole, 6 Term Rep. 642.
be entitled; and if it is, it cannot be read. But the affidavits pro-
ced on ſhewing cauſe againſt the rule may or may not be entitled: and
affidavits made after the rule is made abſolute muſt be entitled.

The courts of this country will take notice of affidavits ſworn before Rex v. Harriſon, *Id.* 60.
eign judicatures, provided they are properly authenticated to them.
here the affidavit is taken before one of the judges of the ſuperior courts *Ex parte* Worſley 2 H. Bl. 275.
Ireland, an affidavit that the ſignature is in his hand-writing has been
mitted as a ſufficient authentication of it. But with reſpect to ordinary
giſtrates, it is uſual to require the atteſtation of a notary publick. In a
e caſe, however (*a*), the court of King's Bench received an affidavit, (*a*) Dalmes v. Barnard, 7 Term Rep. 251. 2.
rporting to be ſworn before the high bailiff and chief magiſtrate of the
trict of *Douglas* in the *Iſle of Man*, upon oath made here before them,
t the deponent believed the ſignature to be of the proper hand-writing
ſuch magiſtrate.

(B) Where an Affidavit is neceſſary.

The Law) By the ſtat. of 7 & 8 W. 3. c. 34. it is enacted that the ſolemn affirmation and
aration of a Quaker ſhall be accepted in all caſes, except in a criminal cauſe, inſtead of an
in the uſual form. See too 12 G. 2. c. 13. 22 G. 2. c. 46.

It is alſo unneceſſary in the caſe of a bill for diſcovery of a cancelled Page 66 King v. King. Moſely 192.
rument, and to have another deed executed, for if the plaintiff had
cancelled inſtrument in his hands, he could make no uſe of it at law,
the relief prayed is ſuch as a court of equity only can give.

If a bill be filed for examining a material witneſs upon the ground that Philips v. Carew, 1 P. Wms. 117.
evidence is likely to be loſt by death or departure from the realm, there
ſt be an affidavit annexed to it, of the circumſtances from which the
nger of ſuch loſs is apprehended. So, if a bill be filed for perpetuating Shirley v. Earl Ferrers, 3 P. Wms. 77. 1 Atk. 450. Mitf. Eq. pl. 51. 131.
e teſtimony of a witneſs upon the ground of his being the only witneſs
a particular point, and his evidence being of the utmoſt importance, an
davit of the witneſs himſelf ſhould be annexed to it. The principle on
ich it is required in theſe caſes to annex to the bill an affidavit of the
cumſtances which render the examination of witneſſes proper in a
rt of equity; though the matter is capable of being made immediately
ſubject of a ſuit at law, ſeems to be the ſame as that on which the
ctice of annexing an affidavit of the loſs or want of an inſtrument, to a
ſeeking to obtain in a court of equity the mere legal effect of an in-
ument, is founded; namely, that the bill tends to alter the ordinary
rſe of the adminiſtration of juſtice, which ought not to be permitted
the bare allegation of a plaintiff in his bill.

In order to obtain the leave of the court to bring a bill of review, or a Taylor v. Sharp, 2 P. Wms. 371. Mitf. Eq. pl. 78. 82.
pplemental bill in the nature of a bill of review *upon the diſcovery of new matter*, there muſt be an affidavit that ſuch new matter could not have been
oduced or uſed by the party claiming at the time when the decree was
de.

He who moves) He muſt ſwear poſitively that the defendant is indebted to him in a ſum
cam: where indeed a bill is for an account only, the plaintiff's ſwearing that he believes the
ance in his favour will be ſo much, will be ſufficient. 3 Atk. 501.

A Quaker hath been permitted to put in an anſwer to a frivolous and vex- Wood v. Story 1 P. Wms. 781. 3 P. Wms. 142. note.
ous bill without either oath or affirmation.

Where a party excepts to a fact certified by a maſter's report, he muſt
pport his exception by an affidavit.

Jones 155. Seld. 3 Vol. p. 2. 1335. The nobility of this kingdom, and lords of the upper houſe of pa liament, are of ancient right to anſwer in all courts as defendants upo proteſtation of honour only, and not upon oath.

(*A Peeres.*) Lord Harcourt held, that the privilege of a peer to depoſe on his honour onl was confined ſolely to his anſwer in Chancery; that in all other caſes he muſt be upon oath; an therefore the Lord Stourton was put to anſwer upon his oath to interrogatories. Sir Thom Meers v. Lady Stourton, 1 P. Wms 146.

(C) Where it may be ſaid to be ſhort and defe tive.

Rex v. Wil- ſon 4 Term Rep. 487. When a defendant who has ſuffered judgment by default in a crimi proſecution, is brought up for judgment, each party ſhould come prepar with affidavits diſcloſing his caſe (if he mean to produce any); but if the courſe of the inquiry the Court wiſh to have any point further e plained, they will give the defendant an opportunity of anſwering it o future day.

Rex v. Sharpneſs 1 Term Rep. 228. When a defendant who has been convicted on an indictment comes for judgment, the proſecutor may read affidavits in aggravation, tho made by witneſſes who were examined at the trial, which affidavits the d fendant is at liberty to anſwer.

AGREEMENTS.

Page 68 (A) Who are capable of contracting and bindi themſelves or others by their Agreements.

(*Alſo an Infant.*) If an infant, ſays Lord Mansfield, does a right act which he ought to or which he was compellable to do, it ſhall bind him. 3 Burr. 1801. And if an infant e into a contract with the advice and concurrence of his friends, and ſuch contract appear to beneficial to the intereſts of the infant, equity will ſupport and give it effect. 1 Eq. Caſ. A 287.

(*The Anceſtor*) So in the caſe of a cuſtomary heir. 2 Vez. 640.

(*So if a.*) See the caſe of Chetwynd v. Fleetwood, 4 Br. P. C. 435. where a ſpecifick p formance of an agreement made by the anceſtor, only tenant for life, was decreed againſt heir, the agreement being clearly for his benefit.

(*If Tenant.*) 2 Vez. 634. But ſee Hill v. Carr, 1 Ch. Ca. 294. The iſſue not bound by a c nant for further aſſurance. 1 Lev. 237. nor by articles to convey for payment of debts. 1 Eq. Abr. 28. p. 34. By analogy to the caſes of tenants in tail who claim *paramount* to the contra party, it hath been holden, that the widow of a copyholder for life, who had agreed for ſale of his eſtate, but died before the conveyance was executed, was not debarred by this a ment of her *free bench*; for that her claim was not under the huſband, but from the cuſtom the manor. Muſgrave v. Daſhwood, 2 Vern. 45. 63. But Ld. Hardwick thought that the dow's eſtate was a branch of, and aroſe from that of the huſband, and that the cuſtom m directed its derivation; and therefore where the agreement was for a valuable conſidera paid, as to the greateſt part, he decreed a ſpecifick performance againſt her. Hinton v. Hin 2 Vez. 631. 638. Ambl. 277. S C. In the ſame caſe of Muſgrave v. Daſhwood, 2 Vern. and upon the ſame principle, it was ſaid, that if a joint-tenant enter into an agreement to a and die without doing ſo, equity would not enforce the agreement againſt the ſurvivor. this, it ſeems, muſt be taken with this limitation, where the articles are not ſuch as amount ſeverance of the jointure; if they are ſuch, equity will decree againſt the ſurvivor. Per L Hardwicke, 2 Vez. 634. Co. Litt. 59. b.

(*A. &*

. Seiſed.) Any agreement with an equivalent will bind the iſſue, as a partition, though but arol, or an exchange of lands. 2 Vern. 202. Co. Litt. 174. a. 384. a.

f there.) It ſeems, that upon the ſame principle the heir in tail of a copyhold, whoſe anceſad entered into an agreement to ſell, but had died before ſurrender, would be decreed to ey to the purchaſer; for the entail of a copyhold is not within the ſtatute *de donis*. Powell ontr. 126.

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s Tenant.) If tenant in tail covenant to make a leaſe, which he has power to make, and before execution, equity, it ſeems, will carry it into execution againſt his heir. 10 Mod. If tenant for life, with power to make leaſes for 21 years, grant one for 26 years, ſuch ſhall bind the remainder-man for 21 years, for under the power of leaſing, there is a reference given. Campbell v. Leach, Ambl. 740.

A mother, acting as adminiſtratrix, may bind her children. Highter v. Sturman, 1 Vern. 210.

Churchwardens are in that character competent to enter into any agreet which may be beneficial to the pariſh, and thereby to bind the pariſhrs and their ſucceſſors, as alſo ſucceeding churchwardens. Dr. Martin v. Nutkin, 2 P. Wms. 266.

f a party undertaking for and on the behalf of another have no authofrom his principal, there it is a fraud, and the undertaker ought himto be liable. But where a due authority is given to treat, there the formance of the contract ſhall be enforced againſt the principal. Johnſon v. Ogilby, 3 P. Wms. 279. Parrot v.

ls, 2. Vern. 127. Ducheſs of Marlborough v. Strong, 5 Vin. Abr. 533. p. 38. 2 Br. P. C. S. C. If an attorney ſhould bid more for an eſtate ſold under a decree of the court of Chan- than he was empowered to bid, and declare his principal, Sir Thomas Sewell, Maſter of the , thought that the attorney himſelf would be liable, but doubted whether the principal would. l. 498. But where many are concerned in intereſt, and the credit is evidently given to the on, and not to any fund, the immediate contractors are liable. Thus where a man contract- pave the ſtreets of a town by a written inſtrument executed between him and two of the hioners, the Court of Exchequer decreed him relief againſt the undertakers, and left them heir remedy over againſt the reſt of the pariſh; more eſpecially as the written contract, h was the plaintiff's evidence, was in the hands of one of the defendants. Merick v. Wydſold, Hardr. 205. So it was holden, that a bill might be ſupported againſt the committee club for an agreement entered into by them on account of the club, without making the of the ſubſcribers parties. Cullen v. Duke of Queenſbery, 1 Br. Ch. Rep. 101. affirmed in n. Proc. March 27, 1787. So where the commiſſioners of a navigation act entered into an ement with an engineer, they were holden to be *perſonally* liable. Horſley v. Bell, Ambl. S. C. in 1 Br. Ch. Rep. 101. in not.

Where an agent employed by huſband and wife to ſell the wife's eſtate publick auction ſold it by private contract, at a higher price than they required, the Court refuſed to compel them to execute the contract, agent not having acted purſuant to the authority given him. Daniel v. Adams, Ambl. 495.

But if a factor ſell goods at leſs price than he is commiſſioned, the ſale bind the principal for the convenience of trade. Ambl. 498.

The agreements of the ſolicitors in a cauſe, relative to orders of court, binding on their clients. Cox v. Peele, 2 Br. Ch. Rep. 334.

) Of Agreements which are good in Law, and will be decreed in Specie in Equity: and herein.

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In many) It is the rule of Courts of Equity not to entertain the ſuit unleſs the plaintiff ts the thing in ſpecie, and cannot have it in any other way. Errington v. Ayneſley, 2 Br. Rep. 343. Therefore, in general, they will not allow a bill for a ſpecifick performance of tracts of ſtock, corn, hops, or other articles of merchandize, but will leave the plaintiff to his

his remedy at law. 1 P. Wms. 570. 5 Vin. Abr. 538. S. C. Capper v. Harris, Bunb. 13
Doriſon v. Weſtbrook, 2 Eq. Ca. Abr. 161, p. 8. 5 Vin. Abr. 540. p. 22. A breach of th
common covenant to repair demiſed premiſes, is conſidered as much in the ſame light, and prope
only to be redreſſed by action at law. Whiſtler v. Mainwaring, in Ch. Mich. 14 Geo. 3. cited
3 Wooddes, 464. n. 2. But on a covenant to rebuild, as it was holden by Lord Hardwicke, th
landlord or leſſor may come into Chancery for a ſpecifick performance, if he is in due time, an
no conſtructive acquieſcence can be imputed to him. City of London v. Naſh, 1 Vez. 12. a
3 Atk. 512. S. C. This doctrine, however, has been lately controverted, and perhaps entirel
over-ruled. Lucas v. Comerford, 3 Br. Ch. Rep. 166.—In the caſes of Gardener v. Pullen,
Verp. 394. Thomſon v. Harcourt, 2 Br. P. C. 415. a performance of an agreement for ſtoc
was decreed. But it ſhould be obſerved, that in thoſe caſes, the party who had undertaken t
transfer the ſtock was plaintiff, ſeeking relief againſt a penalty, in which he had bound himſe
for performance of the contract, and that the performance of it was the only ground on whic
equity could relieve him. Fonbl. Notes on Eq. Tr. p. 120. But on a bill filed againſt the par
who had undertaken to transfer the ſtock, Lord King did not think the rule ſo invariably ſettle
as to allow a demurrer to the bill for want of equity. Colt v. Netterville, 2 P. Wms. 304. An
contracts reſpecting mere perſonal chattels will be enforced in equity where the damages recove
able at law would not be an adequate compenſation for the non-performance. Buxton v. Liſte
3 Atk. 383. and Tayler v. Neville, and Duke of Buckingham v. Ward, there cited; and Le
Ranelaugh v. Hays, infra.

(*So if a Jointreſs.*) In Denton v. Stewart, 4th July 1786. Sir L. Kenyon, Maſter of th
Rolls, directed the Maſter to inquire what damage the plaintiff had ſuſtained by the defendan
not having performed his agreement, of which a ſpecifick performance was prayed by the bi
but which could not be decreed, the defendant having, by ſale of the eſtate, put it out of h
power to perform his agreement with the plaintiff. Fonbl. Notes on Eq. Tr. 389.

Page 70 (*The Condition.*) It hath been holden that to found a decree for a ſpecifick perfo
mance, the contract muſt be good at law; and therefore it is ſtated by Sir Tho. Clar
Maſter of the Rolls, in Ambl. 406. that it was the practice before Lord Somers' time with re
pect to agreements, to ſend the party to law, and if he recovered any thing by way of damag
then to entertain the ſuit. But equity will often enforce a performance of agreements, tho
no action will lie at law upon them, as in the caſe in the text, and in Cannel v. Buckle, 1
Wms. 243. Acton v. Pierce, 2 Vern. 480. Scott v. Wray, 1 Chan. Rep. 45. Edwin v. E
Ind. Comp. 2 Vern. 210.

(*But here*) Vaughan v. Thomas, 1 Bro. Ch. Rep. 556. acc. Stanhope v. Toppe, 2 Br. P. C. 1
2 Eq. Ca. Abr. 55. note to Ca. 1. But inadequacy of price, ſimply and of itſelf, independe
on any other circumſtances, is not a ground with the Court to annul an agreement, though c
cutory, Keen v. Stukeley, Gilb. Rep. 155. and 2 Br. P. C. 396. Mortimer v. Capper, 1 Br. C
Rep. 156. Floyer v. Sherrard, Ambl. 18. Jackſon v. Lever, 3 Br. Ch. Rep. 605 Still leſs is i
ground to reſcind one already executed. Nicols v. Gould, 2 Vez. 422. Henley v. Acton, 2 Br. C
Rep. 17. Spratley v. Griffith, 2 Br. Ch. Rep. 179. Willis v. Ternegan, 2 Atk. 251. But ſee Hen
v. Meeres, 1 Vern. 465. In the caſe of Heathcote v. Paignon, 2 Br. Ch. Rep. 167. Lord Thur
admitted, that mere inadequacy of price was ſcarcely ſufficient; but ſaid, that "there was a
"ference between that and evidence ariſing from inadequacy: If there is ſuch inadequacy as to
"that the perſon did not underſtand the bargain he made or was ſo oppreſſed that he was gla
"make it, knowing its inadequacy, it will ſhew a command over him which may amount to fra
And ſee acc. Young v. Clerk, Pr. Ch. 538. And where agreements are endeavoured to be ſet a
for ſuppoſed weakneſs of underſtanding in one of the contracting parties, for breach of confide
or other ſubſtantive reaſon, the inequality of the terms may be a material ingredient in the c
as evidence of impoſition. 3 Wooddeſ. 453. and Griffin v. De Veulle, and others, reported
the Appendix. It is to be further obſerved, that where an agreement appears very unequal,
Courts will lay hold of very ſlight circumſtances to avoid enforcing the execution of it; as wh
the plaintiff had not made out his title by the time ſtipulated. Kenn v. Stukely, 2 Br. P.
396. a circumſtance which in general has not any weight with them. Gibſon v. Patterſon, 1 A
12. If the contract be fair in its creation, it ſhall not be affected by a ſubſequent event, w
has thrown the advantage greatly, or wholly on one ſide. See the caſe of Caſs v. Rudele, 2 Ve
280. more correctly ſtated in 1 Br. Ch. Rep. 157. City of London v. Richmond, 2 Vern. 4
Carter v. Carter, Ca. temp. Talb. 271. Mortimer v. Capper, 1 Br. Ch. Rep. 156. and the c
there referred to by Lord Thurlow. Adams v. Weare, 1 Br. Ch. Rep. 567. Jackſon v. Le
3 Br. Ch. Rep. 605. where contracts under ſuch circumſtances have been ſpecifically decre
And ſee the caſe of Nicols v. Gould, 2 Vez. 422. Henley v. Acton, 2 Br. Ch. Rep. 17. B
win v. Boulter, cited in 1 Br. Ch. Rep. 156. where the Courts have refuſed to ſet them a
To this current of authorities muſt be oppoſed the dictum of the Maſter of the Rolls, in Sp
v. Ba lis, 2 P. Wms 220. and the caſe of Pope v. Roots, 7 Br. P. C. 184. in which caſe an e
was ſold for an annuity, but the vendor dying before any payment was made; and after th

which the first payment was to have been made, the contract was rescinded, though not impeached in any other respect. James v. Owen, E. T. 1733. cited in Fonbl. Notes on Tr. Eq. c. 1. f. 11. appears to have proceeded on a different ground: the plaintiff had agreed to present defendant to the Court of Aldermen, and to resign the place of printer to the city of London in his favour, to which place certain fees and profits were then annexed, but which the Court of Aldermen intimated their intention to reduce; and, for that reason, the defendant refused to perform his agreement. The Court thought, that the object of the agreement being the then profits, which were not purely contingent, and the plaintiff not having actually surrendered, the performance of the agreement ought not to be decreed. A party who demands specifick execution of an agreement, must shew that he has performed all that was to be done on his part, or that he is ready to do so; "for if he either will not, or through his own negligence, cannot perform the whole on his side, he has no title in equity to the performance of the other party, since such performance could not be mutual." Tr. of Eq. c. 6. f. 2. But it must be observed, that though a plaintiff has not performed what was required on his part, within *the time* stipulated, he is yet in general entitled to a specifick execution, especially if the non-performance has not arisen by his default. Penn v. Ld. Baltimore, 1 Vez. 450. If in the sale of an estate, it be stipulated that the price shall be paid, or the title be completed by a certain day, which elapses without either being done, still the contract shall be enforced; for the general rule is, not to consider the time as of the essence of agreements. Gibson v. Paterson, 2 Atk. 12. In the case of non-completion of the title by the day appointed, if the vendee, immediately upon the vendor's failure in that respect, demand a return of the deposit, and distinctly refuse to go on with the purchase, the Court will not compel him: but if he acquiesce in the delay, knowing the state of it, or do not sufficiently declare his determination not to proceed in the purchase, he will not be allowed to resist the performance afterwards upon that ground. Hincke v. Curteis, 4 Br. Ch. Rep. 329. and the case of Ambrose v. Hodgson, therein cited. Vernon v. Stephens, 2 P. Wms 66. However, in either case, if an injury would accrue to the other party from the failure, or if the circumstances which occasioned it are likely to create any embarrasment, or to protract the final completion of the agreement for any unreasonable time, the Court will set it entirely aside. In the case of Mackreth v. Marlar, at the Rolls, Jul. 10, 1786, Sir L. Kenyon decreed a contract for the purchase of an estate to be delivered up, the purchaser having died shortly after the contract, and a suit having been instituted for an account of assets, which was then depending. The purchaser had agreed to complete his purchase on or before the 30th of November; he died on the 12th of January following; and the vendor filed his bill in the beginning of the year 1785. The decree was, that the defendants, the executors of the purchaser, should deliver up the contract to the plaintiff the vendor, and that the plaintiff should retain his costs out of the deposit. 2 P. Wms 67, Note 1. Equity, too, distinguishes between those cases, where the one party having performed part of the agreement, is rendered unable to perform the whole by some subsequent accident; and yet, notwithstanding the part-performance, is *in statu quo*, and those where after such part-performance he is not in *statu quo*, and in the latter holds him entitled to a performance from the other party, though it refuses it in the former. To this distinction must be referred the difference of decision in the cases of Earl of Feversham v. Watson, Rep. temp. Finch. 445. 2 Freem. 35. S. C. Meredith v. Wynn, Pr. Ch. 312. Gilb. Ch. 242. S. C. 1 Eq. Ca. Abr. 70. pl. 15. S. C. Gilb. Eq. Rep. 170. S. C. If the plaintiff has taken all necessary steps to perform his part of the agreement, but has been prevented by the defendant, his endeavours will be considered as equivalent to performance. Blackwell v. Nash, 1 Str. 535. Hotham v. East Ind. Comp. 1 Term Rep. 638. Though it be generally said that contracts are entire, and shall be performed *in toto*, or *not at all*, yet there are cases in which the Courts will decree a performance, notwithstanding a partial failure, as in the case of marriage agreements, in favour of a wife or children, where there has been a failure by the father's or mother's relations in the part they had engaged to perform; Earl of Feversham v. Watson, supra, Perkins v. Lady Thornton cited in Pyke v. Pyke, 1 Vez. 376. or of part becoming illegal by a subsequent statute; Dr. Bettesworth v. Dean and Chapter of St. Paul's, Sel. Ca. Ch. 66. or of part exceeding the power of the contracting party; Pawsey v. Bowen, 1 Ch. Ca. 23. Campbell v. Leach, Ambl. 740. So in the case of a sale of an estate by lots, though the vendor cannot make a good title to all the lots, yet the Court will oblige the purchaser to take those to which a good title can be made, if they can be separated from the others without being lessened in value. Poole v. Shergold, 2 Br. Ch. Rep. 118.]

(*So where A.*) In the case of Lord Irnham v. Child, 1 Br. Ch. Rep. 95. Lord Thurlow is reported to have said, that "he should be very sorry to lay it down, that a man treating with a "third person in trust for a second, whom he had refused to deal with, could therefore set the "contract aside; that no case had gone so far; that Phillips v. Duke of Bucks was upon a difference of price." But in the case of Eyre v. Popham, M. 14 G. 3. Ld. Bathurst held, that an agreement entered into under the circumstances stated by Ld. Thurlow, was not that fair agreement which ought to be decreed in specie by a court of equity.

(*But*

(*But as theſe.*) The Court will not compel a purchaſer to take a title which is at all doubtful; Shapland v. Smith, 1 Br. Ch Rep. 75. Cooper v. Denne, 4 Br. Ch. Rep. 80. nor will they interpoſe where a party has forborne to inſiſt upon an agreement for ſeveral years, Scolefield v. Whitehead, 2 Vern. 127. Wingfield v. Wheley, 5 Vin. Abr. 534. pl. 38. Powell v. Hankey, 2 P. Wms. Orby v. Trigg. 9 Mod. 2. unleſs the delay can be accounted for by ſpecial circumſtances; Eq. Tr. c. 4. ſ. 27. nor in caſe of a written agreement, afterwards diſcharged by parol; Goman v. Saliſbury, 1 Vern. 240. Ld. Milton v. Edgworth, 6 Br. P. C. 580. Legal v. Miller, 2 Vez. 299. nor in the caſe of a ſale by auction, where an accident has happened to caſt a damp upon the ſale, though without blame imputable to any one; as where the vendor's agent, *known to be ſuch to the company preſent*, bid for the purchaſer; Twining v. Morrice, 2 Br. Ch. Rep. 326. nor if the agreement be to do a thing which would tend to extortion, or promote inebriety; Mythwold v. Walbank, 2 Vez. 238 nor if damages be ſtipulated; Woodward v. Gyles, 2 Vern. 119. but a penalty in general will not be allowed to releaſe parties from their agreements; it being uſually deſigned merely as a medium for ſecuring the performance of the contract. Parks v. Wilſon, 10 Mod. 517. Chilliner v. Chilliner, 2 Vez. 528. Sloman v. Walter, 1 Br. Ch. Rep. 418. Howard v. Hopkyns, 2 Atk. 371. nor will they interpoſe, if the agreement be founded on an illegal conſideration, as that of ſtifling a proſecution for felony, or for fraud. 3 P. Wms. 279. Keen v. Stukely, Gilb. Eq. Rep. 153. Hanger v. Eyles, 2 Eq. Ca. Abr. 20. p. 16. Hickes v. Phillips, Pr. Ch. 575. See acc. Savage v. Taylor, Ca. temp. Talb. 236. Young v. Clerk, Pr. Ch. 538. Vaughan v. Thomas, 1 Br. Ch. Rep. 556. Davis v. Symonds, Scac. 1787. Solemn conveyances, releaſes, and agreements by parties, are not ſlightly to be blown off and ſet aſide, *per* Ld. Macclesfield, Cann v. Cann, 1 P. Wms. 227. Equity therefore will not avoid a *reaſonable and fair agreement*, though founded on miſtake. Frank v. Frank, 1 Ch. Ca. 84. Stapleton v. Stapleton, 1 Atk. 10. or though the party were intoxicated, or in priſon, at the time he entered into it, or ſome paternal authority were exerted, and ſome benefit accrue to the father under it. Cory v. Cory, 1 Vez. 19. Hinton v. Hinton, 1 Vez. 632. Kinchant v. Kinchant, 1 Br. Ch. Rep. 369. It will not decree a forfeiture after an agreement, in which, if there were a miſtake, it was the miſtake of all the parties to it. Pullen v. Ready, 2 Atk. 592. Malden v. Merril, 2 Atk. 8. Savage v. Taylor, Ca. temp. Talb. 236. For caſes of Fraud, *vide* infra, tit. *Fraud.* (B).

(*As Men.*) Though we have borrowed this maxim from the civil law, yet we do not agree with the civilians in their definition of what conſtitutes a *nudum pactum*, the want of conſideration not being regarded by them. In their law, "*Nuda conventio eſt, quæ in nudis placiti et conventionis finibus ſtat, nec certum nomen habens, nec ullam obligandi cauſam præter conventionem.*" D. l. 7. § 1. 2. and 4. de pact. l. 27. Vinnius, in his Commentary on the Inſtitutes, p. 578. explains ſome of the terms of this definition. *Duo ſunt conventionum genera; unum eorum, quæ ſpeciale nomen habent, ex quo genere ſunt emptio-venditio, locatio-conductio, ſocietas, mandatum, depoſitum, commodatum, pignus, et ſimiles contractus, qui, quod certum nomen habent, dicuntur contractus nominati, et obligationem actionemque producunt, non utique propter nomen, quod extrinſecum quid eſt atq; accidens; ſed propter utilitatem commercii, cujus indicium eſt, quod certo ac proprio nomine appellantur; vel potius quia hæ conventiones ob frequentiorem uſum talem accepere vim ac naturam, quæ etiamſi nihil ſpecialiter dictum ſit, ex ipſo nomine ſatis intelligatur.* Grot. L. 2. *de jure bell. et pac.* 12. n. 3. *Alterum genus eſt earum conventionum, quæ nomine quidem proprio carent, ſed quibus præter conſenſum ſubeſt cauſa, ut hoc exprimit juriſconſultus.* D. l. 7. § 2. *Et hæ quoque conventiones obligationem et actionem pariunt. Cum ſam definio datlenem vel factum certâ lege, puta, ſi quid tibi dedi aut feci eâ lege, ut viciſſim mihi aliquid dares aut faceres.*" See further Fonbl. Notes on Eq. Tr. p. 326. A mere agreement by a creditor to take a leſs ſum than that which is owing to him, is *nudum pactum*. Heathcote v. Crookſhanks, 2 Term Rep. 24. As to *nudum pactum*, ſee Elſee v. Gatward, 5 Term Rep. 143. A conſideration executed will not ſupport a ſubſequent promiſe, unleſs the act were done at the requeſt of the party promiſing Dy. 272. Lampleigh v. Braithwaite, Hob. 105. Hayes v. Warren, 2 Barnard, 141. Robertſon v. St. John, 2 Br. Ch. Rep. 140. or unleſs the party promiſing were under a moral obligation to do the act himſelf, or to procure it to be done. Church v. Church, cited in Hunt v. Wotton, Sir T. Raym, 259. Turner v. Watſon, Bull. *Niſi Pri.* 147. 4th ed. Trueman v. Fenton, Cowp. 544. An agreement to ſettle boundaries, though nothing valuable is given, implies ſufficient conſideration extending to both parties, who have an intereſt in ſhunning contention. Penn v. Lord Baltimore, 1 Vez. 444.

Page 71 (*But if it,*) A conſideration is by our law neceſſary, though the agreement be evidenced by *writing*, unleſs the writing, as in the text, from its being of the higheſt ſolemnity, import a conſideration, or unleſs it be negotiable at law, and the intereſts of *third* perſons be involved in its efficacy; for in this latter caſe *as between the original parties*, the want of conſideration may be averred, and will bar the plaintiff from recovering. Pearſon v. Garnett, 4 Mod. 242. Jefferies v. Auſtin, 1 Str. 674. Gilb. Lex Prætoria, 288, 289. Fonbl. Notes on Eq. Tr. 335. Though the agreement be under ſeal, yet if there be no conſideration, equity will not decree ſpecifically; for as in ſuch caſe nominal damages only could be recovered at

w, equity, which follows the law, will not give more ſubſtantial relief. 1 Vez. 450. 1 Atk. Furſaker v. Robinſon, 1 Eq. Ca. Abr. 123. Pr. Ch. 475. S. C. Gilb. Eq. Rep. 479. S. C. r v. Anſon, 2 Vez. 582.

there be.) Equity will not ſupply the want of a ſurrender of a copyhold in favour of a rd daughter againſt the heir of her father, though the father had covenanted to convey it, make further aſſurances; for the daughter is, in conſideration of law, a mere ſtranger, *nullius*, and the conveyance is merely voluntary. Furſaker v. Robinſon, 1 Eq. Ca. Abr. 123.

an Annuity.) Equity will enforce the payment of a bond given to an innocent woman n the obligor hath ſeduced, for it is *præmium pudoris*. Marchioneſs of Annandale v. Harris, Wms. 432. Eq. Caſ. Abr. 87. p. 6. S. C. 3 Br. P. C. 445. S. C. Cray v. Rooke, Ca. temp. 153 S. P. And a bond of this kind hath been holden good at law. Turner v. Vaughan, lf. 339. So where a proviſion has been made for her by an ineffectual conveyance, it will poſe in her behalf both againſt the grantor himſelf and his repreſentative. Ord v. Blackett, in 2 P. Wms. 435. and Carew v. Safford, ibid. See the laſt caſe in Ambl. 520. by the e of Cary v. Stafford. Nor will it relieve againſt a bond given even to a common proſtitute, here be no fraud in the caſe, though the application be made by the repreſentative of the ob- . Hill v. Spencer, Ambl. 641. a circumſtance which hath been formerly thought to ſtrength- he ground for relief. Matthew v. Hanbury, 2 Vern. 187. Alitér where there is fraud, as re the plaintiff claims it as *præmium pudicitiæ*, and ſhe is found to have been a proſtitute prior he time of her having been connected with the party giving it. Clark v. Periam, 2 Atk.

But bonds of this kind entered into *ex turpi cauſâ* are void: as where a woman, *knowing* a to be married, ſubmits to his temptation; Prieſt v. Parrot, 2 Vez. 160. or where a woman ng ignorantly married a man who had another wife alive, upon coming afterwards to the wledge of his ſituation, continues to live with him. Lady Cox's caſe, 3 P. Wms. 339. So re the condition of the bond was that the parties ſhould live together in a ſtate of fornica- Walker v. Perkins, Adminiſtrator, 3 Burr. 1568. 1 Bl. Rep. 517. S. C.

Equity will not carry a merely voluntary covenant beyond the letter of Baſſe v. Grey, 2 Vern. 692.

In decreeing the execution of agreements, it regards the intent of the ties, and does not confine itſelf to the ſtrictly legal operation of the rds. Where, therefore, marriage articles, literally taken, would give huſband or wife an eſtate tail, it decrees a ſtrict ſettlement; for other- ſe the proviſions for the iſſue (*a*), the object of the ſettlement, might defeated.

(*a*) This rule is eſtabliſhed in favour of *iſſue male* by many caſes; firſt, where there are

cles *only* as in Jones v. Laughton, 1 Eq. Ca. Abr. 392. pl. 2. Nandick v. Wilkes, 1 Eq. Ca. . 393. pl. 5. Cuſack v. Cuſack, 1 Br. P. C. 470. Trevor v. Trevor, 1 P. Wms. 622. Dodd Dodd, Ambl. 274. Robinſon v. Hardcaſtle, 2 Term. Rep. 252. So where there are arti- before marriage, and a ſettlement is made after marriage in the words of the articles, as in eatfield v. Streatfield, Ca. temp Talb. 176. or where there are both articles and ſettlement ore marriage, and the ſettlement is made *in purſuance* of the articles, as in Honor v. Honor, . Wms. 123. Roberts v. Kingſley, 1 Vez. 238. But otherwiſe, where the ſettlement made re marriage is *not* in purſuance of the articles; for then the parties will be preſumed to have ne to a new agreement. Legg v. Goldwire, cited in Ca. temp. Talb. 20. Partyn v. Roberts, nbl. 315. And the ſame equity ariſes to the iſſue female. Burton v. Haſtings, Gilb. Eq. Rep. 3. Weſt v. Briſſey, 2 P. Wms. 349. and Hart v. Middlehurſt, 3 Atk. 371. But this muſt underſtood where the articles make no other proviſion for them. Powell v. Priee, 2 P. Wms. 5. (*b*) But where this miſchief does not occur, or where the intention of the parties to create eſtate of inheritance is not ſufficiently explicit, it ſeems the rule is not applicable. Chambers Chambers, Moſ. 333. Green v. Eakins, 2 Atk. 476. Partyn v. Roberts, Ambl. 315. Cord- ll v. Mackrill, Amb. 515. Highway v. Banner, 1 Br. Ch. Rep. 584.

In contracts proper for a ſpecifick performance, equity conſiders them Money co-
en as actually performed (*c*) from the time they are entered into. Mo- venanted to
y covenanted to be laid out in land, it conſiders as land; and land ar- be laid out
led to be ſold, it treats as money; and inveſts each with the qualities in land, will
the other. go to the heir, and not the

ecutor. Chaplain v. Homer, 1 P. Wms. 483. Scudamore v. Scudamore, Pr. Ch. 540. Ed-

wards

wards v. Lady Warwick, 2 P. Wms. 171. Lechmere v. Earl of Carliſle, 3 P. Wms. 221. &c. tled on the wife of a freeman of London in lieu of dower, will not bar her of her cuſtoma part. Babington v. Greenwood, 1 P. Wms. 530. It will not be perſonal aſſets; Earl of Pem broke v. Bowden, 3 Ch. Rep. 115. 2 Vern. 52. S. C. Lawrence v. Beverley, 2 Keb. 841. cite alſo in 1 Vern. 471. It ſhall be ſubject to the curteſy of the huſband, Sweetapple v. Bindon, Vern. 536. Otway v. Hudſon, 2 Vern. 583. Cunningham v. Moody, 1 Vez. 176. but not the dower of the wife, becauſe ſhe is not dowable of an equitable eſtate. It ſhall paſs as land a will, under ſweeping words, if at the time of making the will the teſtator has an equitab eſtate therein, Davie v. Beardſham, 1 Ch. Ca. 39. Prideaux v. Gibben, 2 Ch. Ca. 144. M ner v. Mills. Moſ. 123. Alleyn v. Alleyn, Moſ. 262. Greenhill v. Greenhill, 2 Vern. 6 Pr. Ch. 320. S. C. Shorer v. Shorer, 10 Mod. 39. Lingen v. Sowray, 1 P. Wms. 172. Pr. C 400. S. C. Langford v. Pitt, 2 P. Wms. 629. Guidot v. Guidot, 3 Atk. 254. Potter v. Pot ter, 1 Vez. 437. Gibſon v. Lord Montfort, 1 Vez. 494. And it will not paſs as money und a general bequeſt to a legatee, unleſs deſcribed as ſo much money agreed to be laid out in lan Croſs v. Addenbroke, and Fulham v. Jones, cited in a note 3 P. Wms. 221. Where a recove would be neceſſary to give a perſon the abſolute intereſt in it, if land; a fine will not be ſuffic ent. Colwell v. Shadwell, cited in 1 P. Wms. 471. 485. Edwards v. Counteſs of Warwick, 2 Wms. 171. Collet v. Collet, 3 Atk. 11. Trafford v. Boehm, 3 Atk. 447. Carter v. Carte Ca. temp. Talb. 272. But equity will not conſider money as land, unleſs the covenant or dire tion to lay it out in land be expreſs, Symons v. Rutter, 2 Vern. 227. Curling v. May, cited 3 Atk. 255. And money thus circumſtanced ſhall be deemed as part of the perſonal eſtate one who might have aliened it, there being no other uſe but to himſelf. Chicheſter v. Bick ſtaff, 2 Vern. 295. Pulteney v. Earl of Darlington, 1 Br. Ch. Rep. 236. Wade v. Paget, Bro. Ch. Rep. 368. But ſee Lechmere v. Earl of Carliſle, 3 P. Wms. 220. Ca. temp. Talb. S. C.—Where land is agreed or directed to be ſold, it ſeems, the creditors of the bargainor m compel the heir to convey the land. Beſt v. Stamford, 1 Salk. 154 (*c*). Therefore the perſo eſtate of a man, who, in conſideration of marriage with an orphan of a citizen of London, h covenanted to take up his freedom of the city, was divided according to the cuſtom, though t covenant was not performed. Frederick v. Frederick, 1 P. Wms. 710. 4 Br. P. C. 7.

(*If a Creditor.*) Ambl. 332. But *qu.* whether equity will not relieve in ſuch caſe, if the ſ curity be bettered. 1 Ch. Ca. 110.

(*If Money.*) As this caſe is ſtated in Lady Holles, v. Wyſe, 2 Vern. 289. and in Shoe Parker, 2 Vern. 316. the intereſt was reſerved at 6*l. per cent.* with an agreement to accept *per cent.* if duly paid: a ſtatement doubtleſs correct, as it reconciles the caſe to the other deci ons upon this point, which at preſent it claſhes with. See Jury v. Cox. Pr. Ch. 160. Walm v. Booth Bernard, Ch. Rep. 481. Nicholls v. Maynard, 3 Atk. 519. 3 Burr. 1374.

(*b*) Vol. i. pag. 107.

(*c*) Motely v. Virgin. 3 Vez. jun. 184.

In the caſe of *Lucas* v. *Commerford* alluded to in the preceding part of this work, Lord *Thurlowe* declared his opinion, that a decree for ſpecifick performance could not be made on a covenant to build, by reaſon of its uncertainty. But this poſition, it has been ſaid in a later caſe (*c*) admits this qualification: if the tranſaction and agreement be in its nature defined, perhaps there would not be much difficulty to decree a ſpecifick performance: but, if it be looſe and undefined, and it be not expreſſed diſtinctly what the building is, ſo that the court can deſcribe it as a ſubject for the report of the maſter, the juriſdiction cannot apply.

Williams v. Cheney, *Id.* 659.

It is no objection to a ſpecifick performance of an agreement for a leaſe, that the party means to uſe the eſtate for another purpoſe than that which has been ſtipulated, and that he has entered into an agreement with a third perſon, which, if executed, will not be a fulfilment of the principal contract, and occaſion a forfeiture, provided he offers to take it under the conditions agreed upon.

(C) Of Parol Agreements, or ſuch as may be ſaid to be within the Statute of *Frauds and Perjuries.*

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(*Par.* 7.) By 4 Ann. c. 16. ſ. 15. it is declared, that declarations of uſes, truſts, &c. of fines or recoveries ſhall be valid and effectual, though the deed of uſe be made after the levying or ſuffering of ſuch fine or recoveries.

The

That a judicial ſale of an eſtate under a decree of the court of Chance- Attorney
is not within the ſtatute. Thus *A.* being likely to die, made a con- General v.
vance of a real eſtate in favour of a charity, and then made a will, by Day, 1 Vez.
ich he gave 3000*l.* (the exact value of that land,) and alſo 250*l.* to the 218.
e charity, and gave the eſtate to *D.* (wife of *B.*) and *C.* A bill was
ought for an account, and for the direction of the Court for a ſettlement
the eſtate under the will; and a decree was had thereupon, and the
ſter was thereby directed to receive a ſcheme for carrying the convey-
ce into execution; the foundation of part of which was to conſider, in
at way the money ſhould be laid out, and a perpetual fund created for
e maintenance of the charity. The maſter reported a ſcheme for laying
t the money in the purchaſe of lands; and the caſe being ſet down to
heard on the matter reſerved, the Court made a decretal order confirm-
g the maſter's report, and ordering that the ſcheme ſhould be approved
, and the other matters therein carried into execution. Theſe directions
ere all acquieſced under by *B.* and *D.* who ſurvived him. After her
D.'s) death, an information was brought on behalf of the charity, toge-
er with the adminiſtratrix of *D.* to have this purchaſe carried into exe-
tion by the aid of the Court againſt the deviſee of the heir at law of *D.*
nd the infant ſon of *C.* the co-deviſee with *D.* And it being objected
hat there was no agreement ſigned purſuant to the ſtatute of Frauds, one
ueſtion was, whether the tranſactions which paſſed in the life-times of *D.*
nd *C.* amounted to a binding agreement on them for the ſale of the lands?
And Lord *Hardwicke* held, that here was ſuch an agreement as the Court
ught to execute notwithſtanding the ſtatute; this being a judicial ſale of
he eſtate. And upon the ſame principle it is holden that purchaſers be- Ibid. 221
ore the maſters are out of the ſtatute, and the Court will in ſuch caſes
arry into execution againſt the repreſentative, a purchaſe by a bidder be-
ore the maſter, without the bidder's ſubſcribing, after confirmation of
he maſter's report that he was the beſt bidder; the judgment of the Court
aking it out of the ſtatute. So if the authority of an agent who ſubſcrib- Ibid.
d for a bidder before the Maſter cannot be proved, yet if the Maſter's
eport can be confirmed, the Court will carry it into execution, unleſs there
e ſome fraud.

And Lord *Thurlow* was of opinion, where the attornies, concerned in Cox v.
a ſuit by a firſt mortgagee for a foreclоſure, agreed, with reſpect to the Peele, 2 Br.
final decree, that the eſtate ſhould be ſold, the firſt mortgagee paid prin- Ch. Rep.
cipal and intereſt, and the remainder paid to the ſecond mortgagee, but 334.
that the former ſhould in the mean time take a decree; that if the firſt
mortgagee made an improper uſe of the decree, this agreement, though
by parol, might be read, on an application to open the foreclоſure, as an
agreement relative to a decree; the attornies being competent to make
agreements relative to the orders of the Court. And upon that ground
he admitted the evidence of it *de bene eſſe*, though it had been rejected at
the Rolls, becauſe it was not in writing, and therefore void under the
ſtatute.

(*That if.*) See Eyre v. Iviſon, Scac. Tr. 1785. cited 2 Br. Ch. Rep. 563. Stewart v. Careleſs, Scac. Apr. 1785. cited *ibid.* 564. and Rondeau v. Wyatt, 2 H. Bl. Rep. 68. If the party himſelf die, his heir will, it ſeems, be bound on a bill of revivor. Per Lord Hardwicke, 1 Vez. 221. And, upon this principle, equity will decree an agreement on evidence of its having been confeſſed by a party to it, although it be denied by his anſwer. As where an agreement was proved by one witneſs only, and poſitively denied by the defendant's anſwer; but there was proof in the cauſe that the defendant had confeſſed the agreement: the Maſter of the Rolls offered to direct an iſſue to try the agreement if the defendant deſired it; but he declined that, unleſs his Honour would make an order that his anſwer ſhould be read at the trial, which his Honour

Honour refuſed, there being circumſtances to corroborate the evidence of the ſingle witneſs, and decreed the agreement to be carried into execution. Only v. Walker, 3 Atk. 407. Where the two defendants in a ſuit confeſſed an agreement in their anſwer, but different from that ſtated in the bill, and an agreement different from either was proved by the teſtimony of only a ſingle witneſs, Lord Loughborough C. decreed a performance purſuant to the terms of the agreement confeſſed by the anſwer. Mortimer v. Orchard, 2 Vez. jun. 243. In what manner, and in what caſes the ſtatute may be pleaded to a bill for the performance of a parol agreement, vide in Whitbread v. Brockhurſt, 1 Br. Ch. Rep. 404. Whitchurch v. Bevis, 2 Br. Ch. Rep. 559. and the caſes there mentioned. See alſo Mitf. Eq. Tr. 212. Taylor v. Beach, 1 Vez. 297.

(*So Where a parol*) Where a man, in confidence of a parol promiſe, has omitted making that proviſion for others which he intended, ſuch promiſe has been enforced in equity on the ground of fraud. Devenish v. Baines, Pr. Ch. 3. 2 Eq. Ca. Abr. 43. S. C. Sellock v. Harris, Vin. Abr. tit. *Contract* and *Agreement*, (H). p. 31. Reech v. Kennigate, Ambl. 67. Harris v. Horwell, Gilb. Eq. Rep. 11. Page 73

(*On a Bill*) A letter from a father to his daughter that he will give her 3000*l.* not ſhewn to the huſband, who afterwards accepts of 2000*l.* under a will, is no foundation for a decree. See a different ſtate of this caſe in 9 Mod. 3. 2 P. Wms. 65. Nor is a letter promiſing a portion, but not reducing it to any certainty. Hall v. Butler, Eq. Ca. Abr. p. 7. Gilb. Lex Prætor. 243. For a letter cannot be ſet up as an agreement unleſs the terms of the contract are diſtinctly ſet forth therein. Seagood v. Neale, 1 Str. 426. Pr. Ch. 560. Clerk v. Wright, 1 Atk. 13. But a letter (though not ſigned) referring to, and promiſing to perform an agreement in which the terms are ſet forth, is ſufficient. Tawney v. Crowther, 3 Br. Ch. Rep. 318. Q. Whether a court of equity will decree an agreement entered into by letter, if a deed appear to have been afterwards framed, (but not executed,) varying the terms expreſſed in the letter? Cookes v. Maſcal, 2 Vern. 35. Or if the terms be varied by parol? Jordan v. Sawkins, 3 Br. Ch. Rep. 388. See 2 Ch. Ca. 180. Fitzgib. 213. 2 Salk. 444. That an agreement in writing may be diſcharged by parol, ſee 1 Vern. 240. 2 Vez. 376. A bond given by a woman to her intended huſband, conditioned to ſettle an eſtate upon him in fee, is good evidence of the agreement ſo ſpecified in the condition on a bill in equity to carry it into execution, though it be void at law. Cannel v. Buckle, 2 P. Wms. 242. It is a ſufficient ſigning, if a perſon, *knowing the contents*, ſubſcribe a deed as a witneſs only. Welford v. Beazely, 3 Atk. 503. 1 Vez. 6. 1 Wilſ. 118. As to the ſignature, in order to comply with the requiſitions of the ſtatute, it muſt have the effect of giving authenticity to the whole inſtrument: and where it has that effect, it is immaterial in what part of the inſtrument it is found: but where a party has given written inſtructions to his agent for a leaſe, and had inſerted his name in thoſe inſtructions as applicable only to a particular purpoſe, the Court of Exchequer held that this did not amount to a ſufficient authentication. Stokes v Martin, 1 P. Wms. 771. note 1. It was formerly thought neceſſary that both parties ſhould ſign; but in the caſe of Cotton v. Lee, before the Lords Commiſſioners, 1770, it was determined to be ſufficient, if the party charged has ſigned. Cited in 2 Br. Ch. Rep. 564. An agreement ſigned by one party may, in ſome caſes, be concluſive againſt both. Owen v. Davies, 1 Vez. 82. But though the contract itſelf muſt be in writing, an authority to buy, or treat as agent for another, may be good without writing. Vin. Abr. tit *Contract* and *Agreement*, (H), p. 45. Wedderburne v. Carr, in the Exchequer, T. T. 1775. 3 Wooddeſ. 427.

(*But where*) Pr. Ch. 402. S. C. See Lord Hardwicke's obſervations upon this caſe, 3 Atk. 503. A note ſigned and given by a huſband to his wife previouſly to their marriage, promiſing to rectify a miſtake in the ſettlement, in conſideration of which ſhe was induced to execute it, was holden to be part of the ſettlement, and binding on the huſband and his aſſignees. Tyrrel v. Hope, 2 Atk. 558.

Hawkins v. Holmes, 1 P. Wms. 770.

The plaintiff agreed with the defendant to ſell him a houſe for 640*l.* and by conſent of both parties an attorney was employed to make a draft of the conveyance; which the attorney accordingly prepared and ſent to the defendant, who made ſeveral alterations therein with his own hand, and delivered it back to the attorney to be engroſſed; upon which a time was appointed for the plaintiff and defendant to meet at a tavern to execute the writings, and for the latter to pay the money. The plaintiff and his attorney came to the tavern, where the plaintiff executed the writings, and

d having gotten the conveyance regiſtered, (the houſe being in *Middle-*
x,) brought his bill againſt the defendant to compel him to pay the pur-
haſe-money. The defendant pleaded the ſtatute of *frauds*; and it was
olden he was not bound, he not having ſigned the agreement.

A. agreed by parol with *B.* for the purchaſe of lands. *B.* delivered Whaley v. Bagenal, 6 Br. P. C. 45.
rent-roll which was dated and altered in his own hand-writing, and
ewed by the title of it that an agreement had been made between them
r the ſale of the eſtate at 21 years purchaſe. An abſtract of the title
as alſo delivered to *A.* together with the deeds, in order to be compared
ith the rent-roll. *B.* likewiſe wrote letters to ſeveral of his creditors,
forming them that he had contracted with *A.* for the ſale of his eſtate
21 years purchaſe, and ſent the tenants to treat with *A.* for the renewal
f their leaſes. Notwithſtanding all theſe circumſtances, upon *A*'s filing
bill for a ſpecifick performance, the plea of the ſtatute of *frauds* was
lowed by the Houſe of Lords both as to the diſcovery and relief.

If there be general inſtructions for an agreement conſiſting of material 2 Br. Ch. Rep. 569.
ircumſtances, to be hereafter extended more at large and to be put into
he form of an inſtrument with a view to be ſigned by the parties, and no
raud, but the party takes advantage of the *locus pœnitentiæ*, he ſhall not be
ompelled to perform ſuch an agreement as that, when he inſiſts upon the
tatute of *frauds*. *Per* Lord *Thurlow*. Page 74

(*There are*) In Lacon, v. Mertins, 3 Atk. 4. Lord Hardwicke ſaid, that payment had always
een holden a part performance. But it ſeems that it is not ſo in the caſe of lands. Seagoode
. Meale, Pr. Ch. 560. Lord Pengall v. Roſs, 2 Eq. Ca. Abr. 46. pl. 12. Simmons v. Corne-
ius, 1 Ch. Rep. 128. But ſee Voll v. Smith, 3 Ch. Rep. 16. Anon. 2 Freem. 128. Acts done
n part performance, muſt be ſuch as could be done with no other view or deſign than to perform
he agreement, and not ſuch as are merely introductory or ancillary to it: they muſt be ſuch,
oo, as would be a prejudice to the party who has done them, if the agreement ſhould afterwards
e vacated; and where no fraud is alledged, it ſeems, that the terms of the agreement
nuſt be certainly proved. Gunter v. Halſey, Ambl. 586. Whitbread v. Brockhurſt, 1 Br.
Ch. Rep. 412. The giving of poſſeſſion is to be conſidered as an act of part performance.
Butcher v. Stepeley, 1 Vern. 363. Pyke v. Williams. 2 Vern. 455. Lockey v. Lockey, Pr.
Ch. 519. Lacon v. Mertins, 3 Atk. 4. Floyd v. Buckland, 2 Freem. 268. Stewart v. Denton,
Fonbl. Notes on Eq. Tr. 38. but poſſeſſion wrongfully obtained, or from perſons not competent
to give it, of however long continuance, will not avail. Hole v. White, cited in 1 Br. Ch. Rep.
409. Ireland v. Rittle, 1 Atk. 541. The giving directions for conveyances, and going to view
the eſtate. are not conſidered as acts of part performance. Clerk v. Wright, 1 Atk. 12. Wha-
ley v. Bagenal, 6 Br. P. C. 45. Hole v. White, ſupra. Nor will deſiſting from a purchaſe of
lands in favour of another, upon certain terms, take an agreement in favour of the party de-
ſiſting, as to part of the lands, out of the ſtatute. Lames v. Bayley, 2 Vern. 627, and ſee Vin.
Abr. tit. *Contract*, &c. H. pl. 32. 2 Eq. Ca. Abr. 45. 10. which ſeem to be the ſame caſe.

(*One that*) That a defect in a written agreement cannot be ſupplied, ſee Binſted v. Coleman, Bunb. 65. But on the ground of fraud or miſtake it may. Joynes v. Statham, 3 Atk. 388. Page 75

Although parol agreements are bound by the ſtatute, and agreements are not to be part parol, and part in writing; yet a depoſit or collateral ſecurity for the performance of a written agreement, is not within the purview of the ſtatute. Hales v. Vanderchem, 2 Vern 617. Ruſſell v. Ruſſell, 1 Br. Ch. Rep. 269.

(4. *That the Clauſe*) Nor does it extend to a promiſe to marry at the plaintiff's father's death, or to leave an annuity by will, for ſuch promiſes may be perfected within the year. Cook v. Parker, Str. 34. Fenton v. Emblers, 3 Burr, 1278. 1 Bl. Rep. 353.

5. A doubt

2 Term Rep. 80. Cowp. 227. 1 H. Bl. 120.

5. A doubt was formerly entertained, whether, if the undertaking of a third person were before the delivery, it were within the statute. But the general line now taken, is, that if the person for whose use the goods are furnished is liable at all, any promise by a third person to pay the debt, must, in all cases, be in writing.

Fish v. Hutchinson, 2 Wilf. 94. Reed v. Nash, 1 Wilf. 305.

If *A.* in consideration that *B.* will stay proceedings in an action he has commenced against *C.* to recover a sum of money due from *C.* to him, promise to pay that money, such promise must be in writing, for it is to pay a debt of another person still subsisting: but where in consideration that the plaintiff in an action of assault and battery against *J. S.* would withdraw his record, and forbear to proceed, the defendant promised to pay him 30*l.* the Court held the promise not to be within the statute, for the consideration was new, here was no subsisting debt; it could not be known before the trial whether the plaintiff would recover any damages or not.

Williams v. Leaper, 3 Burr. 1886 2 Wilf. 308.

J. S. becoming insolvent, made a bill of sale to the defendant of all his goods in his dwelling-house in trust to be sold for the benefit of his creditors. After the defendant had taken possession, the landlord came to distrain for rent, and to prevent the distress, and that the sale might go on, the defendant promised to pay it. This promise is not within the statute.

Alexander v. Comber, 1 H. Bl. Rep. 20. Towers v. Osborne, 1 Str. 506. Clayton v. Andrews, 4 Burr. 2101. (*a*) Rondeau v. Wyatt, 2 H. Bl. Rep. 63. 3 Br. Ch. Rep. 154. S. C.

6. That as to the clause respecting sales, it has been formerly thought that it means only present and immediate sales, and does not include executory contracts, where goods are bespoken, and time is given by special agreement for the delivery of them, and payment of their value. But this construction (*a*) has been denied in a recent determination of the court of Common Pleas, *Wilson*, J. dissent., where an executory contract, merely a contract of sale, even though confessed by the defendant in his answer in Chancery, was determined to be within this provision. To this opinion it may be added, Lord *Thurlow* intimated an inclination, when the case was before him in Chancery.

Simon v. Metivier, 3 Burr 1921. 1 Bl. Rep. 599. S. C.

An auctioneer is an agent as well for the buyer as the seller; and the entry of the contract in his books is sufficient to satisfy this provision of the act.

Bull. *Nisi Pri.* 280. 4th ed.

1 Ld. Raym. 182.

A contract for the sale of timber growing upon land is not within the statute, but may be by parol, because it is a bare chattel. *Per Treby* C. J.

Watson v. Turner, Sitt. Tr. 7. G. 3 Bull. *Ni. Pri.* 281. 4th ed.

Wherever a man is under a moral obligation to do a thing, and another does it without request, a subsequent promise to pay is good, though not in writing; as where an overseer promises by parol to pay an apothecary, who, without his knowledge, has administered medicines to a pauper.

Tomlinson v. Gill, Ambl. 330.

A. promised if the widow of an intestate would permit him to be joined with her in the letters of administration, that he would make good any deficiency of assets to pay debts. Lord *Hardwicke* held this promise not within the act; not within the first branch of the section, for *A.* was not administrator at the time of making it; not within the second, for here is a new distinct consideration.

In addition to the ſolemnities required by the ſtatute of *frauds* in order give validity to agreements, the legiſlature, by the ſtatute of 23 *Geo.* c. 58. have impoſed a ſtamp duty of ſix ſhillings "upon every ſkin or piece of vellum or parchment, or ſheet or piece of paper upon which any agreement ſhall be engroſſed, written, or printed, whether the ſame ſhall be only evidence of the contract, or obligatory upon the parties from its being a written inſtrument.

"Provided that nothing in the act ſhall extend to charge or make liable any label, ſlip, or memorandum, containing the heads of inſurances to be made by the Corporation of the Royal Exchange Aſſurance, or London Aſſurance, or the Corporations of the Royal Exchange Aſſurance of houſes and goods from fire, and London Aſſurance of houſes and goods from fire, or any of them, to the payment of the ſtamp duties charged by this act upon contracts or agreements. Sect. 3.

"Provided alſo, that nothing therein ſhall extend to charge with the above duty, any memorandum or agreement for any leaſe at rack-rent, of any meſſuage under the yearly value of five pounds; or to charge any memorandum or agreement for the hire of any labourer, artificer, manufacturer, or menial ſervant: or to charge any memorandum, letter, or agreement made for or relating to the ſale of any goods, wares, or merchandizes; or to charge any memorandum or agreement where the matter of ſuch memorandum or agreement ſhall not exceed the ſum of twenty pounds; or to charge any memorandum or agreement in that part of *Great Britain* called *Scotland*, that ſhall be ſtamped with the duty required on deeds in that part of *Great Britain* called *Scotland*. Sect. 4.

"Provided alſo, that no memorandum or agreement not ſtamped ſhall be deemed to be void in caſe the ſame ſhall be ſtamped at the head office, or the ſaid duty ſhall be paid thereon, and a receipt given thereon for the ſame by the proper officer receiving ſuch duty, within twenty-one days after the ſame ſhall have been entered into." Sect. 5. By ſtat. 32 Geo. 3. c. 51. agreements reſpecting merchandize, notes, or bills of exchange contained in letters paſſing by the poſt, between merchants residing 50 miles from each other, are exempted from the above duties.

The implication from the laſt proviſo ſeems to be that the inſtrument cannot be ſtamped after the twenty-one days have elapſed: but the practice is otherwiſe, and upon payment of the penalty, it may be ſtampt at any time. Ford v. Compton, 2 Br. Ch. Rep. 32.

Upon a bill for a ſpecifick performance of a contract for the leaſe of a houſe, an unſtampt paper being offered in evidence as containing the terms of the agreement, the Maſter of the Rolls, upon the above act, rejected it, obſerving that where the terms are reduced into writing the inſtrument muſt be ſtampt, though parol evidence might otherwiſe have been given of them. Hearne v. James, 2 Br. Ch. Rep. 309.

A broker, when he bought goods for his principal, agreed for one half per cent. to indemnify him from any loſs on the re-ſale: it was holden, that this agreement, though in writing, need not be ſtampt, it being a contract *relating to the ſale of goods*, and ſo within one of the parts of the proviſo in the fourth ſection. Curry v. Edenſon, 3 Ter. Rep. 524.

To a bill for a ſpecifick performance of an agreement for the ſale of certain freehold premiſes and ſtock in trade, principally conſiſting of ſtock and timber for ſhip-building, and ſome houſes, the defendant pleaded the ſtatute of frauds. It appeared, that, pending the negociation, the defendant Cooke v. Tombs, Anſtr. 420.

dant delivered to the plaintiff a particular of the premiſes and property to be ſold, and the terms or conditions of the ſale, all in his own hand-writing, and ſigned by him, when it was agreed, that the plaintiff ſhould have till a certain day to conſider of the purchaſe, as he objected to the price. It was afterwards agreed, that the purchaſe ſhould take place at a reduced price; and verbal inſtructions for a conveyance were given by both parties together to an attorney, to whom the defendant delivered the particular, as inſtructions for the deed, which was prepared, read over and approved by the parties. The court of Exchequer held, that theſe circumſtances were not ſufficient to take the agreement out of the ſtatute: that the particular was not made out, as evidence of any agreement, but merely as a liſt or catalogue of the matters for ſale, to enable the purchaſer to form a proper eſtimate of their value: that it was delivered into the attorney's hands for the ſame purpoſe: and was ſigned merely to authenticate it as ſuch liſt: that it was delivered in as the foundation of a ſale at a higher price; and could be no evidence of the terms of the ſecond contract, or even of its exiſtence; ſince with the price, the parcels alſo may have been varied: that the inſtructing an attorney to draw conveyances, and his doing ſo, is no part performance of a contract: to take the caſe out of the ſtatute, there muſt be a part execution of the ſubſtance of the agreement itſelf, that the agreement being void as to the land, muſt be void alſo as to the perſonal property, which was to be ſold with it; it is one entire contract, and the whole muſt ſtand or fall together: that it could never be the intention of the parties, that the ſtock ſhould be ſold apart from the premiſes, as moſt of it was of little comparative value ſeparately; and the agreement being for one entire ſum, they could not ſever it.—As the bill, however, charged, that a correſpondence took place from which, if produced, the agreement might be proved; the plea was ordered to ſtand for an anſwer, with liberty to except as to that particular.

Lea v. Barber, Anſtr. 425. n. S.P.

Tawney v. Crowther. 3 Br. Ch. Rep. 161. 318.

A parol promiſe to pay the debt of another, and alſo to do ſomething elſe, is void *in toto*; for that part which relates to the debt of another is void within the ſtatute, and the contract being entire, the plaintiff cannot ſeparate it, and recover on part only.

Chater v. Becket, 7 Term. Rep. 201.

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ALIENS.

(C) How far the Laws of this Country attach upon Aliens.

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(A) Who are Aliens, and this either by the Common Law, or by Statute.

Vaugh. 281.

IF the king of *England* enter with his army in a hoſtile manner the territories of another prince, and any be born within the places poſſeſſed by the king's army, and conſequently within his protection, ſuch perſon

ſon is a ſubject born to the king of *England*, if from parents ſubjects, d not hoſtile.

(*If an Engliſh*) But Q. Whether the caſes referred to warrant this conſtruction; and ſee the e of Doe ex dim Count Dutoure v. Jones, where it was determined, that the ſon of an alien, her of an *Engliſh* mother born out of the king's dominions, cannot inherit an eſtate in right of mother. The judgment of the Court went upon the ſtatutes of 4 *Geo.* 2. *c.* 21. and 13 *G.* 3. 1. which confine the privilege to the paternal heirs, and were conceived to be parliamentary poſitions of the 25 E. 3. 4 Ter. Rep. 300.

(*By the 4th Geo.* 2.) The confirmatory clauſe here alluded to, differs from the ute of Ann in this reſpect, that it reſtricts the privilege to the paternal line. e words are, "That all children born out of the ligeance, &c. whoſe *fathers* ſhall natural-born ſubjects, &c." Page 78

"By the 13 *Geo.* 3. *c.* 21. the proviſions of the above acts are extended to grand-children, ſtill however adhering to the paternal line, with proviſos that nothing in that act ſhall be conſtrued to affect any of the limitations or reſtrictions of the act of 4 *Geo.* 2. *c.* 21. or to repeal or alter the act of 5 *Geo.* 1. *c.* 27. hereafter mentioned; or to repeal or alter any law or cuſtom concerning aliens' duties, cuſtoms, and impoſitions, or to cauſe any privilege, exemption, or abatement relating thereto, in favour of any perſon naturalized by virtue of that act, unleſs ſuch perſon ſhall come into this realm, and there inhabit and reſide, and ſhall take and ſubſcribe the oaths, and make, repeat, and ſubſcribe the declaration appointed by the act of 1 *Geo.* 1. *c.* 13. entitled, an act for the further ſecurity, &c. at the places and times, and in the manner directed by that act, and alſo receive the ſacrament of the Lord's ſupper according to the uſage of the church of *England*, or in ſome proteſtant or reformed congregation within the kingdom of *Great Britain*, within three months before his taking the oaths in the ſaid act mentioned, and ſhall, at the time and place of taking ſuch oaths, and of making, repeating, and ſubſcribing the ſaid declaration, produce a certificate ſigned by the perſon adminiſtering the ſaid ſacrament, and ſigned by two credible witneſſes, whereof an entry ſhall be made of record in the court and courts reſpectively wherein ſuch oaths ſhall have been made and ſubſcribed, without any fee or reward. And it is further provided, that no perſon ſhall be by this act enabled to defeat any eſtate, right or intereſt, which on the laſt day of that ſeſſion ſhould be had or veſted in any other perſon, or to claim or demand any eſtate or intereſt which ſhall hereafter accrue, ſo as ſuch claim or demand ſhall be made within five years after the ſame ſhall accrue."

By ſtat. 14 and 15 *H.* 8 *c.* 4. it is enacted, That if an *Engliſh* ſubject beyond the ſeas, and there become a ſworn ſubject to any foreign prince ſtate, he ſhall, during his reſidence abroad, pay ſuch impoſitions as ns do: with a proviſo, that if he returns, and lives here, he ſhall be ored to his liberties and privileges.

It ſhould here be obſerved, that the duty of allegiance ariſing from h is perpetual and unalienable, and that it is not in the power of any ate ſubject to ſhake off his allegiance, and tranſfer it to a foreign nce; nor is it in the power of any foreign prince by naturalizing or emying a ſubject of *Great Britain*, to diſſolve the bond of allegiance been that ſubject and the crown. But when, by treaty, eſpecially if ra- d by act of parliament, our ſovereign cedes any iſland or region to ther ſtate, the inhabitants of ſuch ceded territory, though born under Foſt. Cr. L. 59. Dy. 298. b. 300. b.

the allegiance of our king, or being under his protection whilſt it appertained to his crown and authority, become effectually, aliens, or liable to the diſabilities of alienage, in reſpect of their future concerns with this country. And ſimilar to this ſeems the condition of the revolted Americans, ſince the recognition of their independent commonwealths.

Page 79 **(B) Of Naturalization and Denization, the Difference and Effect of them.**

(*If a Man is*) But Q. ſince the ſtatute of 23 Geo. 3. c. 28.

(*If an Alien be*) This proviſo is required by St. 32 H. 8. c. 16. ſ. 7.

Co. Litt. 278. b. If an alien be a diſſeiſor, and obtain letters of denization, and then the diſſeiſee releaſe unto him, the king ſhall not have the land; for the releaſe hath altered the eſtate, and it is, as it were, a new purchaſe: otherwiſe it is, if the alien had been feoffee of the diſſeiſee.

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(*But this Statute*) A naturalized perſon is not eligible to the office of conſtable. 5 Burr. 2787. When any foreigner, diſtinguiſhed by eminent rank or ſervices, is naturalized, it is uſual firſt to paſs an act for the repeal of theſe ſtatutes in his favour, and then to paſs an act of naturalization without any exception. 4 Ann. c. 1. 7 Geo. 2. c. 3.

(*b*) It was uſual to inſert a clauſe to this effect in naturalization bills before the paſſing of this act. The practice had obtained ever ſince the year 1752, in conſequence of a petition to parliament at that time from the City of London, complaining of the great abuſe of the privileges of naturalization in this reſpect. Debrett's Deb. 3 vol. 124.

And by 14 *Geo.* 3. *c.* 84, it is enacted, "That no naturalization bill "ſhall in future be received, unleſs there ſhall be a clauſe in it, declaring "that the perſon to be naturalized ſhall not thereby obtain, or become en"titled to claim within any foreign country, any of the immunities or in"dulgences in trade, which are or may be enjoyed or claimed therein by "natural-born *Britiſh* ſubjects, by virtue of any treaty or otherwiſe, unleſs "ſuch perſon ſhall have inhabited or reſided within *Great Britain*, or the "dominions thereto belonging, for the ſpace of ſeven years ſubſequent to "the firſt day of the ſeſſion of parliament in which the ſaid bill of naturalization ſhall have paſſed; and ſhall not have been abſent out of the "ſame for a longer ſpace than two months at any one time during the "ſaid ſeven years (*b*)."

By ſtatute 13 *Geo.* 2. *c.* 3. every foreign ſeaman, who in time of war ſerves two years on board an *Engliſh* ſhip by virtue of the king's proclamation, is *ipſo facto* naturalized under the like reſtrictions as in 12 *W.* 3. *c.* 2.; and by ſtatute 13 *Geo.* 2. *c.* 7. 20 *Geo.* 2. *c.* 44. 22 *Geo.* 2. *c.* 45. 2 *Geo* 3. *c.* 25. and 13 *Geo.* 3. *c.* 25. all foreign Proteſtants, and Jews, upon their reſiding ſeven years in any of the *American* colonies, without being abſent above two months at a time, and all foreign Proteſtants ſerving two years in a military capacity there, or being three years employed in the whale-fiſhery, without afterwards abſenting themſelves from the king's dominions for more than one year, and none of them falling within the incapacities declared by ſtatute 4 *Geo.* 2. *c.* 21. ſhall be (upon taking the oaths of allegiance and ſupremacy, or, in ſome caſes, making an affirmation to the ſame effect) naturalized to all intents and purpoſes, as if they had been born in this kingdom; except as to ſitting in parliament or being of the privy council, and holding offices or grants of land, &c. from the crown within the kingdoms of *Great Britain* and *Ireland*. By ſtatute

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Geo. 3. *c.* 50. *ſ.* 24, 27, 28. and 28 *Geo.* 3. *c.* 20. *ſ.* 15. every foreigner has eſtabliſhed himſelf and family in *Great Britain*, and carried on ſouthern whale-fiſhery, and imported the produce thereof for the ſpace ve years ſucceſſively, is declared to be entitled to all the privileges of tural-born ſubject.

Of the Diſadvantages which Aliens lie under.

AN Alien cannot purchaſe (*d*) or inherit any lands in this country, becauſe an intereſt in the ſoil requireth a permanent allegiance, ich would probably be inconſiſtent with that which he oweth to own natural liege lord.

Some have thought that the laws againſt aliens were introdu-

in the time of Hen. 2. when a law was made at the parliament of Wallingford for the ulſion of ſtrangers, in order to draw away the *Flemings* and *Picards* who were brought into kingdom by the wars of King Stephen. Daniel, 67. Others have thought that the original this law was far more ancient; and that it is an original branch of the feudal law; for, by t law, no man can purchaſe any lands without being obliged to fealty to the lords of whom y are holden; ſo that an alien, who owed a previous faith to another prince, could not take oath of fidelity in another ſovereign's dominions. Spelm. tit. *Ligeantia*, 368. Cuſtumer, c. Some reſtraints have been laid upon aliens by the laws of almoſt all countries. Among the *mans*, the *cives Romani* only were at firſt eſteemed freemen; afterwards, when their territories reaſed, all the *Italians* were made free, under the name of *Latins*, only they had not the pri-ge of wearing gold rings, which was altered by Juſtinian; at laſt, all born within the pale the empire were citizens, *in orbe Romano qui ſunt, ex conſtitutione Imperatoris Antonini cives Romani ſti ſunt.* Vicinius, 27. Dig. Lib. 1. tit. 5 fo. 16. Dio Caſſius relates the occaſion of this con-ution being made, in Excerpt. Valeſ. p. 751. The *Orbis Romanus* of Spanheim is a complete tory of the progreſſive admiſſion of *Latium*, *Italy*, and the provinces, to the freedom of *Rome*. rd C. J Hale ſaith, that the law of *England* rather contracts than extends the diſability of ens, becauſe the ſhutting out of aliens tends to the loſs of people, who, when laboriouſly em-yed, are the true riches of any country. Ventr. 427. 2 Roll. Rep. 94 He may purchaſe, cannot hold. Co. Lit. 2. b. Therefore, if tenant in tail, he may ſuffer a recovery, and dock remainders. Goldſb. 102. 4 Leon. 82. Br. tit. *Denizen* and *Alien*, 17. On a covenant to ſtand ſed, an uſe will ariſe for an alien. Godb. 275. But by act of law, he cannot take, as by ſcent, courteſy, dower, guardianſhip. Ventr. 417. Molloy, 464. 7 Co. 25. By a ſpecial of parliament, not printed, Rot. parl. 8 H. 5. n. 15 women aliens marrying Engliſhmen, h the king's licence, were allowed in future to demand dower. But this act not extending to oſe married before, therefore, in Rot. Parl. 9 H. 5. n. 9. there is a ſpecial act of parliament enable Beatrice Counteſs of Arundel, born in *Portugal*, to demand her dower. Hal. MSS. rgr. Co. Lit. 31. b. n. 9. See acc. Roll. Abr. 675. The diſability of an alien to hold lands his own benefit is not to be conſidered as a penalty or forfeiture; but ariſeth merely from the licy of the law; and therefore, it hath been adjudged in equity, that he cannot demur to a covery of any circumſtances neceſſary to eſtabliſh the fact of alienage. Attorney General v. pleſſis, Parker, 144. 5 Br. P. C. 91.

(*If the Eldeſt*) The father being a natural-born ſubject, the ſon would be ſo now by force the ſtatutes of 7 Ann. c. 5. and 4 G. 2. c. 21.

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(*And now by the*) The reaſon why lands deſcending to an alien could not be taken by him, s, that the king could not oblige his perſon and ſervices. But, as it ſeemed hard, that ſubject, thin the allegiance, who claimed under him, ſhould be diſabled from conveying deſcent, by e operation of a reaſon of which the very reverſe was true as to themſelves, therefore this tute was made. Law of Forfeit. 84.

(*If an Alien and*) The king has a title before office found; the office veſts the poſſeſſion. 5 Co. Hob. 153. Parker, 152. Choſes in action belonging to an alien enemy are forfeitable to e crown, but there muſt be an inquiſition to entitle the king; and if a peace be made before he inquiſition is taken, the cauſe of forfeiture is diſcharged. Attorney-General v. Weeden and ales, Parker, 267.

Page 82 St. 13 and 14 Car. 2. c. 11. ſ. 10. An alien infant, under the age of 21 years, cannot be a merchant trader within this realm, nor can he enter any goods in his own name at the cuſtom-houſe.

(*An Alien cannot*) Merchant ſtrangers were firſt permitted to rent houſes, and to buy and ſell their own commodities themſelves, without any interruption from the citizens, about the year 1284; for before that time they hired lodgings, and their landlords were the brokers, who ſold all their goods and merchandiſes for them. Rapin, 361. note 9. Fab. Chron. This indulgence, together with the loſs of their brokerage, ſeems to have provoked the reſentment of the citizens; for, in the Parliament roll, in the 18th year of Edward 1ſt, (*viz.* A. D. 1289) we find the following petition and anſwer: "*Cives London petunt quod alienigenæ mercatores expellantur a civitate, quia ditentur ad depauperationem civium, &c.*"—Reſponſio: "*Rex intendit quod mercatores extranei sunt idonei et utiles magnatibus, &c. et non habet concilium eos expellendi.*" 2 inſt. 741.

(*But by the 32 H. 8.*) Sir W. Blackſtone (1 Bl. Comm. 372.) ſays, that the ſtatutes, prohibiting alien artificers to work for themſelves, are generally held to be virtually repealed by the ſtat. 5 Eliz. c. 7. but there doth not appear to be any other authority to that effect. 1 Wooddeſ. 373. note.

(*Upon this Statute*) In this caſe two actions were brought; the one debt, for rent; the other the action here mentioned. In both, the ſtatute was pleaded; it was in the firſt that the objection here made, for the want of the averment, was taken; for the other ſtood clear of that exception. The opinion of the Court was not finally given on the point; for the defendant, believing that judgment would be pronounced againſt him, ſubmitted.

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(*Aliens Seem*) To the firſt of theſe ſtatutes, it is ſaid in the old abridgement, that the Lords Spiritual did not aſſent.

By the ſtatute of 24 *Geo.* 3. *c.* 35. the biſhop of London, or any biſhop appointed by him, is enabled to ordain aliens either as prieſts or deacons without requiring them to take the oath of allegiance, provided that they do not officiate in any place within the king's dominions; and further that in the letters teſtimonial of ſuch orders the name of the perſon ſo ordained be inſerted, with the addition of the country to which he belongs, and the further deſcription of his not having taken the oath of allegiance, being exempted from ſo doing by this act.

(C) How far the Laws of this Country attach upon Aliens.

1 Wooddeſ. 379. Foſt. Cr. L. 185. 1 Hawk. P. C. c. 17. ſ. 5. St. 9. Ann. c. 16. Hob. 271. 3 Inſt. 4, 5

AN alien, whilſt he reſides here, is generally ſubject to our laws and owes a local and temporary allegiance to the ſovereign, by whoſe authority thoſe laws are adminiſtered, and by whom his perſon and property are protected; conſequently, if during ſuch reſidence he commit an offence, which in the caſe of a natural-born ſubject would amount to treaſon, he may be dealt with as a traitor; and this whether his ſovereign be in amity or at enmity with us. My Lord *Coke*'s poſition, therefore, that an alien enemy cannot be guilty of treaſon, muſt be taken with this reſtriction, namely, where he invades this country, and is taken in war; in which caſe indeed he is not puniſhable at all, according to the courſe or by the rules of the municipal inſtitutions, but is to be dealt with according to the law of nations in martial affairs.

t is declared by ſtatute 32 *H.* 8. *c.* 16. *ſ.* 9. That every alien, com-
into the king's dominions, ſhall be bounden by and unto the laws and
tes of this realm.

ut a *French* priſoner of war, being indicted for privately ſtealing in Foſt. Cr. L. 188. note. Moliere's caſe. In this caſe, a learned writer obſerves, the humanity of the
ſhop of a goldſmith and jeweller, a diamond ring, which by ſtatute
& 11 *W.* 3. *c.* 23. is an offence puniſhable with death, the judge who
l him thought it improper to proceed capitally upon a local inſtitution,
therefore adviſed the jury to acquit him of the circumſtance of ſtealing
he ſhop, and to find him guilty of ſimple larceny, to the value laid in
indictment.

e was at leaſt more conſpicuous than the ſoundneſs of the principle, as a point of mere law.
ooddeſ. 382.

liens are comprehended within the ſtatute 25 *E.* 3. *c.* 4. for extend- 2 Hawk. P. C. c. 33. ſ. 5. Br. tit. *Clergy*, p. 20.
the benefit of clergy, according to a very old interpretation of that

reſident alien, it hath been adjudged, is entitled to the benefit of a Courteen's caſe, Hob. 270.
ral pardon; but, if he is not in the kingdom at the time of the pro-
gation of the pardon, he is not within the benefit of it, for he is no
rwiſe a ſubject, but *by his reſidence here.*

liens are ſubject to, and ſhall have advantage of the ſtatutes againſt St. 21 Ja. 1. c. 19. ſ. 15.
krupts.

he property of an alien, reſident abroad, conſiſting of ſtock in the 1 Atk. 19.
ic funds, or other perſonal effects in this country, is ſubject to the con-
l of the Court of Chancery. Pipen v. Pipen, Ambl 25.

But if an alien, reſident abroad, dies inteſtate, his whole property here Burn v. Cole, Id. 415.
iſtributable according to the laws of the country where he ſo reſided:
the reſidence muſt be ſtationary, not occaſional, elſe the municipal
tutions will not attach upon the property.

) What Actions Aliens may maintain; and therein of the Difference between an Alien Friend, and one whoſe King is at Enmity with ours.

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n Alien Friend may) And this, though reſident abroad. Dy. 2. b. But in ſuch caſe the
tts of K. B. and C. P. require ſecurity for coſts: not, however, until bail is put in. 1 Term
. 267. 362. 2 H. Bl. Rep. 118. 4 Term Rep. 697.

d Merchant) By an expreſs law, *viz.* St. 31 H. 6. c. 4. redreſs is provided for aliens who
njured by the king's ſubjects on the ſea, or in any part of the realm. 2 R. 2. ſ. 2. 3 Bulſtr.

n Abbot) Upon the ſame principle it hath been holden, notwithſtanding the ſtatutes of 3
c. 3. 7 R. 2. c. 12. and 1 H. 5. c. 7. that an alien, incumbent on an eccleſiaſtical benefice,
maintain an action concerning the glebe tithes, &c. Hughes's Parſon's Law, c 10. cites
Beaton's caſe, M. 8 J. 1. C. B.

f an Alien enemy) But if alienage ſimply be pleaſed, it is not neceſſary to reply, that the
ntiff is not an alien enemy. 2 Str. 1082.

It

Record v. Bettenham, 3 Burr. 1734. 1 Bl. Rep. 563. Cornu v. Blackburn, Dougl. 619.

It hath been heretofore holden, that an alien enemy may maintain a action in this country for the recovery of a right claimed to be acquir in actual war; but that opinion hath been ſince over-ruled, and it ha been determined in the Exchequer chamber, that by the municipal law this country no ſuch ſuit can be ſupported.

Anthon v. Fiſher, Dougl. Ad. 30.

Anon. 2 Bl. Rep. 1324.

An alien enemy, priſoner of war, is not entitled, under any circu ſtances, to his diſcharge upon a *habeas corpus*.

Simmonds v. Du Barre, 3 Br. Ch. Rep. 263.

A foreigner is allowed to put in his anſwer to a bill in equity in h own language, but a ſworn tranſlation muſt be alſo filed with it.

Lord Belmore v. Anderſon, 4 Br. Ch. Rep. 90.

Interrogatories for the examination of witneſſes who are foreigners m be in *Engliſh*, and being afterwards tranſlated, their anſwers muſt be tr ſlated by ſworn interpreters.

(E) Of pleading Alienage.

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(*If an Alienage*) In an action by an alien enemy for a right acquired in actual war, the de dant, it ſeems, may avail himſelf of the objection of alienage without ſpecially pleading Anthon v. Fiſher, Dougl. Ad. 30.

Weſt v. Sutton, 2 Ld. Raym. 853.

Alienage cannot be pleaded to a *ſcire facias* on a judgment; for t plaintiff having been admitted to be able to recover judgment, can be diſabled from having execution upon it by matter which was precede to it.

Daubigny v. Davallon, Anſtr. 462.

Alien enemy is pleadable in equity as well to a bill for diſcovery as a bill for relief: and ſuch a plea ſtating that this nation was at war w the *French* government, and that the plaintiffs were *Frenchmen*, adh and *enemies* of the king, was adjudged to be good in point of form, tho it was objected, that it ought to ſtate the plaintiffs to have been born of the liegeance of the king, and within the liegeance of a ſtate at w with this country.

AMBASSADORS.

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(*If a Foreign*) In the caſe of the King againſt Guerchy, the Attorney General, under d rection of the Court of K. B., granted a *noli proſequi*, on an indictment againſt the *French* A baſſador for an attempt to aſſaſſinate M. D'Eon. It does not appear, from the report, whe this direction was given upon the naked ground of the defendant's protection from his chara as ambaſſador, or whether the judgment of the Court were not influenced by the ſpecial c cumſtances of the caſe, which induced a ſuſpicion that the proſecution was a groſs calumny u the defendant, and inſtituted and kept on foot merely for the purpoſe of defaming him. 1 Rep. 545.

o, upon Contracts) An ejectment brought, and left at the house of the ambassador, conceived breach of privilege in the case of Monsr. Colbert for York-House. M. 28 Car. 2. B. R. lloy, Bk. 1. c. 10. s. 15. in marg.

And now by) He must also swear to the actual performance of the service. 3 Burr. 1731. where one swore positively to an actual engagement as *English* secretary to the *Bavarian* mi-er, and to the actual performance of that employment, the Court of King's Bench thought nselves bound to allow his privilege, though it appeared that he had formerly been a trader, there were several other suspicious circumstances. 3 Burr. 1478. Lord Mansfield was clear an officiating land-waiter at the custom-house could never be esteemed a *bonâ fide* domestick foreign minister. 1 Burr. 401. Nor can a purser of a man of war. 3 Wilf. 33. Nor a er residing at his own house, his supposed master being abroad. Barnes, 374. Nor can an assador take one into his service for the purpose of screening him from his creditors. 3 Burr. 6. Therefore, the person claiming privilege must swear that he was in the service at the e of the arrest. 4 Burr. 2015. Q. Whether an ambassador can retain one in the character of sician? *Ibid.* A secretary to a foreign minister is privileged, though his name be not registered he office of either of the secretaries of state, the statute requiring that only for the purpose proceeding against the parties criminally. 3 Ter. Rep. 79. 4 Burr. 2017. S. P. Therefore, gh his name be not registered, the sheriff must execute the proces, notwithstanding the pro-tion of a certificate. 1 Wilf. 20.

Provided) If not actually a servant, though his name be registered, he is not within the Fitzg. 200.

A consul, or any person acting in an office of that kind, it seems, is entitled to privilege. Barbuit's case, Ca. Tem. Talb. 281.

The privilege of a publick minister is annexed to his situation; it is privilege of the state that sends him, and not that of the indivi-l: he cannot therefore wave it, or forfeit it by becoming a tra-, &c. Ibid.

Amendment and Jeofail.

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(I) Of Amendments in Equity.

(I) In what Cases and at what Time Amendments may be made where the Crown is concerned.

(A) Of Amendments at Common Law.

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That Part) In penal actions, while the proceedings are in paper, mistakes are amendable at mon law; and it has been done where several terms had elapsed since the commencement of suit, and issue had been joined. 2 Burr. 1099. So where the record had gone down to trial, been afterwards withdrawn. 5 Burr. 2833. But this is a matter of discretion in the Court, a similar application has been refused. 2 Term Rep. 707.

In penal actions the court will give leave to amend, notwithstanding time for bringing a new action has elapsed, provided there have been unnecessary delay, and the amendment prayed for be not to introduce ew substantive cause of action. Cross v. Kaye, 6 Term Rep. 513. Maddock v. mmett, 7 Term Rep. 55. Goff v. Popplewell, 2 Term Rep. 707. Steele v. Sowerby, 6 Term p. 171.

After

Kinder v. Paris, 2 H. Bl. 561. After a party has once amended on a demurrer, the court will not give him leave to amend again on a ſecond demurrer.

(B) The ſeveral Statutes of Amendment and Jeofail.

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(*The* 32 *H.* 8.) *N. B.* This laſt point was determined on the ſtat. of 18 El. c. 14.

By ſtat. of 4 *Geo.* 2. *c.* 26. for turning all law proceedings into *Engliſh*, it is provided, *ſ.* 4. that every ſtatute of jeofails ſhall extend to all forms and proceedings in *Engliſh* (except in criminal caſes), and that this clauſe ſhall be taken and conſtrued in the moſt ample and beneficial manner for the eaſe and benefit of the parties, and to prevent frivolous and vexatious delays.

(C) Whether the Statutes of Amendment extend to the King, or to any criminal Proceedings.

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(*It has been*) Penal actions are not conſidered as criminal proceedings, and therefore within the ſtatutes of jeofails. Cowp. 382. 1 Will. 125.

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(*This in a*) The *venire* is now to be awarded of the body of the county, *vide* the ſtat. 4 Ann. c. 16. ſ. 6. and 24 Geo. 2. c. 18. ſ. 3. *Vide* head of *Juries*.

(*Alſo by the*) An information was laid, that teas were imported between, *&c.* and the day of exhibiting the information, which was the day of the ſeizure, and of courſe would have been excluded: leave was therefore given to amend, by extending it to the next day. Bunb. 49. p. 80. An information on the act of navigation was amended, by ſubſtituting the words *India goods* inſtead of *ſilks*; but the addition of other goods was not allowed, for that would have been to have made a new information. *Id.* 252. p. 327. In one caſe an amendment was permitted, which made quite a new offence; this was in an information of ſeizure for importing brandy and rum in caſks under *ſixty* gallons, by making it, as to the rum in caſks, under twenty gallons. *Id.* 334. p. 415. But where an indenture of appraiſement was dated before the writ of appraiſement, the Court inclined to think it might be amended. *Id.* 58. p. 99.

(D) In what Caſes the Proceedings in Civil Cauſes are amendable and the Manner thereof; as by amending one Part of the Record by another. And herein,

(*The Original*) A *ca. ſa.* amended after it had been executed, by the award of the writ on the roll. 2 Bl. Rep. 836. A bill of *Middleſex* filed as of record of 24 G. 2. when it ought to have been of the 25th, amended by the præcipe. 1 Term Rep. 782. A bill of *Middleſex*, by a common informer in debt *only*, amended by inſerting "in a plea of treſpaſs with an *ac etiam* in debt." 1 Bl. Rep. 462.

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(*But the Negligent*) Teſte of a capias amended, as *vitium clerici*, and contrary to implied inſtructions.

ctions. 2 Bl. Rep. 918. 1 Term Rep. C. P. 291. A replication amended after verdict, by erting the *similiter* instead of, &c. Sayer v. Pocock, Cowp. 407.

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(*After the*) But an amendment shall not be made in this manner after verdict, if it change record in a substantial point. 2 Wils. 147.

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(*If there be*) In the case of Richards *qui tam* v. Brown, the Court of K. B. gave leave to do very reverse to what was done in this case, *viz.* to alter the name in the warrant of attorney to that in the declaration, and this after error brought, and that variance assigned for error. Dougl. 110.

(*But If*) The decision here referred to, is that of the court of errour: and the reason given by Yelverton why an amendment could not be made in this case, is, that the mistake had been specially shewn for cause of demurrer in the Court below, and the judgment of the Court had issued upon the cause so shewn, and therefore all amendments were ousted.

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(*If the jury*) Where there is a general verdict on a declaration, consisting of different counts, some of which are inconsistent, or bad in point of law, and evidence has been given on the good or consistent counts only, the verdict may be amended by the judge's notes. Dougl. 361, 518. *Aliter*, it seems, if evidence has been admitted on the bad or inconsistent counts. *Id.* 362. But an amendment by the judge's notes, it was formerly holden, could not be made after judgment. *Id* 703. But it seems now, that it may be made at any time, even after final judgment, and a writ of error brought. 3 Term Rep. 749. A mistake in not entering up a verdict on one of the issues, allowed to be amended by the judge's notes, after error brought for that reason, and joinder in error. *Id.* 659.

(*Also A*) And see Dougl. 362. where a mistake in the verdict in a criminal case, was corrected from minutes signed by the jury. In Bunb. 283. a mistake in a special verdict on an information of seizure, amended by minutes, after one argument.

(*But nothing*) The point in this clause was not touched upon in any of the passages referred to in the former editions.

(E) What Defects may be amended or aided after Verdict: And herein, Page 102

(*The Chief*) After verdict, the insertion in some of the counts of the defendant's name instead of the plaintiff's rejected as surplusage. 3 Wils. 43.

(*In Debt*) See Cro. Ja. 585. where such a variance in the *quantum* of the demand was holden to be fatal.

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(*In an Action of Debt*) *Qu.* If in debt on a penal statute, as, for not setting forth tithes, for usury, &c. not guilty would not be a good plea, though *nil debet* is the proper, formal plea. 1 Term Rep. 462.

In an action on the statute of usury, a verdict was given for the plaintiff, and taken on one of the counts in the declaration, the other counts being found for the defendant. It was moved in arrest of judgment, because the *christian* name of one of the persons mentioned in that count (rightly named, in that count, before) was mistaken in the issue roll, which had been carried in, whereby the count was rendered absurd and bad. The court gave leave to file a right bill, (the proceedings being by bill,) and afterwards amended the issue roll by the bill. The *nisi prius* roll was right.—This was done as an amendment at common law.

Gardner v. Brown, B. R. Tr. 15 G. 3. Jacob's L. Dict. by Tomlins tit. Amendment.

A decla-

Wilder v. Handy, 2 Str. 1151. Marſhall v. Riggs, *Id.* 1162. Tomlinſon v. Blackſmith, 7 Term Rep. 130.

A declaration in treſpaſs running by recital "Whereas," &c. may be amended after verdict, provided the bill be filed right, the time of filing which, by the way, the court will not inquire into. So, where the damages have been laid by miſtake in an action upon contract at a ſmaller ſum than the amount of the ſeveral ſums mentioned in the body of the declaration, the court have given leave to amend the declaration by increaſing the damages, according to the truth of the caſe as found by the jury. In this caſe, however, the former verdict muſt be ſet aſide, and a new trial had to enable the defendant to make his defence to the demand ſo enlarged.

(F) Of amending the Judgment.

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(*So in an Action*) This caſe was on a writ of error from *Ireland*; and ſee Cowp. 841. where the Court of King's Bench, in this country, amended a record in ejectment from thence, by enlarging the term.

(*In Ejectment brought*) Where judgment was entered againſt executors *de bonis propriis* inſtead of *de bonis teſtatoris*, and error brought upon it; this being conſidered as merely the blunder of the clerk, was amended, after argument in the Exchequer-chamber. 5 Burr. 2730. 2 Lev. 22.

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(*If in Replevin*) Where, in replevin, the defendant made cognizance for rent in arrear, and the jury found for him, and damages to the amount of the rent claimed in the cognizance; but did not find either the amount of the rent in arrear, or the value of the cattle diſtrained, and judgment was entered for the damages aſſeſſed, he was permitted to amend his judgment, and to enter judgment *pro retorno habendo*. Rees v. Morgan, 3 Term Rep. 349.

(G) At what Time the Amendment muſt be made; and therein of Records removed out of inferior Courts, and paying of Coſts.

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(*But where*) A mere clerical miſtake in the return to a *mandamus*, may be amended after the return has been filed. Dougl. 130. Rex v. the Mayor, &c. of *Lyme Regis*. 1 Str. 273. A declaration in *quare impedit* was allowed to be amended after the defendant had craved *oyer* of the writ, and pleaded a variance between the writ and count. 2 Wilſ. 118.

(*So where*) Where an executor had pleaded a former judgment recovered, but by miſtake had ſtated a leſs ſum than the judgment was really for, the Court of C. P. gave leave to amend, though the record had been made up near three years; but they at the ſame time permitted the plaintiff to reply *per fraudem*. Skutt v. Woodward executor. 1 H. Bl. Rep. 238.

(I) Of Amendments in Equity.

Anon. 2 Atk. 15. 1 Pr. Al. Cur. Canc. 546.

A BILL may be amended at *any time* for the ſpecial purpoſe of adding neceſſary parties. Green v. Poole, 4 Br. P. C. 122.

After

After the examination of witneſſes no part of the pleadings can be amended but under very ſpecial circumſtances: but if no witneſs has been examined, an amendment has been permitted after publication iſſued. Mitf. Eq. Tr. 258. 263. and the caſes (cited in the note)

Haſtings v. Gregory, Scac. 19th Nov. 1782. and Sanderſon v. Thwaites, in Canc. Tr. 1781. non, Barnard. Ch. Rep. 222. Harding v. Cox, 3 Atk. 583. Where a matter has not been put iſſue by a bill with ſufficient preciſion, permiſſion has been given to amend it on the hearing of e cauſe. Filkin v. Hill, 2 Br. P. C. 194.

After appearance the bill cannot be amended without payment of coſts, which are fixed at forty ſhillings, a ſum which the Court will not exceed, notwithſtanding repeated amendments, unleſs the defendant ſtate a caſe of particular oppreſſion. Earl of Maſſerene v. Lyndon, 2 Br. Ch. Rep. 291. 1 Eq. Caſ. Abr. tit. *Amendment*, p. 1. note.

An amendment to a bill has been permitted, after a demurrer to the whole bill has been allowed; but this ſeems not to have been ſtrictly regular. Ld. Coningſby v. Sir Joſeph Jekyll, 2 P. Wms. 300. and——v. Baines, in the note.

But there ſeems to be no precedent of an amendment to a bill, in a part wherein it was diſmiſſed on the merits. Napier v. Lady Eſſingham, 2 P. Wms. 401.

Where an improper ſubmiſſion was made in the bill of an infant, the Court allowed it to be amended on the hearing of the cauſe. Serle v. St. Eloy, 2 P. Wms. 386.

Where an anſwer was prejudicial to a defendant from a mere miſtake, though ſuch miſtake was both in the original and office copy, upon evidence of the miſtake, an amendment was permitted after the cauſe had been heard, and after it had been denied on a petition and on a motion. Counteſs of Gainſborough v. Gifford, 2 P. Wms. 426. In this caſe the draught was correct; but where the miſtake runs through the draught, and the engroſſed anſwer, no amendment will be allowed. Biſhop of Ely v. James, Bunb. 295.

There are no certain rules reſpecting the amendment of anſwers; but they are in the diſcretion of the Courts. The admiſſion of a fact (*a*) is never ſuffered to be ſtruck out, but on an affidavit of ſurpriſe, or the defendant being ill adviſed. But where an amendment (*b*) is admitted in the bill, where, through inadvertency (*c*) a miſtake is made, as to a fact or date, where there is no danger (*d*) of perjury, where the caſe depends upon old documents, lies pretty much in the dark, and new matter is diſcovered, which affords the defendant a good defence; the Courts have allowed amendments to be made, either by ſtriking out paſſages, or making new facts, and this (*e*) after iſſue joined, or upon the hearing of the cauſe. If new matter has ariſen, the practice is to add it by way of ſupplemental anſwer; for the defendant will not be permitted to take the old anſwer off the file, and put in a new one. Woodgate v. Fuller, Barnard. Ch. Rep. 50. 1 Eq. Ca. Abr. tit. *Amendment*, p. 4. (*a*) Rawlins v. Powell 1 P. Wms. 297. Pearce v. Grove 3 Atk. 523. Ambl. 65. S. C. (*b*) Filkin v. Hill, 2 Br. P. C. 194. (*c*) Wharton v. Wharton, 2 Atk. 294. (*d*) Berney v. Chambers, Bunb. 248. Holliday v. Nabb, Bunb. 323. (*e*) Phillips v. Gwynne, cited in Mitf. Eq. Tr. 261. But the author adds, that in later caſes this indulgence has been refuſed. However, in the caſe of Moggridge v. Hudſon, the Court of Exchequer thought that there were many caſes in which it was highly neceſſary that it ſhould be given. In that caſe, Richards moved to file a ſupplemental

mental anſwer to a bill for an account of tithes, upon an affidavit of the diſcovery of new matter. The motion was oppoſed by Abbot, who inſiſted that it was the rule of the Court not to ſuffer a ſupplemental anſwer to be put in after iſſue joined. The Chief Baron admitted the general rule to be as Abbot ſtated; but ſaid there were many exceptions to it. That if they were to refuſe it, another bill might be filed for an account, and then it might appear that the plaintiff ought not to have had a decree in this inſtance, by reaſon of the matter now offered; that tithe caſes were entitled to peculiar indulgence, depending upon old documents, and lying in remote antiquity. Perryn B. added, that he had known many inſtances of ſupplemental anſwers being allowed in ſimilar circumſtances: but ſuppoſing there were no precedent, the motion ſeemed ſo reaſonable and ſo neceſſary, that the Court ought to make one. Eaſter Term. 34 G. 3. Where the amendment is not in a very material point, it may be made without notice; but where it is, it cannot be made without notice, and alſo payment of coſts. 1 Harr. Ch. Pr. 307.

Earl Verney v. Macnamara, 1 Br. Ch. Rep. 419.

An anſwer ſhall not be amended after an indictment for perjury preferred or threatened. Yet if there were circumſtances extremely ſtrong to ſhew that it was only a mere miſtake (*f*), it might be otherwiſe.

(*f*) Vaux v. Lord Waltham, cited, *ibid.* Woodgate v. Fuller, Barnard. Ch. Rep. 51. Whaſton v. Wharton, 2 Atk. 294.

Studwick v. Pargiter, Bunb. 338.

An infant may amend his anſwer when he comes of age, and therefore no exceptions can be taken to it.

Griells v. Ganſell, 2 P. Wms. 646.

Where it appears that either the examiner is miſtaken in taking a depoſition, or the witneſs in making it, it may be amended after publication.

Speering v. Lynn, 2 Vern. 376 Pr. Ch. 115. S. C. 1 Eq. Caſ. Abr. tit. *Amendment*, p. 6. S. C.

A miſtake in the title of an order was allowed to be amended, though for the purpoſe of charging a ſurety, who had entered into a recognizance to abide the order of hearing.

White v. Taylor, 2 Vern. 335. 1 Eq. Ca. Abr. tit. *Amendment*, pl. 7. S. C.

Where there was a miſtake in the title of the interrogatories, neither the depoſitions were permitted to be read, nor the title to be amended, though moſt of the witneſſes were gone abroad. But *q.*

Freeland v. Johnſon, Anſtr. 276.

On a bill to ſet aſide an agreement and releaſe, ſtating circumſtances of impoſition and equitable dureſs in obtaining them; the defendant pleaded to the whole, the agreement and releaſe. There was no anſwer, nor was the fraud or dureſs denied in the plea. The court refuſed leave to amend, and over-ruled the plea.

Tennant v. Wilſmore, *Id.* 362.

Harris v. Daubeny, *Id.* 717.

On a motion to amend an anſwer after replication put in, upon affidavit that the defendant was informed and believed he had a good defence, (*viz.* a modus, the bill being for an account of tythes,) and had not inſerted it in his anſwer, not being able, at the time of putting in his anſwer, to ſet forth the modus with proper preciſion; it was objected, and ſo ruled by the court of Exchequer, that the practice in that court is to give leave to put in a ſupplemental anſwer, not to amend the former, for the purpoſe of keeping them diſtinct: but that even that is allowed only where new matter ariſes, or a ſufficient reaſon is given for its not being inſerted in the firſt anſwer. The reaſon why the court inſiſt upon a ſupplemental anſwer, and will not allow the former anſwer to be amended, is to avoid the danger of perjury.

) In what Caſes and at what Time Amend-ments may be made where the Crown is con-cerned.

An information filed by the Attorney-General againſt an *Eaſt India* nquent, under the 24 & 26 G. 3. to which the defendant demur-, was amended in the King's Bench on the motion of the Attorney-neral.

By the practice of the court of Exchequer, the Attorney-General may, ny time, amend a revenue information as of courſe.

Ancient Demeſne.

A) The Nature of the Tenure, and how proved. Page 110

(*The Lands*) The authority referred to for this paſſage is Dy. 150. b. but the editor has not n able to find any thing to this effect, either in that page, or in any other part of that book. e writ in the regiſter does not require the production of the book itſelf, but only a certificate the fact from the treaſurer and chamberlain of the Exchequer. F. N. B. 16. C, 9th edit.

Proof of the name being varied cannot be admitted, without its being averred on the record. . Bull. *Ni. Pri.* 248. 4th ed. *Doomſday*-book will not ſhew whether the lands themſelves are cient demeſne; it will only ſhew whether the manor is ſo, or not. 2 Burr. 1048.

(B) Of the Privileges annexed to Ancient Demeſne. Page 111

(3. *They are Free*) Q. as to tenant for years, or at will; and ſee 2 Burr. 1047.

(C) How it may become Frank-fee. Page 112

(*But if the Lord*) An action on the caſe, in the nature of diſceit, to reverſe a recovery of nds in ancient demeſne, was brought againſt the vouchee only, as *ceſtuy que* uſe, which was con-ſſed by the plea. On motion to enter up judgment, the Court refuſed it, becauſe all the par-s to the recovery were not before them; and the vouchee not appearing to be *ceſtuy que* uſe, herwiſe than by his own acknowledgment, there was danger of colluſion between him and e lord of the manor, to reverſe a recovery of land in frank-fee, and ſo turn it into ancient de-eſne. Rex v. Hadlow, 2 Bl. Rep. 1170. *Vide* Rex v. Mead, 2 Wilſ. 17. The lord is not rred of his writ of diſceit by the death of any of the parties to a fine. Zouch v. Thompſon, Lord Raym. 177.

D) Where Ancient Demeſne may be pleaded, and the Form thereof. Page 114

(*Ancient Demeſne*) But ſee *contr.* 3 Wilſ. 51. 2 Burr. 1047. And the affidavit muſt ſhew that e lands are holden of a manor, which manor is itſelf ancient demeſne; that the matter can be ied in the court of the manor, that there are ſuitors there, and that the plaintiff hath an eſtate freehold. 2 Burr. 1047. 8.

Annuity

Annuity and Rent-charge.

(*An Annuity*) An annuity in fee, granted by the crown out of the 4½ *per cent.* duties payable for exports and imports at *Barbadoes*, is merely a perſonal inheritance. Earl of Strafford v. Buckley, 2 Vez. 170. And ſo, as Lord Hardwicke ſaid, in giving his judgment in that caſe, is an annuity out of the poſt-office or exciſe. Co. Lit. 20. a. n. 14th edition; and as ſuch, the former has been treated by Lord Thurlow. Lady Holderneſſe v. Marquis of Carmarthen, 1 Br. Ch. Rep. 377. A rent created out of a rent is a mere annuity. *Per* Lord Hardwicke, 2 Ves. 178.

As an annuity may be granted in fee, it may, of courſe, as a conditional or qualified fee: but it cannot be entailed, being, in point of charge, ſtrictly perſonal; Co. Lit. 20. a.: therefore a remainder cannot be limited over of it, as it may of a rent-charge; Turner v. Turner, 1 Br. Ch. Rep. 316. Weeks v. Peach, 2 Lutw. 1218; except in a grant by the king, 2 Vez. 181.; but when granted to one, and the heirs of his body, if the condition is performed by the grantee having iſſue, the eſtate becomes abſolute, and alienable without reſtriction; and this, it ſeems, though the grantee never come into actual poſſeſſion. 1 Br. Ch. Rep. 316. Ambl. 776. S. C. It is not the ſubject of a fine or recovery, Sheph. Touchſt. 11. Pig. 97. 1 Vez. 391.; but paſſes by mere grant or transfer. 1 Br. Ch. Rep. 377. There can be neither courteſy, nor dower of it. Co. Lit. 144. b. Poph. 87. Moor, 83. It is not within the mortmain act of 7 E. 1. ſt. 2. Co. Lit. 2. b., nor the proviſions of the ſtatute of frauds, ſo far as they affect real property. 1 Vez. 170. It is not aſſets in the hands of the heir, becauſe not comprized within the deſcription either of land or tenements; not of executors, becauſe its heritable quality prevents it from going to them. Doct. and Stud. c. 30 p. 97. 2 Vez. 179. But an annuity of inheritance is forfeitable, as an hereditament, for treaſon. Nevil's caſe, 7 Co. 34. b. It is aſſignable, and in moſt caſes, though aſſigns be not named in the grant. Co. Lit. 144. b. Gerrard v. Boden. Hetl. 80. If granted by the king, it muſt be granted out of ſome branch of his revenue, for the royal perſon is not chargeable. Anon. 1 Salk. 58. (*a*) Whether the one or the other ſhall be liable, is in the election of the grantee; which election, when once diſtinctly made, is final and concluſive. Co. Lit. 144. b. Lit. § 219. Ambl. 782.

(*D*) Of the Proviſions made by the Legiſlature reſpecting Life Annuities.

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(A) How an Annuity or Rent-charge differs from other Rents.

(*If a Man makes*) Gilb. Rents, 16, 17.

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(B) What ſhall be a good Grant or Creation thereof.

(*If an Original Grant*) An annuity (after a diſpoſition of it for other purpoſes) was deviſed to the teſtator's eldeſt ſon: and on his deceaſe, to the heirs male of his body; and in caſe of his having no iſſue male, to remain to the teſtator's next eldeſt ſon, and the heirs male of his body: the four eldeſt ſons died without iſſue: it was adjudged, that the claim of the fifth was too remote. Turner v. Turner, 1 Br. Ch. Rep. 316.

Ld. Kinnoule v. Earl of Bedford, 1 Eq. Ca. Abr. tit. *Annuity, &c.* (A). p. 1. 1 Ch. Ca. 295. S. C.

Where a man deviſed all his lands for the payment of his debts, and alſo an annuity out of a certain town, which the truſtees ſold; it was decreed in equity, that the annuity ſhould iſſue out of the other lands unſold, there being ſufficient to pay the debts.

Whether

Where an annuity was deviſed out of a rectory, the glebe being but of ll value, and the tithes not liable to diſtreſs, it was decreed that the le rectory ſhould be liable. Thorndike v. Allington, 1 Eq. Caſ. Abr. tit. *Annuity*, &c. (A). pl. 2. 1. Ch. Ca. 79. S. C.

f a man, poſſeſſed of a term, grant a rent generally, without limiting eſtate, the rent ſhall continue during the term. 1 Ro. Abr. tit. *Eſtate*, (H). pl. 5.

man poſſeſſed of a term for years, determinable on lives, deviſed *per annum* to *J. S.* to be paid half-yearly, if the *ceſtuy que vies* ld ſo long live. *J. S.* died during the life of the *ceſtuy que vies*, it was adjudged that the rent was not determined by his death, but ld be paid to his executors during the continuance of the term. Goſley v. Gilford, 2 Vern. 35. The like determination in the caſe of a deviſe

annuity to teſtator's executors, and their heirs during the life of *B.*, to the ſeparate uſe of rried woman, who died in the life of *B.* Rawlinſon v. Montague, 2 Vern. 667. So, e a man deviſed an annuity to another during the life of his executor, to be paid him by executor, and the annuitant died in the life-time of the executor. Savery v. Dyer, Ambl.

C) Of the Remedies for the Recovery of an Annuity.

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f a Man Grants) Where a man covenanted to ſettle lands of ſuch a value, and had none e time, but purchaſed land afterwards, and voluntarily deviſed it, ſuch land was holden to able to the annuity in the hands of the deviſee. Tooke v. Haſtings, 2 Vern. 97.

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There is Another) In ſuch caſe, if he enters, he is not compellable to quit till he has been intereſt for the arrears down to the day; *aliter*, if he neglects to enter. Robinſon v. Cumg, 2 Atk. 2411. Where a grantee of an annuity has recovered in ejectment againſt a tenant year to year, of the grantor, he may afterwards, in an action for uſe and occupation, reer all the rent in the hands of the tenant at the time he gave him notice, and down to the of the demiſe, but not afterwards. 1 Term Rep. 378. Birch v. Wright.

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But if A. *had*) An annuity granted by a body politick, will charge the ſucceſſors, though not ed in the grant. Plowd. 455.

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But if the) In the caſe referred to from Vern. the grantee was only a mortgagee of the te charged with the annuity.

) Of the Proviſions made by the Legiſlature reſpecting Life Annuities.

Y ſtatute 17 *G.* 3. *c.* 26. *ſ.* 1. it is enacted, "That a memorial of "every deed (*a*), bond, inſtrument, or other aſſurance, whereby ny (*b*) annuity or rent-charge ſhall, from and after the paſſing (*c*) of his act, be granted for one or more life or lives, or for any term of years, or greater eſtate determinable on one or more life or lives, ſhall, within twenty days (*d*) of the execution of ſuch deed, &c. be enrolled "in

(*a*) The warrant of attorney is an aſſurance within the act, and muſt be regiſtered. Hopkins v.

Waller, 4 Term Rep. 463. Davidſon v. Foley, 2 H. Bl. Rep. 12. 3 Br. Ch. Rep. 598. S. C. Jaques v. Withy, 1 Term Rep. 557.

" in the high court of Chancery; and that every ſuch memorial ſha
" contain the day (*e*) of the month and the year when the deed, &
" bears date, and the name of all the parties, and for whom any of the
" are (*f*) truſtees, and of all the witneſſes; and ſhall ſet forth the amou
" ſum or ſums to be paid, and the name of the perſon or perſons for whos
" life or lives the annuity is granted, and the conſideration (*g*) or con
" derations of granting the ſame; otherwiſe every ſuch deed (*h*), &
" ſhall be null and void to all intents and purpoſes."

Downes v. Parkhurſt, cited in 2 H. Bl. 13. But a judgment entered is no ſuch an aſſurance, unleſs perhaps where it is the only ſecurity. Sherſon v. Oxlade, 4 Term Rep. 824. (*b*) Where ſeveral annuities are payable out of a groſs ſum aſſigned for that purpoſe, every annuity muſt be ſtated in the memorial; it is not ſufficient to deſcribe it as one annuity of ſo much groſs ſum. Hood v. Burlton, 4 Br. Ch. Ca. 121. An aſſignment of part of an annuity is within the act; for it muſt always appear by the regiſtry who has the preſent ſubſiſting right. Duke of Bolton v. Williams, 4 Br. Ch. Rep. 297. 2 Vez jun. 138. S. C. So, where an annuity was granted before the act paſſed, and aſſigned ſubſequent to it, *and after the aſſignment made*, the original ſecurities, but not the aſſignment itſelf, were enrolled, it was holden, that no proceedings could be had by reaſon of this non-regiſtry of the aſſignment. Grant v. Foley, C. P. Tr. 23 G. 3. A contract to grant and ſecure an annuity, though ſuch contract be in part executed, is not within the act. Jackſon v. Lever, 3 Br. Ch. Ca. 605. (*c*) The act being made to take effect "from " and after the paſſing of it," its operation commenced from the firſt day of the ſeſſion, and affected annuities granted ſubſequent to that time, though before it actually paſſed. Latleſs v. Holmes, 4 Term Rep. 660. Hall v. Whalley, *ibid.* 662. n. (*d*) The twenty days are excluſive of the day on which the deeds are executed. *Ex parte* Fallon, 5 Term Rep. 283. (*e*) The omiſſion, or incorrect ſtatement of the date of the warrant of attorney, is fatal. Downes v. Parkhurſt, cited in 2 H. Bl. 13. Duke of Bolton v. Williams, 4 Br. Ch. 210. A defect in the memorial, as to the date of any one of the ſecurities, vitiates the whole tranſaction. Duke of Bolton v. Williams, 4 Br. Ch. Rep. 210. 2 Vez. jun. 138. S. C but ſee *ex parte Cheſter*, 4 Term Rep. 694. and Saunders v. Hardinge, 5 Term Rep. 9. (*f*) It is not neceſſary to deſcribe the truſtees *eo nomine*: it is enough if it appear on the face of the memorial that they are ſuch. Oliver v. Style, Exchequer Tr. 31 G. 3. Anderſon v. Collard, Sittings at *Weſtminſter*, after Lord Kenyon, after Eaſter Term 1791. The names of all the perſons, whether agents or principals, by whom and to whom the conſideration is paid, muſt be ſet forth. Duke of Bolton v. Williams, 4 Br. Ch. Rep. 297. 2 Vez. jun. 138. S. C. Every truſt relating to the annuity muſt be regiſtered: Hood v. Burlton. 4 Br. Ch. Ca. 121. 2 Vez. jun. 29. S. C. But it ſeems not to be neceſſary to take notice of thoſe which are not created in conſequence of the annuity. Toldervy v. Allen, 5 Term Rep. 480. (*g*) The memorial muſt contain an account of all the proceedings relative to the conſideration, to whom, and on whoſe behalf it was paid, and the actual mode and manner of paying it. Duke of Bolton v. Williams, 4 Br. Ch. Rep. 297. 2 Vez. jun. 138. If part be paid in *notes*, a deſcription of it as *money* is bad: and the dates and other particulars of the notes, muſt be ſtated. Wright v. Reed, 3 Term Rep. 554. If part of the conſideration be money previouſly lent, Kirkman v. Price, 1 H. Bl. Rep. 309.; or part of it be retained in ſatisfaction of a debt, Shove v. Webb., 1 Term Rep. 732.; or to ſatisfy the accruing payments of the annuity, Cox, v. Wright, E 22 G. 3. B. R. Hunt on *Annuities*; or part of it be the giving up of a former annuity, Waſhburn v. Birch, 5 Term Rep. 472.; or if the whole be a judgment recovered againſt the grantor, Jaques v Withy, 1 Term Rep. 557; a memorial ſtating the payment *generally*, is bad, for it does not diſcloſe the tranſaction truly*. But where the conſideration has been paid from time to time, and has been renewed for the purpoſe of keeping the contract open, the groſs amount may be ſtated as the conſideration. Symons v. Mortimer, 5 Term Rep. 139. The conſideration may be ſet forth merely by way of recital; Sowerby v. Harris, 4 Term Rep. 494: and it is ſufficient to mention it only o nce, though there are ſeveral deeds for ſecuring the annuity, in each of which it is expreſſed. Hodges v. Money, 4 Term Rep. 500. But where one of the inſtruments which conſtitute the aſſurance does not ſet forth the conſideration, (for it is not neceſſary that it ſhould be inſerted in every one,) the memorial muſt connect the inſtrument, omitting it with the others, by ſo plain a reference that it may clearly appear to relate to the ſame tranſaction, elſe ſuch inſtrument will be void; and it muſt be inferred from the memorial itſelf that all the deeds are connected. Saunders v. Hardinge, 5 Term Rep. 9. (*h*) The ſecurities being thus made abſolutely void, a ſtranger may take advantage of any irregularity; and therefore, where a *fieri facias* iſſued againſt a perſon in poſſeſſion of goods under a deed given (*inter al.*) in conſideration of an annuity, it was holden that the ſheriff, having notice that the annuity was not regiſtered, was juſtified in returning *nulla bona*. Croſsley v. Arkwright, 2 Term Rep. 603. See too, Saunders v. Hardinge, 5 Term Rep. 9. And where the contract is avoided merely for irregularity, the conſideration-money may be recovered back from the grantor, whether

ther ſuch conſideration be wholly in money, or for a debt *antecedently* due for goods ſold. g. as to goods ſold at the time of granting the annuity. Shove v. Webb, 1 Term Rep. 732. an action for this purpoſe cannot be maintained againſt a ſurety, who has in fact never re- ed any part of the conſideration, though he join with the principal in ſigning a receipt for *Per* Buller J. and Groſe J. *contr.* Aſhhurſt J. Straton v. Raſtall, 2 Term Rep. 366. Where grantee of a rent-charge had aſſigned ſeveral annuities out of it to different perſons, and e was a diſpute reſpecting the claims of the aſſignees, in conſequence of which the arrears he rent-charge were paid into the court of Chancery, where the aſſignments were holden on account of their being improperly regiſtered, that Court would not ſuffer the aſſignees educt their conſideration-money out of the arrears paid therein, but ſaid that they muſt firſt y to a court of law to eſtabliſh their reſpective claims. Duke of Bolton v. Williams, 4 Br. Rep. 297. 2 Vez. jnn. 138.

It is the office of the *deed* to expreſs the conſideration fully and truly: all that is required of *memorial* is to ſet forth truly what is contained in the deed, with the ſingle exception, per- s, of a ſecret truſt. It ſeems, from ſome of the reports, that the Courts have not always nded to this diſtinction. Ducheſs of Cumberland v. Praed, 2 H. Bl. Rep. 280.

§ 2. "That before any judgment ſhall be entered of record upon any warrant of attorney for recovering or ſecuring the payment of any annuity or rent-charge that hath already been granted for one or more life or lives, or for any term of years or greater eſtate determinable upon one or more life or lives, and before any execution ſhall be ſued out, or action (*a*) brought on any ſuch judgment already entered, or on any deed, bond, &c. already executed for the purpoſes aforeſaid, a like memorial of the deed, &c. ſhall be enrolled in the high court of Chancery; and in caſe the party ſhall neglect to enrol the ſame, any ſuch judgment, execution, or proceeding in the action reſpectively, ſhall be null and void."

Vide ſupra, Grant v. Foley. The memorial in ſuch caſe muſt diſcloſe the conſideration truly. Rex v. Wright, Hunt, 43.

(*a*) A *ſcire facias* to revive a judg-

ent entered up before the act paſſed, is an action within this clauſe. Fenner v. Evans, 1 rm Rep. 267.

§ 3. "That in every deed, inſtrument, or other aſſurance, whereby any annuity or rent-charge ſhall, from and after the paſſing of this act, be granted, or attempted to be granted; the conſideration really and *bonâ fide*, (which ſhall be in money only (*b*,) and alſo the name or names of the perſon or perſons by whom and on whoſe behalf the ſaid conſideration or any part thereof ſhall be advanced, ſhall be fully and truly ſet forth and deſcribed in words at length; and in caſe the ſame ſhall not be fully and truly ſet forth and deſcribed, every ſuch deed, &c. ſhall be null and void to all intents and purpoſes.

(*b*) The payment of part of the money to a third perſon at the requeſt of the grantor for the redemption of a former annuity, was

olden not to effect the legality of the conſideration. *Ex parte* Fallon, 5 Term Rep. 283. A ebt for goods *antecedently bonâ fide* ſold, ſeems to be a good part-conſideration. Shove v. Webb, Term Rep. 732. Q. Whether a judgment recovered, Jaques v. Withy, 1 Term Rep. 557. r an aſſignment of a former annuity, be a good conſideration? *Ex parte* Fallon, 5 Term Rep. 83. Duke of Bolton v. Williams, 4 Br. Ch. Rep. 297. It is not neceſſary to ſtate the conſi- eration in more than one of the inſtruments which conſtitute the aſſurance. Hodges v. Money, Term Rep. 500.

§ 4. "That if any part of the conſideration ſhall be returned to the perſon advancing the ſame, or in caſe the conſideration or any part of it is paid in notes, if any of the notes with the privity and conſent of the perſon advancing the ſame, ſhall not be paid when due, or ſhall be cancelled and deſtroyed without being firſt paid, or if the conſideration or any part of it is paid in goods, or if any part of the conſideration is retained on pretence of anſwering the future payments of the annuity, or any other pretence; in all and every of the aforeſaid caſes it ſhall

(*a*) But this relates only to the particular proviſions of this ſection. On a defect in the memorial, any perſon may apply to the

Court. Saunders v. Hardinge, 5 Term Rep. 9. (b) The entering up judgment or even giving a warrant of attorney to enter up judgment in any court, is sufficient to give that court this summary juris

" and may be lawful for the person (a) by whom the annuity or re
" charge is made payable, to apply to the Court in which any action
" is brought for payment of the annuity on judgment entered, by moti
" to stay proceedings on the judgment or action; and if it shall appear
" the Court that such practices as aforesaid, or any of them, have be
" used, it shall and may be lawful for the Court to order the de
" bond, &c. to be cancelled, and the judgment, if any has been en
" ed, to be vacated."

tion. Haynes v. Hare, 1 H. Bl. 569. *Ex parte* Chester, 4 Term Rep. 694.

§ 5. Directs, That a particular roll shall be kept by the clerk of
enrolments in Chancery, and that every memorial shall be enrolled
order of time, as it shall be brought in; and the day, hour, and time
bringing the memorials into the office are to be specified on the roll.
also appoints the fees of the clerks.

§ 6. Directs, That all contracts for the purchase of annuities fr
infants shall be void, and incapable of confirmation after the infants
come of age: and makes the procuring or soliciting an infant to gr
any life-annuity, or to promise, or otherwise engage to ratify it when
comes of age; an indictable misdemesnor, punishable with fine and
prisonment: as does § 7. the asking, demanding, or taking by any
citor of more than 10*s. per cent.* for procuring money to be advanced
any life-annuity.

(c) An equitable estate is within this exception, though it be mortgaged for its whole value. Shrapnel v. Vernon, 2 Br. Ch. Rep. 268.

The last section excepts from the act any annuity or rent-charge gr
by will or marriage-settlement; any annuity secured upon lands of e
or greater annual value, whereof the grantor was seized (c) in fee-si
or fee-tail in possession at the time of the grant, or secured by the ac
transfer of stock in any of the publick funds, the dividends whereof
of equal or greater annual value than the annuity; any voluntary ann
(a) granted without regard to pecuniary consideration; any annuity
rent-charge granted by any body corporate, or under any authority
trust created by act of parliament; and any annuity where the sum u
paid does not exceed ten pounds, unless there be more than one
annuity from the same grantor or grantors, to or in trust for the
person or persons.

(a) An annuity in consideration of the grantee's giving up his business to the grantor, is within this clause; for annuity granted for any other than a *pecuniary* consideration is, for the purposes of the act, be taken to be a *voluntary* annuity. Crespigny v. Wittenoom, 4 Term Rep. 790.

As to the extent of the summary jurisdiction of the common law co
in questions on this act, see 2 Vez. jun. 154. 4 Br. Ch. Rep. 310.

(E) Of Life Annuities as affected by Stat. 17 G. 3. c. 26.

Dixon v. Bird, 2 H. Bl. 317. Bromley v. Greathead B. R. Hil. 34 G. 3. Hunt on Annuities, 188.

Where the *whole* of an annuity is assigned, it is not necessary to e
a memorial of the assignment; for in such case the object of the sta
which was the protection of the grantor, is fully complied with by
having enrolled a memorial of all the original securities.

is requiſite that not only *every* deed executed by the immediate or of the annuity ſhould be mentioned in the memorial, but that every deed or aſſurance, though it be but a collateral ſecurity given by a perſon, ſhould be equally ſet forth in the memorial: therefore, a entered into by ſureties for better ſecuring an annuity that had been ouſly granted, though the bond was made to bear even date with the , was holden by the court neceſſary to be regiſtered. Roſher v. Hurdis, 5 Term Rep. 678.

very part of the contract which can affect the nature or value of the ity ſhould be ſet forth in the memorial; as, where a ſpecial agree- and covenant was indorſed on the deed to enable the grantor to m at a ſtated price, and this indorſement was not taken notice of in nemorial, the court upon that ground held that the deeds were void. it is not merely becauſe the indorſement may be conſidered as a diſ- and ſeparate inſtrument, that this is required; for if the power of mption be contained in the body of the deed itſelf, it is equally ne- y that it ſhould be mentioned in the memorial. Sawyer v. Bunce, Hunt on Annuit. 74. Steadman v. Purchaſe, 6 Term Rep. 737. Harris v. Stapleton, 7 Term Rep. 205.

he memorial muſt diſtinctly ſtate the names of the witneſſes to all the s: to ſtate that all the inſtruments were atteſted by *A. B.* of, *&c.*, D. of, *&c.*, *or one of them*, is not ſufficient. Hart v. Lovelace, 6 Term Rep. 471.

one caſe it was ſaid by the court of King's Bench, that the legiſla- did not mean to require the parties to mention in the memorial all truſts that were a lien on the eſtate independently on the annuity, but thoſe truſts which were created in conſequence of the annuity being ted. However, in a ſubſequent caſe (*a*), it has been holden, by that court, that if a deed, by which an annuity is granted or ſecured, con- other truſts, than thoſe which affect the annuity, they, as well as thoſe h do affect the annuity, muſt be ſet forth in the memorial, elſe the will be a nullity. Toldervy v. Allan, 5 Term Rep. 480. (*a*) Denn v. Dolmer, *Id.* 641. *Vide* Plowd. on Uſury, &c. 369, &c.

he memorial ſtated, that the conſideration-money (700*l.*) was paid promiſſory note drawn by *Hamerſley*, and payable at *Hamerſley, Mor- , and Co's, and which ſaid ſum ſo ſecured has been ſince paid.* It was ſted, that the memorial did not ſet forth when the note was payable, ther immediately or at a diſtant day; for, if at a diſtant day, it was worth 700*l.* by reaſon of the diſcount. In anſwer to this it was ed in an affidavit, that it was a banker's check payable immediately. the court ſaid, that the memorial ſhould contain every thing neceſſary hew, that the tranſaction was fair, and that the conſideration-money been paid: and they thought, that this caſe was decided by that of *mball* v. *Murray*. Berry v. Bentley, 6 Term Rep. 690. *Vide* Plowd. on Annuit. 377.

Where the memorial ſet forth as the conſideration of granting the an- y the payment of 18*cl.* by the grantee to the grantor, whereas in fact only paid him 130*l.*, and retained, with the grantor's conſent, 50*l.* debt due from the grantor to a perſon, who was the attorney of both ties in the tranſaction; it was declared defective from not ſpecifically ing this retention of the 50*l.* as one of the terms of the contract, and king a part of the conſideration. Watts v. Millard, 5 Term Rep. 398.

Annuity deeds will not be ſet aſide on account of mere clerical miſtakes the memorial: as, where the chriſtian name of the witneſs to one of deeds is omitted; or, if in ſtating the aſſignment of a term of 61 rs, it ſet forth a term of 62 years; or, if after reciting the true con- eration, *viz.* 280*l.*, it ſtate afterwards, "which ſum of 250*l.* was d;" or if it omit to ſtate the nominal conſideration for the deed, or, *Id. ibid.* Ince v. Everard, 6 Term Rep. 545.

that the annuity was payable for the portion of time from the laſt quarter-day to the death of the annuitant.

Hammond v. Foſter, 5 Term Rep. 635. An annuity granted by *A.* to *B.* which was duly regiſtered, was redeemed by virtue of a clauſe of redemption in the deeds, when the deeds were delivered up to the grantor uncancelled, and he and the attorney for the grantee agreed, that if at any future time he, the grantor, ſhould wiſh to borrow money on the ſame terms, thoſe deeds ſhould be given as a ſecurity. On a ſubſequent application by the grantor, the attorney advanced the ſame money on having the ſame deeds delivered to him. But this re-grant of the annuity not being regiſtered, the court ſet aſide the annuity, and ordered the deeds to be cancelled.

Dalmer v. Barnard, 7 Term Rep. 248. If the conſideration-money be paid by an agent on behalf of the principal, it muſt be ſo ſtated in the deed; if it be ſtated to be paid by the principal, the deed is void within the third ſection of the act.

Crawfurd v. Caines, 2H. Bl. 458. A fine levied of a rent-charge aſſigned by way of annuity will not give the court of Common Pleas juriſdiction to ſet aſide the annuity on account of a defective memorial, if there be neither a judgment, nor a warrant of attorney to enter up a judgment in that court.

Vide Plowd. on Annuit. 425, &c. and Garrood v. Saunders, 6 Term Rep. 404. as to the power of the courts to interfere merely on the three firſt ſections of the act.

Hart v. Lovelace, 6 Term Rep. 471. Where the validity of an annuity under this act has been once before a court of competent juriſdiction, and there decided, another court will not entertain an application as to the validity of the ſame annuity upon the ſame grounds.

Hutton v. Lewis, 5 Term Rep. 639. Where an annuity was granted in conſideration of the grantee reſigning his ſituation, as maſter of an academy, in favour of the grantor, it was holden not neceſſary to regiſter it, though at the time of the grant the grantee agreed to aſſign over to the grantor his houſehold furniture, *&c.*, at an appraiſed value, and if it ſhould not be convenient to the grantor to raiſe money to pay for them, to lend him a ſum of money, to be repaid with intereſt: for the annuity was not granted in conſideration of money paid to the grantor, but of reſigning the grantee's ſituation in favour of the grantor; and the loan of money, which was to be in the option of the grantor afterwards, was no part of the conſideration of the annuity.

Halſey v. Hales, 7 Term Rep. 194. *A.*, who was teaant for life, remainder to truſtees to preſerve contingent remainders, remainder to his firſt and other ſons in tail remainder to himſelf in fee, ſuffered a recovery together with *B.* his only ſon, and declared the uſes to ſuch perſon and for ſuch eſtate, *&c.* as they ſhould jointly appoint: they jointly granted an annuity, and appointed and granted the lands to *C.* for a term of years in truſt for the grantee. It was adjudged, that this caſe came within the exception of the act.

Hudſon v. Skinner, 6 Term Rep. 596. Where *A.*, who was entitled for life to the dividends in certain ſtock ſtanding in the names of truſtees, granted an annuity payable out of the dividends, and empowered thoſe truſtees to pay the grantee, it was holden that this annuity was not within the exception of the act, and muſt be regiſtered; for the eighth ſection, which excepts annuities ſecured by the transfer of ſtock, only extends to thoſe caſes where an actual transfer of the ſtock is made for the purpoſe of ſecuring the annuity.

APPEAL.

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An Appeal) It is derived from the *French*, "*appeller*," the verb active, which ſignifies to call on, ſummon, or challenge one; and not the verb neuter, which ſignifies the ſame as the ordinary ſenſe of "*appeal*" in *Engliſh*. 4 Bl. Com. 312.

(I) What may be pleaded in Bar to an Appeal.

(*A Retraxit*) The caſe referred to in Bulſtr. Cro. Ja. and Yelv. is that of Bradley v. Banks, where the whole Court were clearly of opinion, that a diſcontinuance before appearance was peremptory.

APPROVER.

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(*If an Approver*) It hath alſo been uſual, for the juſtices of the peace by whom any perſons charged with felony are committed to gaol, to admit ſome one of their accomplices to become witneſs (or, as it is generally termed, king's evidence) againſt his fellows; upon an implied confidence, which the judges of gaol-delivery have uſually countenanced and adopted, that if ſuch accomplice makes a full and complete diſcovery of that, and of all other felonies to which he is examined by the magiſtrate, and afterwards gives his evidence without prevarication or fraud, he ſhall not himſelf be proſecuted for that, or any other previous offence of the ſame degree. 4 Bl. Com. 331. If the diſcovery upon the whole be fair and ample, he ought not to be proſecuted again, becauſe he has merely by accident omitted any one offence. Cowp. 339. But if he be proſecuted, he cannot plead this in bar, or avail himſelf of it upon his trial: but he may move the Court to put off the trial, that he may have time to apply for a pardon. *Ibid.*

Arbitrament and Award.

(H) In what Caſes the Performance of an Award may be compelled by an Attachment, and the Courſe of Proceeding to be taken in order to obtain it.

(J) Of compelling Performance of an Award by Bill in Equity.

(K) In what Caſes, when, and in what Manner Awards may be relieved againſt.

(A) The

Page 132 **(A) The Matter in Controverſy.**

(*Where the*) But ſee 3 Bl. Com. 16. Ld. Raym. 115. Kyd. 34 to 40. In the year 1[illegible] we find a very important arbitration by the keeper of the king's privy ſeal, the chief ju[illegible] of the King's Bench, and one of the other judges of that court, arbitrators nominated [illegible] appointed by King Henry V. to ſettle a long controverſy between the biſhop and the prior of [illegible] church of *Ely*, concerning their ſeveral claims to eccleſiaſtical and temporal juriſdiction, and [illegible] land of ſeveral manors. Bentham's Hiſt. El. Append. 27. e. MSS. Cotton. C. 11. fo. 3[illegible]

(*A Certain and*) Godfrey v. Godfrey, 2 Mod. 303. S. P. And ſo things which cannot be [illegible] mitted by themſelves, may, when joined with things of an uncertain nature, as debt on [illegible] 6 H 4. 6. a. b. Cuxal v. Sharp, 1 Keb. 937. Morris v. Creech, 623. 659. 1 Lev. 292. [illegible] Debt for arrears of rent aſcertained by a leaſe, 10 H. 7. 4. Damages recovered by verdict [illegible] judgment. Goldſb. 91. 2.

Cald. 30. Rex v. Juſtices of Northampton. An appeal at ſeſſions againſt a poor-rate may, with the conſent of [illegible] parties intereſted, be referred by the juſtices to arbitration.

Page 133 **(B) The Submiſſion; and therein of the differe[illegible] Kinds, and the Revocation thereof.**

(*This Submiſſion may*) But now an action may be maintained in all caſes upon the ſubmi[illegible] ſion itſelf. Purſlow v. Bailey, 2 Ld. Raym. 1039. Kyd. 7.

36 H. 6. 8. 22 E. 4. 25 Owdy v. Gibbons, Comb. 100. If the ſubmiſſion be by bond, ſuch bond may be given to a third perſ[illegible] or even to the arbitrator himſelf; and it may be given by other perſ[illegible] than the parties themſelves who will incur the forfeiture, if the parties [illegible] not perform the award.

Hayes v. Hayes, Cro. Car. 433. It is not neceſſary that in each of the bonds of ſubmiſſion it ſho[illegible] appear of how many perſons the parties to the ſubmiſſion conſiſt. Th[illegible] where it appeared that there were three brothers, *Richard*, *Robert*, a[illegible] *William*; that their father had deviſed certain lands to the two latter, a[illegible] that, ſeveral diſputes ariſing between them and *Richard*, they had, [illegible] bond, ſubmitted to arbitration; *Richard* entering into a bond to *Ro[illegible]* and *William* jointly; but they giving him ſeparate bonds; it was hold[illegible] after ſeveral arguments, on an action brought by *Richard* againſt *Ro[illegible]* that the ſubmiſſion was properly made.

Samways v. Eldſley, 2 Mod. 73. The ſubmiſſion may be by indenture with mutual covenants to ſtand [illegible] the award.

Page 134 (*But where*) In 2 Keb. 10. 20. 24. and Sid. 281. there is an inſtance of an ac[illegible] on the caſe being maintained for the countermand of a parol ſubmiſſion; and th[illegible] can be no doubt but an action will lie in ſuch a caſe, for a parol ſubmiſſion amounts to a promi[illegible] perform.

Newgate v. Degeldir, 2 Keb. 10. 20. If one of the parties firſt revoke the authority of the arbitrators, [illegible] afterwards requeſt them to make an award, that will not ſave the for[illegible] ture. But where the ſubmiſſion limits no time for the making of [illegible] award, it ſhall be underſtood to be within convenient time; and if in ſu[illegible] a caſe the party requeſt the arbitrators to make an award, and they do [illegible] a revocation afterwards will be no breach of the ſubmiſſion.

Noble v. Harris 3 Keb. 745. One party may revoke with the conſent of the other; but conſent [illegible] the revocation will not ſave the penalty of the bond.

f a Fine) But if the husband and wife submit again, the Courts will not encourage the oppe party in suing for the forfeiture. Samin v. Norton, 3 Keb. 9.

By the 9 & 10 W.) A consent in the submission bond that the award shall be made a rule of rt, does not warrant the making of the suqmission a rule of Court. 2 Str. 1178. 2 Barnard. A submission may be made a rule of Court on the motion of one party, and producing bond executed by the other, Barnes, 55. So it may, though it be no part of the condition he bond, but be thereunder written, and not signed, if it appear by affidavit that it was writbefore the execution of the bond. *Ibid.* (*a*) The Court will compel a witness to a submission rbitration, to make affidavit of the execution, in order to make a rule of Court. Str. 1. nes, 58.

was made to put submissions to arbitration in cases where no cause was depending upon the e footing as where there was one, and is only declaratory of what the law was in the latter

There is no authority given to the court by the stat. 9 & 10 *W.* 3. *c.* to make a parol submission to an award of a rule of court. Anfell v. Evans, 7 Term Rep. 2.

) The Parties to the Submission, and who are bound by it.

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An executor may, as such, submit to arbitration. But if the arbitra- s do not award as much as he would be entitled to at law, it will be a vastavit for the residue. As, if an executor submit to arbitration, and e awarded, that for 70*l.* he release an obligation given to his testator, 100*l.* for performance of covenants which were broken by the obligor, 100*l.* shall be assets, for the submission was his own act. Dy. 261. Office Extr. 159. Anon. 3 Leon. 53. But the submission of itself is not an ad-

ssion of assets. Pearson v. Henry, 5 Term Rep. 9. Where the executor engages himself tionally, and in broad terms submits to pay whatever shall be awarded, he cannot afterwards ort to the plea of *plene administravit*. Barry v. Rush, 1 Term Rep. 691.

Executors are bound by the submission of their testator. 1 Ld. Raym. 248. 2 Ventr. 249.

(*If an Infant*) Equity will not decree an award to bind an infant. Eq. Cas. Abr. 50. In the e of Roberts v. Newbold, it is ruled, that a guardian may submit for the infant, and enter o a bond for the performance of the award. Comb. 318. And in the case of the Bp. of Bath d Wells v. Hippesley, 28 Ch. 2. cited by Ld. Hardwicke, 3 Atk. 614., Lord Nottingham held infant bound by an award submitted to by the bishop of the one part, and the infant and his ardian of the other part; and on a bill to confirm it, decreed accordingly.

If a man authorize another on his behalf to refer a dispute between the incipal and another, an award consequent on such submission is binding the principal alone; and it is no objection that the agent had no inteest in the subject of the dispute. But if the agent expresly bind himself r the performance of the principal, not only the principal who authozed him, but the agent himself, is bound by the award (*a*). Dyer, 216. b. Caghill v. Fitzgerald, 1 Wilf. 28, 58.

(*a*) In general, a man is bound by an award to

hich he submits for another. Alsop v. Senior, 2 Keb. 707. 718. Shelf v. Bailey, Com. Rep. 3. And where an attorney submits without the expres authority of his principal, the attorey only, and not the principal, shall be bound. Bacon v. Dubarry, 1 Salk. 70. 1 Ld. Raym. 46. S. C. Comb. 129. S. C. Carth. 412. S. C. In the case of Evans v. Cogan, Ld. King thought, hat daughters of age and unmarried, might, though not parties to the submission, by consent bsequent, be bound by an award to which their mother submitted, touching the title of an state which was limited to them after her death. 2 P. Wms. 449. The assent of a solicitor to reference by rule of a court of equity, it has been holden, is not obligatory upon the client, without his actual concurrence; though such a reference, by rule of *nisi prius*, will bind the client; Ch. Rep. 104. 1 Ch. Cas. 86.; but the former point may now be doubted.

If

Strangford v. Green, 2 Mod. 228. If a man ſubmit, for himſelf and partner, all matters in difference between the partnerſhip and another, the partner ſubmitting ſhall be bound to perform the award; but the other ſhall not, becauſe he is a ſtranger to the award.

Mudy v. Oſam. Lit. 30. Hetl. 4. S. C. If the parſon on the one hand, and ſome of the pariſhioners on the other, in behalf of themſelves and the reſt of the inhabitants of the pariſh, but without the authority of the reſt, ſubmit to arbitration by bond, the pariſhioners ſubmitting ſhall alone be anſwerable for a breach of the award by any of the other pariſhioners.

By ſtat. 5 *G.* 2. *c.* 30. *ſ.* 34., it is provided, "That the aſſignee or "aſſignees of any bankrupt's eſtate and effects, with the conſent of the "major part in value of the bankrupt's creditors who ſhall have duly "proved their debts under the commiſſion, and who ſhall be preſent at "any meeting of the ſaid creditors, purſuant to notice to be for that pur-"poſe given in the *London* Gazette, may ſubmit any difference or dif-"pute between ſuch aſſignee or aſſignees, and any perſon or perſons what-"ſoever for or on account, or by reaſon or means of any matter, cauſe, "or thing whatſoever relating to ſuch bankrupt or bankrupts, his, her, or "their eſtate or effects, to the final end and determination of arbitrators "to be choſen by the ſaid aſſignee or aſſignees, and the major part in "value of ſuch creditors, and the party or parties with whom they ſhall "have ſuch difference, and perform the award of ſuch arbitrators: and "the ſame ſhall be binding on all the creditors of the ſaid bankrupt or "bankrupts; and the aſſignees are thereby indemnified for what they "ſhall fairly do according to the directions aforeſaid."

1 Atk. 91. *Ex parte* Whitchurch. Lord *Hardwicke* held, that under this clauſe the creditors could not give a general power to the aſſignees to ſubmit matters to arbitration at their own diſcretion, but that they muſt have a ſpecial meeting, upon notice given for that purpoſe in the *London* Gazette, to conſider of the particular caſe intended to be ſubmitted to arbitration.

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(D) The Arbitrators or Umpire.

(*The Arbitrators are Perſons*) Q of this? and ſee the part referred to in Weſt, where the very perſons are excepted againſt as incompetent. In 8 E. 4. 1. & Br. tit. *Arbitrament*, 37. there is an inſtance of an unmarried woman, the Ducheſs of *Suffolk*, being an arbitreſs.

(*The Arbitrators are Perſonally*) 2 Atk. 504. So if they award releaſes, but leave it to the Court to give directions to ſettle the form; *aliter*, if they award, that the Court ſhall ſettle the releaſe firſt, and the arbitrators will afterwards conſider whether they ſhall order it. *Ibid.* So if they recommend it to the parties to appoint a receiver, and if they do not, requeſt the Court to do it; the award ſhall not be avoided; for it is not a delegation of their power, but a recommendation; and if the parties do not comply, it is ſurpluſage. *Id.* 501.

But not as any but the officers of the ſuperior courts ſhould ſettle. B. R. H. 181. 2 Str. 1025.

(*If the Condition of an Obligation be to Stand to the Award of Certain Perſons*) If arbitrators join with the umpire in the deed of umpirage, it is merely ſurpluſage, and the deed is good. The diſtinction taken in Bulſtr. 184. is abſurd. 1 Bl. Rep. 463. 3 Burr. 1474.

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(*The Arbitrators may*) In 2 Term Rep. 644. it is expreſsly determined, that the arbitrators may elect an umpire the very inſtant they begin to take the matter into conſideration, and that this is the faireſt way of chooſing one.

As

An award made by the umpire merely on the evidence as ſtated by the arbitrators, without any re-examination of the witneſſes, if he were not required by the parties to re-examine them, is good. Hall v. Lawrence, 4 Term Rep. 589.

(E) The award itſelf, or final Determination of the Arbitrators or Umpire. Page 139

(*If Arbitrators Award*) But ſuch an act muſt appear to be for the party's benefit. Bedam v. Berkſon, 1 Ld. Raym. 123.

(*But an Award*) An award that all proſecutions ſhall ceaſe in all actions between *A.* and *B.* will not extend to ſuits where *A.* is plaintiff, and *B.* and others are defendants. Barnardiſton v. Fowler, 10 Mod. 204.

(*If two Submit*) Award of general releaſes under a ſpecial reference, is good for the matters referred, and void as to the reſt. 2 Bl. Rep. 1115. So on a ſubmiſſion by an executor and an adminiſtrator in thoſe characters, an award that they execute general releaſes to each other, is good, for the Court will not intend that any thing is ordered to be releaſed except the matter in diſpute between the parties. 1 Term Rep. 691.

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(*A Submiſſion of all Matters*) This point does not appear in the caſe in the year-book referred to in Bulſtr.

Under a reference of all matters in difference between partners, the arbitrators may award a diſſolution of the partnerſhip. So between a maſter and apprentice, they may award the indentures of apprenticeſhip to be delivered up. Green v. Waring, 1 Bl. Rep. 475.

Under a reference *of all matters in difference between the parties in the cauſe*, the arbitrators may travel out of that particular cauſe, and take into conſideration any croſs demands between the parties, though not pleaded by way of ſet-off: and the coſts being to abide the event makes no difference. But under a reference of *all matters in difference in this cauſe between the parties*, they are confined to the matters in diſpute in that cauſe only. But this diſtinction in the terms being perhaps too refined for the general underſtanding of mankind, it is recommended (*a*) to make the former a reference *of all matters in difference between the parties*, omitting the words *in the cauſe*, and the latter a reference *of all matters in difference in the cauſe*, omitting *between the parties*. Malcolm v. Fullarton, 2 Term Rep. 645. Smith v. Muller Term Rep. 626. (*a*) By Buller, J.

Aſſignees of a bankrupt having received a ſum of money from a debtor to the bankrupt as due to his eſtate, and having commenced an action againſt the ſame debtor for a further demand on the ſame account, to which the general iſſue only was pleaded, and this cauſe being referred to arbitration, it was holden, that, under the general reference above ſtated, the arbitrators might award that the aſſignees ſhould repay a part of the money which they had already received, if it appeared to have been paid by miſtake. Malcolm v. Fullarton, 2 Term Rep. 645.

A demand as executor may be taken into conſideration under a general reference. Elletſon v. Cummins, 2 Str. 1144.

(4)

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(*An Award may*) 4 Leon. 49. Lutw. 554. Hawkins v. Coclough, 1 Burr. 274. But where the ſubmiſſion is of certain things ſpecifically named, with a proviſion or clauſe, *ita quod*, the arbitrator ought to make his award of all, otherwiſe it will be void. Baſpole's caſe, 8 Co. 98. Hamond v. Hatch, Goldſb. 125, p. 14. This conditional clauſe is uſually expreſſed by the words, "*Ita quod de præmiſſis*:" but the expreſſion, "ſo as the *ſame* award be made and delivered by a "particular day," admits of a ſimilar conſtruction, the "*ſame*" referring to every thing before mentioned. Riſden v. Inglet, Cro. El. 838. A proviſo that an award be made on or before a particular day, implies a proviſo that it be made "of the premiſes," though that be not expreſſed. Lee v. Elkin, Lutw. 545. Where there is a proviſion for the appointment of an umpire, the conditional clauſe, if inſerted with reſpect to the arbitrators, extends to him, though it be not repeated. Bean v. Newbury, 1 Lev. 139.

Hopper v. Hackett, 1 Lev. 132. 1 Keb. 738.

An award of one particular thing for the ending of a hundred matters in difference, is ſufficient: as, where the ſubmiſſion was of all matters in controverſy, and the award taking notice of ſeveral matters, ordered the defendant to pay to the plaintiff four pounds for arrears of rent, and towards the repair of the houſe.

Baſpole's caſe, 8 Co. 98. a. But ſee King v. Hammerton, 1 Barnard. K. B. 316, where the general principle, here laid down, is contradicted.

Where ſpecifick ſubjects of difference are ſubmitted, but without the conditional clauſe "of and concerning the premiſes," it is ſaid the arbitrator may make his award of any of them without conſidering the others.

8 Co. 98. a. *Vid.* 2 R. 3. 18. Br. tit. *Arbitrament*, p. 44, cited in Plowd. 289. Bean v. Newbury, 1 Lev. 140. 1 Keb. 885. *contr.*

As it is of ſeveral particular things, ſaith Lord *Coke*, ſo it is of ſeveral particular perſons; and therefore if two of the one part, and one on the other part, ſubmit themſelves, the arbitrator may make an arbitrament between one of the two of the one part, and the other of the other part, and it will be good.

Joyce v. Haines, Hardr. 399.

Where the ſubmiſſion was by two plaintiffs on one ſide, and defendant and his wife on the other, of all matters and controverſies between them, "or any of them;" the award was holden good, though nothing was awarded concerning the defendant's wife, on account of the words "between them or any of them."

Arnold v. Pole, Roll. Abr. tit. *Arb.* D. 5. Carter v. Carter, 1 Vern. 259.

If *A.* and *B.* on one ſide, and *C.* on the other, ſubmit to the award of *J. S.* all matters between them; *J. S.* may make an award of any matter between *A.* alone and *C.* for the ſubmiſſion ſhall be taken diſtributively, and perhaps there was no matter between *B.* and *C.*

Athelſton v. Moon, Com. Rep. 547.

A ſubmiſſion of all matters in difference between the parties, when there are more than one on one ſide, is the ſame as a ſubmiſſion of all matters between the parties, or either of them; and therefore on ſuch a ſubmiſſion an award of a ſum to be paid by one of the two or more to the ſingle party is good.

Harris v. Painter, Ro. Abr. tit. *Arb.* O. P. cited in Lutw. 1628.

But if, in ſuch caſe, it appear in the ſubmiſſion that there were differences between the perſon on one ſide, and all the parties on the other, and the ſubmiſſion be with the proviſional clauſe; the award muſt comprehend all the parties, becauſe the ſubmiſſion is under a condition that it ſhall do ſo.

Where

Where the ſubmiſſion to an award was that it ſhould be made on or before the firſt day of *Michaelmas* term, and the time was enlarged *until* the firſt day of *Hilary* term, Lord *Thurlow* held that an award made on the firſt day of *Hilary* term was good, that it was an enlargement of the time in *ſtatu quo*, and therefore muſt include that day. Knox v. Simmonds, 3 Br. Ch. Rep. 358.

The awarding of coſts is incidental to the power of an arbitrator: a proviſion therefore in the reference that the coſts ſhall abide the event of the award, is a reſtriction of the power which he otherwiſe neceſſarily hath of giving coſts at his election. 2 Term Rep. 644.

By the terms *event of the award*, muſt be underſtood *the legal event*, and therefore under this proviſion the party ſhall pay only ſuch coſts as he would have been liable to pay if a verdict had paſſed againſt him. Coſts therefore ſhall not be taxed againſt executors, nor ſhall plaintiff be entitled to any, if his original demand be found by the arbitrators to be under forty ſhillings. So where in an action of treſpaſs for pulling down the plaintiff's gates and aſſaulting him, the defendants juſtified to all the counts except one under different rights of way, and pleaded not guilty to the whole, and the arbitrators awarded the defendants a right of way, but different from thoſe claimed in the pleas, and gave five ſhillings damages for the aſſault, which they found was committed in the exerciſe of the right of way negatived by the arbitrators; it was holden that the plaintiff was entitled to no more coſts than damages; for the arbitrator's award is not equivalent to a judge's certificate under the ſtatute of 22 & 23 *Car.* 2. *c.* 9. 3 Ter. Rep. 138. Swinglehurſt v. Altham, Highnam and another executors, v. Haſſeil, Hil. 14 G. 3 Butler v. Grubb, Hil. 23 G. 3. K. B.

An award to the plaintiff of "the coſts by him ſuſtained in the ſaid "action to be taxed by the proper officer," does not include the coſts of the reference, but is confined merely to thoſe of the action. Browne v. Marſden, 1 H. Bl. Rep. 223.

(*As an Award*) The certainty of an award may be judged of according to a common intent, and conſiſtent with fair and reaſonable preſumption: therefore, where the ſubmiſſion was in general terms, "of all actions, "&c.," and the arbitrator recited *one*, which was in fact depending, referring to the ſubmiſſion, as authorizing him to determine it, the award was holden ſufficiently certain, for there was no probable preſumption of any other cauſe of complaint, the parties not having deſired to be heard upon any more than that one. Hawkins v. Coclough, 1 Burr. 274. Page 142

An award, "that the defendant ſhall deliver certain goods particularly "named, and three boxes, and *ſeveral* books, without naming the books," is uncertain: the books ſhould have been particularly deſcribed, unleſs it had been ſaid that the books were within the boxes, by which they would have been ſufficiently aſcertained. So, an award "That one of the par-"ties ſhall deliver up to the other a certain writing obligatory, or a certain "bill obligatory which he had before," is altogether uncertain, for it does not ſay of what ſum, or of what penalty the bond is, or of whom it was obtained. Cockſon v. Ogle, 1 Lutw. 550. Bedam v. Clarkſon, 1 Ld. Raym. 124.

(*If an Award be that one of the*) In the caſe from March an infant was concerned.

An award "that the one ſhall ſeal and deliver a demiſe to the other, "*or* his aſſigns, is certain enough; it ſhall be underſtood to himſelf." Wats v. Philips, 1 Keb. 335.

An award "that the plaintiff ſhall pay the defendant a certain ſum on "a particular day, and that then the defendant ſhall re-aſſign the land "mortgaged to him by the plaintiff," is ſufficiently certain, though it do not ſay for what term the re-aſſignment ſhall be, whether for years, life, Roſſe v. Hodges, 1 Ld. Raym. 234.

life, or in fee; for it shall be understood to be for the whole interest mortgaged.

Ferser v. Proud, Cro. J. 423. Linfield v. Feme, (a) 3 Lev. 18. Kyd 136.

It is no objection to an award that it is conditional, as that one of the parties shall enjoy a house for three years and a half, and shall pay his rent every half year; and that if he fail in payment, the award for the enjoyment of the house shall be void. So (a) that he shall pay the other 10*l.* on condition that each shall acquit the other; for it shall be taken as a positive injunction that they *shall* acquit each other.

Kockill v. Wetheral, 2 Keb. 838.

So it may be made with a penalty to attach on the non-performance of a preceding part; as to pay 12*l.* on two several days, and on default of payment the first day, to pay the whole 12*l.* immediately after.

Collet v. Powell, 2 Keb. 670.

Where it is left to a subsequent event to ascertain precisely the thing awarded, it will be sufficient if that event must necessarily happen; as if the submission be with respect to a way leading to a house, and the award be, that the one shall give a bond of 300*l.* to the other payable at three years' end; and in case the way be taken away, then that he shall pay less by a certain sum, and if not, a certain sum more.

Kyd, 137. Lee v. Elkins, 12 Mod. 585. Lutw. 545. S. C.

An award in the alternative, that the party shall do one thing or another, is not liable to the objection of uncertainty; for when he has done one of the things he has performed the award; as if the award be that he shall deliver up to the other party a certain deed, or pay him 50*l.* and such an award in the alternative seems to be the best mode of compelling a party to exert himself to procure the performance of what is not immediately in his power.

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(A. *and* B. *Submit.*) But if the award recite a trespass committed by the plaintiff against the defendant, and another by the defendant against the plaintiff, and for that reason order, "that "the one shall be quit against the other, and the other against him;" the objection of want of mutuality will not lie against it. 7 H. 6. 41. 21 H. 6. 9. 22 H. 6. 39. Br. Arbitrament, p. 33.

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(*If an Award be to Pay*) But see Nichols v. Granwin, Brownl. 58. Hob. 49.

Strangford v. Green, 2 Mod. 228. 1 R. Abr. tit. *Arb.* K. 10. Harris v. Knipe, 1 Lev. 58.

An award that all suits shall cease is equivalent to an award of a release.

So that all "controversies" shall cease, and that the one shall pay 12*d.* to the other, although he have nothing given to him.

R Abr. 254. p. 12. 260. p. 1.

An award was made "of and upon the premises," that one should pay the other 10*l.* at a certain day, and that the parties aforesaid shall continue in love and friendship as formerly: it was holden to be an award on both sides, and that it should be intended in satisfaction of all matters between the parties, more especially as it was said, that the parties should be friends as formerly.

Ormelade v Coke, Cro. Jac. 354. Hob. 49. 1 Freem. 285. 266. (a) Hopper v. Hackett, 1 Lev. 132. (b) Hawkins v. Coclough, 1 Burr. 277.

An award "that the one shall pay 10*l.* to the other in satisfaction of "a trespass," is good; for both parties have benefit, the one receiving money, and the other being discharged of the wrong. So (a) an award "that one shall pay so much *for* arrears of rent," the word *for* implying that it is to be in satisfaction of the arrears. So (b) for having made the first breach in the law, implies that the sum awarded shall be taken in satisfaction.

An

An award recited that there had been conſiderable dealings between the plaintiff and the defendant, that the plaintiff had paid to the defendant all his demands, and that 40*l.* were due to the plaintiff, and then ordered that the defendant ſhould pay that ſum to the plaintiff. It was holden that the recital of the dealings between the parties, and of the payment by the plaintiff of all that was due on his part, implied that the payment of the 40*l.* by the defendant was intended to be in full ſatisfaction of the debt. Elliott v. Chevall, Lutw. 541.

It ſeems now not to be neceſſary that an award ſhould expreſs that a ſum awarded to be paid, or an act to be done, in favour of one of the parties, ſhall be in ſatisfaction; or that it ſhould contain any equivalent terms: diſcharge to the other muſt neceſſarily be preſumed from the payment of the ſum, or the performance of the act. Kyd, 153. Tomlinſon v. Arriſkin, Com. Rep. 328. Cooper v. Hirſt Lutw. 539.

(*An Award that all*) In 2 Str. 1024. That all manner of proceedings (if any) depending at law, ſhall be no farther proſecuted, holden not to be final: but ſee 6 Mod. 34. *contr.* Page 147

An Award "that each of the parties ſhould pay his own charges at law, and that the defendant the plaintiff 5*s.* for his making the firſt breach," was holden to be good; for it muſt neceſſarily be preſumed that the ſuits were to ceaſe, and the 5*s.* to be paid by the defendant to be taken as a diſcharge. Hawkins v. Coclough, 1 Burr. 274.

If an award direct that debts due from the parties jointly ſhall be paid by them in moieties, and then mentions three ſuch debts only, the Court will not preſume that there are more. 2 Atk. 501.

An award "that if the plaintiff, on account prove certain articles againſt the defendant, then he ſhall pay ſo much as the plaintiff was damnified thereby," is not final. So alſo, "that if the defendant make out upon oath before a judge, any diſburſements made on account of the plaintiff, that the plaintiff ſhall pay them; but in caſe the defendant do not prove theſe matters within a certain time limited, then the parties ſhall give general releaſes;" this is not final. Selſby v. Ruſſel, Comb. 456.

But an award of a thing to be done at a future day, if ſuch thing muſt then be abſolutely done, is final; as to pay money (*b*) at three ſeveral days to come. So to give a note (*i*) or a bond for the payment of money at a future day. (*b*) Palm. 110. *per* Dodderidge J. (*i*) Booth v. Garnett, 2 Str. 1082.

An award that *A.* ſhould execute a covenant to indemnify *B.* againſt a *qui tam* action begun at *A.*'s inſtance in the name of another perſon, was holden to be good, for it was not in the power of the arbitrators to order the ſuit to ceaſe, the poor being equally intereſted in it with the informer; and in this caſe too the informer was (*a*) a third perſon. Philips v. Knightley, 2 Str. 903. 1 Barnard. 84. 151. 387. 457. 463. S. C.

Fitzg. 54. 108. 270 (*a*) According to the report by Fitzgib. the former was the plaintiff in the preſent action.

It is enacted by ſtatute 23 G. 3. *c.* 58. "That for every piece of vellum or parchment, or ſheet or piece of paper upon which ſhall be engroſſed, written, or printed any award, there ſhall be charged a ſtamp duty of five ſhillings."

An award that the defendant ſhould pay to the plaintiff ſuch a ſum of money unleſs within twenty-one days (which, in fact, was after the time limited for making the award) the defendant ſhould exonerate himſelf by affidavit from certain payments and receipts, in which caſe he was only to pay a certain other leſs ſum, was holden to be illegal and void, becauſe uncertain and inconcluſive. Pedley v. Goddard, 7 Term Rep. 1.

(F) The

Page 148 (F) The Conſtruction and Effect of the Award, and herein of the Performance thereof.

(*It is an Eſtabliſhed*) A miſtake in matter of calculation, or an unintentional omiſſion, which turns the balance to the other ſide than that on which it ought to fall, will not vitiate an award *in toto*. Ambl. 245.

(*If it be Provided*) But this was not the point on which the judgment turned.

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(*If the Submiſſion be of a*) A matter was referred by conſent at *niſi prius* to three of the jury, and before the award was made, one of the parties ſerved the arbitrators with a *ſubpœna* out of Chancery. This was holden to be a breach of the rule, and an attachment *niſi* was granted. Salk. 73. Under a rule of court to abide by an award, and not to bring any bill in equity, an award is made, that *A.* ſhall pay to *B.* 20*l.*: this award *A.* moves the court to ſet aſide; but the court confirming it, he pays the money, and then files a bill: this is a high contempt in *A.*, his counſel, and attorney. Rex v. James Wheeler, 3 Burr. 1256.

Ld. Raym. 234. If an award order a defendant to re-aſſign to the plaintiff an eſtate in mortgage, he is bound to do ſo without requeſt.

10 Mod. 204. Roll. Abr. 246. An award that all ſuits ſhall ceaſe between *A.* and *B.* does not extend to ſuits between *A.* on the one ſide, and *B.* and *C.* or *B.* and his wife on the other, ſo that the proſecution of ſuch a ſuit is no breach of the award.

Mo. 3. p. 8. Where an award was that one ſhould make a leaſe for years to another rendering rent, and the leaſe was accordingly made, it was holden that the arbitration-bond was not forfeited by the non-payment of the rent, becauſe the leſſor had his proper remedies for that by diſtreſs or debt; but if the award had been that the leſſee ſhould pay the rent, the bond had been forfeited. So if it be awarded that one ſhall enter into a bond for the payment of money to another, the entering into the bond is a ſufficient performance of the award, nor will the non-payment of the money, according to the condition of ſuch bond, be any breach of the award.

Str. 903. 1 Barnard. 463.

Baker v. Rocheſter, 1 Sid. 365. Where the award orders a releaſe to a time beyond the ſubmiſſion, a releaſe to the time of the ſubmiſſion is a ſufficient performance.

Squire v. Grevell, 6 Mod. 34.

Sweet v. Hole, Ca. temp. Finch. 384. A conſiderable number of years having elapſed ſince the making of an award, is no objection to the party being called upon to perform it.

Page 151 (G) Of the Pleadings in Awards.

Farrer v. Bates, All. 5. Clapcott v. Davy, 1 Ld. Raym. 612. An award which does not extend to the whole of the thing demanded, is not a good plea to an action on the demand.

(*a*) 7 H. 4. 31. b. Br. 44. b. p. 48. (*b*) Thomlinſon v. Arriſkin, Com. Rep. 328. To an action of treſpaſs a defendant may ſometimes plead an award made on ſubmiſſion by the plaintiff and (*a*) a ſtranger: ſo he may plead (*b*), that the treſpaſs complained of was committed by the defendant and another, and that the matter was afterwards ſubmitted to arbitration by the plaintiff, the defendant, and the other treſpaſſer.

To

To a plea of an award, the plaintiff may reply that the ſubject mat- 4 Ter. Rep.
of his action was not included in the reference, though the terms 146.
ſuch reference were general, of all matters in difference, and the
uſe of action was in point of fact ſubſiſting at the time of the re-
ence.

(*If in an Action*) In an action on the award itſelf it is neceſſary to ſet out in the declaration
ly ſo much as is ſufficient to ſupport the plaintiff's caſe: but in an action of debt on the ar-
ration-bond, the whole demand muſt be ſet out at length, though *Holt*, Ch. J. thought, that
en in this caſe the omiſſion of that which is void would not be material. 1 Burr. 278. 1 Salk.
There is this difference again between actions on the award itſelf, and actions on the arbi-
tion-bond: in the former caſe the plaintiff muſt ſtate a mutual ſubmiſſion; in the latter, it is
neceſſary, for by oyer it appears on the face of the condition, and the plea of *nul agard fait* ad-
its it. 2 Str. 923.

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(*If in Debt*) If an award be good in part, and bad in part, it is ſufficient to aſſign a breach
that part which is good. 2 Wilſ. 293.

Where an award was that the defendant ſhould pay to the plaintiff 16*l.* 2 Wilſ. 267.
s., and all ſuch coſts, charges, and expences as the plaintiff had been Fox v.
it unto in a cauſe then depending between them, and that thereupon they Smith, 293.
ould execute mutual releaſes, it was holden that the breach was pro- Addiſon v.
erly aſſigned in the non-payment of the 16*l.* 10*s.* only; for that the bond Gray.
as forfeited by the breach of any one part of the award, and the recovery
this action would be a bar to any future action brought on the bond for
e coſts, *&c.* when aſcertained.

To a plea of *nul agard* the plaintiff replied that an award was made Biſſex v.
ter the execution of the bond, and before the exhibiting of his bill (to Biſſex, 3
it) on, *&c.* in the condition mentioned. It was adjudged on a ſpe- Burr. 1730.
al demurrer, that the time of making the award is poſitively enough
leged under the *ſcilicet*, and that the defendant might have taken iſſue
on it.

In debt on an award to pay ſo much money and to execute mutual Bell v.
releaſes to the date of the arbitration-bond, judgment will not be arreſted Simpſon,
ecauſe it does not appear upon the record that there was any arbitration- 2 Wilſ. 10.
ond, though this perhaps may be a good objection at the trial.

In debt upon bond conditioned to perform the award of *J. S.*, ſo as it Henderſon
e made in writing under his hand and ſeal, *&c.* it is not ſufficient for v. William-
he plaintiff in his replication to ſtate that *J. S.* made his award in wri- ſon, 1 Str.
ng, and to ſet it out, but he muſt ſhew that it was under his hand and 116.
al, purſuant to the terms of the ſubmiſſion.

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But no action will lie upon the arbitration-bond, if it appear that the Brown v.
ward was made after the time limited in the bond, though ſuch time Goodman,
ere enlarged by the mutual conſent of the parties. E. 29 G. 3.
3 Ter. Rep.
592. *n.*

An award was that the defendant ſhould pay to the plaintiff 11*l.* on or Lee v.
efore the 7th day of *May*, and the breach aſſigned in that the defendant Elkin
id not pay the ſaid 11*l. ſecundum formam et effectum arbitrii prædicti:* and Lutw. 545.
e Court held it to be well enough, though they ſaid that it would have
een more correct to have aſſigned the breach in the very words of the
ward.

An award may be pleaded to a bill to ſet aſide the award, and open Mitf. Eq.
he account (*a*); and it is not only good to the merits, but likewiſe to Pl. 209.
(*a*) 2 Atk.
295. 501.

the

the discovery (*b*) sought by the bill. But if fraud or partiality are charged against the arbitrators, those charges must not only be denied by way of averment in the plea, but the plea must be supported by an answer, shewing the arbitrators to have been incorrupt and impartial (*c*).

(*b*) 3 Atk. 529. 644.

(*c*) 2 Atk. 396. 501. Kill v. Hollister, 1 Wilf. 129. Mitchell v. Harris, 2 Ves. jun. 129. 4 Br. Ch. Rep. 311. S. C. Wellington v. M'Intosh, 2 Atk. 569. *Vid.* Halfhide v. Fenning, 2 Br. Ch. Rep. 336. *contr.*

A mere agreement to refer matters to arbitration, where no actual reference has taken place, or is depending, will not oust the jurisdiction of any court either of law or equity.

Pope v. Bish, Anstr. 59. Edmunson v. Hartley, *Id.* 97.

It has been ruled in the court of Exchequer, that to a bill impeaching an award, it is proper to plead the award itself nakedly: that the denial of the circumstances which are alleged to impeach it should be only in the answer. This practice, however, seems to prevail only (*a*) in that court. And even in that court, a plea of the award alone, unaccompanied with any answer, where the bill charged that the award had been obtained by a misrepresentation of facts, has been over-ruled (*b*).

(*a*) Butcher v. Cole, before Sir L. Kenyon, at the Rolls, 26th June 1786, cited Anstr. 99.

(*b*) Gartside v. Gartside, Anstr. 735.

(*H*) In what Cases the Performance of an Award may be compelled by Attachment, and the Course of Proceeding to be taken in order to obtain it.

THE submission to arbitration being made a rule of Court, an attachment is granted against the party refusing to perform the award, as for a contempt of that court of which the submission is a rule.

Rex v. Myers, 1 Term Rep. 266.

The attachment in this case is only in nature of a civil execution, and therefore cannot be executed on a *Sunday*.

Robins v. Sayward, Str. 441.

But it is so far criminal, that the motion for it cannot be grounded on the affirmation of a Quaker.

1 Keb. 130. 138. 559. 1 Sid. 452. Sir T. Raym. 35. 152. 2 Keb. 22. 645. 1 Ch. Cas. 185. Hales v. Taylor, 1 Str. 695.

The courts of law were for some time rather scrupulous about interposing in this summary way in order to enforce obedience to awards; though the courts of equity, where the submission was under one of their rules, made no difficulty in doing it. And an attachment is not at this time what the party applying for it is entitled to *ex debito justitiæ*, but it is entirely in the discretion of the court whether to grant it or not: and therefore they have refused it where there hath been contrariety of evidence, or the case hath been a hard one, or the person against whom it hath been moved hath been a bankrupt, and incapable of paying the money awarded.

Stock v. De Smith, Cas. Tem. Hardw. 106. Perry v. Nicholson, 1 Burr. 278. 1 Cr. Pr. 271. 1st ed.

Davila v. Almanza, 1 Salk. 73. p. 19.

If one of the parties revokes the submission, or hinders the arbitrators from proceeding in the award, the court will grant an attachment.

But

But if the party dies, there is no remedy by attachment againſt his re- Webſter v.
eſentatives, for the contempt dies with him. And therefore the Court Biſhop, 2
ill not ſtay proceedings in an action upon the ſubmiſſion bond, or upon Vern. 444.
e award, though the party be in cuſtody on the attachment. But they Paterſon v.
ill not grant an attachment, unleſs under ſome very particular cir- Groſs,
mſtances, where an action hath been already commenced. And if the 2 Barnard.
fendant be taken in execution on a judgment, the attachment will be 227.
ſcharged. Stock v. De Smith, Caſ. Temp. Hardw. 1. 6, 107. Richardſon v. Chancery, 1 Barnard. 386.

If exceptions are made to the award, though it be affirmed, an attach- Morris v.
ent will not be granted; for the non-performance of it, whilſt the mat- Reynolds,
r was *ſub judice*, was no contempt. Salk. 73. p. 11. 2 Ld. Raym. 857. S. C.

The defendant a feme ſole, and the plaintiff agreed to a reference. The Anon.
fendant was awarded to deliver up two notes, and pay a ſum of money; B. R. 1 Cr.
e married, and her huſband refuſed to pay: and it was a queſtion, Whe- Pr. 272.
er the court could grant an attachment againſt both or either of them? 1ſt ed.

The courſe of proceeding in order to obtain an attachment is this; the Kyd on
ward muſt be tendered to the party againſt whom it is intended to move, *Awards*,
d if he refuſe to accept it, affidavit of the due execution of the award, 216. 1 Cr.
d of ſuch tender and refuſal, muſt be made, and on that an application Pr. 271.
the court to make the order of *niſi prius* a rule of court; a copy of 1ſt ed.
is rule muſt then be ſerved on the party refuſing to accept the award: if
e ſtill refuſe to accept it, an affidavit muſt be made of perſonal ſervice of
e rule, and of the diſobedience to it; and then, upon application,
rounded upon that affidavit, an attachment will be ordered.

Where the award is accepted, but the money being demanded is not Kyd, 216.
id, an affidavit muſt be made of the due execution of the award, and
the demand and refuſal of the money. But a demand of the money Longman v.
ade by a third perſon authoriſed ſo to do, by indorſement on the award Holmes,
nſtamped, is ſufficient without any warrant of attorney. 2 Bl. Rep. 990.

Where the ſubmiſſion is made a rule of court, the award becomes ſo of 1 Salk. 71.
ourſe, and therefore the motion for an attachment is the next immediate
ep.

If the ſubmiſſion to the award be made a rule of court under the ſtatute, Bevan v.
e affidavits on which to move for an attachment need not be entitled in Bevan,
ny cauſe, but thoſe in anſwer muſt be regularly entitled. 3 Ter. Rep. 601.

If the time limited by the ſubmiſſion expire without any thing being done, Owen v.
nd a reference to a ſecond arbitrator be ſubmitted to, ſuch ſubmiſſion Hurd,
uſt be made a rule of court, and muſt be by the parties to the record, 2 Ter. Rep.
ſe the court will not interpoſe by attachment. For the court cannot in 643.
ch a caſe enter into the merits of the award, though with the conſent of
e parties, for there is a nullity of juriſdiction.

Where on a reference at *niſi prius*, the plaintiff takes a verdict by con- Kyd, 216.
nt for ſecurity; he may upon an award being made in his favour, either
nter up judgment on the verdict, and take out execution for the ſum
warded, if it do not exceed the ſum for which the verdict was taken, or Forſter v.
pply to the court for an attachment. But he cannot enter up his judg- Brunetti,
ent without the leave of the court, and for this purpoſe he muſt have 1 Salk. 84.
affidavit of the due execution of the award, and the demand and re- Read v.
ſal of the money awarded, in like manner as on a motion for an attach- Garnett,
ent. Barnes, 58.

Robinſon v. Davis, 1 Str. 526.

Upon an affidavit that the original award was loſt by coming up in the *Briſtol* mail, which was robbed, an attachment was moved for upon a copy of it, and granted *niſi*.

Knox v. Simmonds, 3 Br. Ch. Rep. 361.

Where a reference has been ſubmitted to under an order of the Court of Chancery, Lord *Thurlow* ſeemed to think, that the proper motion was not for an attachment, but that the party refuſing to perform the award ſhould ſtand committed. And notice of ſuch motion muſt be perſonal, not on the clerk in court. However nothing was done in that caſe, nor is the practice by any means ſettled.

(I) Of compelling Performance of an Award by Bill in Equity.

Hall v. Hardy, 3 P. Wms. 189. 190.

WHERE the award is to pay a ſum of money, it is ſaid that a bill in equity to compel performance is improper: but where it is to do any thing in ſpecie, a court of equity will ſometimes lend the aid of its decrees to enforce the execution of it. And a bill in general will lie for performance, either where the award hath been made under a ſubmiſſion entered into by order of the court, or where, though the ſubmiſſion be voluntary or the award defective in circumſtances, the parties have long acquieſced in it, or it has been in part executed.

1 Ch. Rep. 86.

2 Ch. Rep. 304.

3 P. Wms. 189, 190.

A court of equity will decree a ſpecifick performance of an award for conveying an eſtate, where the defendant hath received the conſideration money for doing it.

2 Vern. 24. 2 Ch. Rep. 304.

On a ſubmiſſion by bond, an award was made not binding by form of law, by which the plaintiff was to pay the defendant 900*l.* and to ſeal a releaſe to him; and the defendant was to aſſign ſeveral ſecurities he held from the plaintiff. The plaintiff ſold ſome lands to raiſe the 900*l.* expecting the defendant to receive it, as he gave him intimation he would, and tendered him the 900*l.* and a releaſe executed by the plaintiff; and though there was no other execution on the plaintiff's part, and though the award was extrajudicial, and not good in ſtrictneſs of law, yet the Lord Chancellor decreed it ſhould be performed in ſpecie.

1 Ch. Rep. 139.

On a bill of review to reverſe a decree confirming an award, the plaintiff aſſigned for error, that the cauſe was referred to four commiſſioners, and but three certified; that a leaſe which he then inſiſted upon, was not in iſſue in the cauſe; and that he never conſented to the certificate. But notwithſtanding theſe objections, as the decree had been acquieſced in ſixteen years without any attempt having been made to impeach it, the court refuſed to reverſe it.

Ca. Tem. Finch, 22.

Though a court of equity will not hold a defendant to an award where the plaintiff hath neglected to perform his part within the time limited by the terms of it; yet if the defendant after ſuch time accepts part-performance from the plaintiff, in that caſe a performance on his part to the extent of what he has accepted from the plaintiff will be decreed.

Thompſon v. Noel, 1 Atk. 62.

A. and *B.* co-partners ſubmitted differences between them to arbitration, and it was awarded that a part of the ſtock in trade ſhould be depoſited in the hands of a third perſon, part thereof to be delivered from time to time to either party who ſhould pay any debt due from the partnerſhip eſtate, the quantity to be in proportion to the money ſo paid

n. A moiety of the ſtock ſo depoſited was afterwards taken in execu-
n by ſeparate creditors of *A.* as his property; upon which *B.* the other
tner, and the partnerſhip creditors filed a bill to ſet aſide the execution,
to have the moiety of the ſtock ſo ſeized, appropriated to the pay-
nt of their debts, inſiſting, that it was ſpecifically bound by the award,
the execution. But Lord *Hardwicke* diſmiſſed the bill, becauſe the
nerſhip creditors were not parties to the ſubmiſſion, or at all privy to
tranſaction, or under any obligation of abiding by the award.

Nor will a bill in equity lie to carry into execution an award on a vo- Ibid.
ary ſubmiſſion, unleſs there has been an acquieſcence in it by the
ies to the ſubmiſſion, or an agreement by them afterwards to have it
cuted.

All matters in difference in law and equity being referred to arbitra- Hutchiſon
, and made a rule of the court of King's Bench, the award directed, v. Hodgſon
all ſuits between the parties ſhould be diſcontinued; and thereupon Anſtr. 361.
defendant in equity moved that the bill might be diſmiſſed. But the
ion was refuſed; for the court ſaid, they could not act upon the
rd: if the plaintiff proceeded in his bill, the way was to move for an
chment in the court of which the ſubmiſſion to arbitration is made
le: ſo, if he refuſed to diſmiſs his bill, if that were the meaning of
award.

In what Caſes, when, and in what Manner Awards may be relieved againſt.

WHEN an award is put in ſuit at law, no extrinſick circumſtance, Wills v.
nor any matter or fact *debors* can be given in evidence to im- Maccar-
ch it: if it be open therefore to any objection of this kind, the defen- mick,
t muſt apply for relief either to a court of equity by bill, or, if the 2 Wils.
miſſion has been made a rule of any court of law, to the ſummary and 148.
itable juriſdiction of that court of which ſuch ſubmiſſion has been made
le.

Theſe objections being in general founded on the miſtakes or miſcon- 2 Vez. 315.
t of the arbitrators, who are judges choſen by the party himſelf, are 1 Atk. 64.
ived by the courts at firſt with a degree of caution and reſerve; 1 Salk. 73.
ugh, if made out to their ſatisfaction, relief is certainly afforded.

On a bill in equity to ſet aſide an award, Lord Chancellor ſaid, That 2 Vern.
appears that the arbitrators went upon a plain miſtake, either as to 705.
law or the fact, the ſame is an error appearing on the face of the
rd, and is ſufficient to ſet it aſide: *aliter*, on a doubtful point of law, 3 Atk. 495.
ugh the court on deliberation ſhould be of a different opinion.

On a like bill, where it appeared that the arbitrator had made his 3 P. Wms.
rd, notwithſtanding he had been deſired by one of the parties to poſt- 362.
e it till he could ſatisfy him as to ſome facts which the arbitrator had
ceived to be againſt him, Lord *Talbot* ſet the award aſide.

So where the objection was that a part of the evidence had been ſhewn 2 Atk 64.
to one of the arbitrators, and not to both, and the arbitrator to whom Kyd, 240.
d not been ſhewn, ſwore, that he believed if he had ſeen it, his award
ld have been different from what it was, Lord *Hardwicke* declared
award for that reaſon void.

2 Vern. 251. 485. 514. So where one of the arbitrators has had an intereſt in the matter in controverſy, or has been related to one of the parties; or where two of the arbitrators have by fraud or force excluded a third; or where they have heard one party, and refuſed to hear the other; or have choſen an umpire by lot; in all theſe caſes the awards have been relieved againſt.

2 Vez. 315. If one of the arbitrators uſe any expreſſions towards either party, which diſcover bias or prejudice in his mind, a court of equity will ſet aſide the award, though there be nothing to impeach the conduct of the other arbitrator who joined with him in it.

2 Vern. 100. Where the ſervant of an umpire had given out before the time allowed the arbitrators to make their award was expired, that he was ſure his maſter would give ſo much, and he afterwards did give ſo much, which was more than was awarded by either of the arbitrators; the court looked upon this as evidence of fraud and corruption, and therefore decreed the arbitration bond to be delivered up.

Ward v. Periam, 1720, cited by Ld. Hardwicke in 2 Vez. 316. Where an award was made a rule of the court, of K. B. and on a motion on one hand for an attachment, and on the other to ſet aſide the award, that court refuſed to interfere, and left the plaintiff to his remedy at law on the ſubmiſſion-bond, Lord *Macclesfield* conſidered this as a bare bond of award without being made a rule of court, and that therefore as the one party was taking relief by his action, the other was entitled to take relief by bill in equity.

2 Atk. 155. A bill was filed to ſet aſide an award which had been made a rule of the court of K. B. for corruption in the arbitrator; the defendant pleaded the award, and ſubmitted to amend any errors. Lord *Hardwicke* held that the K. B. was the proper court to examine into the corruption or partiality of the arbitrator; but as the anſwer was very looſe and general, and there was an expreſs ſubmiſſion to amend any errors, he ordered the plea to ſtand for an anſwer, with liberty to except.

Ambl. 245. On a bill in equity to ſet aſide an award, the court will not let the party go into any legal objections, except for partiality and corruption; but if the bill is for an account, and prays to ſet aſide an award there, in order to let in ſuch account, the plaintiff may make legal objections.

Caſ. Temp. Hardw. 54. Where the arbitrators took money of one of the parties alone for their charges without any bill delivered, and before the making of their award, Lord *Hardwicke* thought this a ſufficient reaſon to ſet the award aſide; for, if ſuffered, it would be hard to diſtinguiſh what is corruption.

2 Atk. 395. 501. 3 Atk. 529. 644. Mitf. Eq. Pl. 209. If a bill to ſet aſide an award for partiality or corruption be filed againſt arbitrators, the charges of partiality muſt not only be denied by way of averment in the plea; but the plea muſt be ſupported by an anſwer ſhewing the arbitrators to have been incorrupt and impartial.

2 Atk. 396. But where the arbitrator has accepted of the office upon condition that the parties ſhould undertake not to bring any bill in equity againſt him, but a bill is afterwards brought againſt him, and corruption and partiality are charged; the court will order his name to be ſtruck out from being a party.

Andr. 299. The miſconduct of the arbitrators cannot be urged in anſwer to a motion for an attachment, but is a ground upon which to move to ſet aſide the award.

Harriſon v. Grundy, 2 Str. 1178. A motion to ſet aſide an award under the ſtatute, cannot be received till the ſubmiſſion is made a rule of court; and a conſent in the ſubmiſſion bond to make the award a rule of court, inſtead of the ſubmiſſion

been adjudged, will not warrant the court's interpoſition. But ſee
es, 55. ſupra (*B*).

motion to ſet aſide an award under the ſtatute for corruption, muſt
ade before the laſt day of the next term after the award is pub-
d, elſe it is too late, and an attachment for non-performance may

Freame v. Pinneger, Cowp. 23.

a motion to refer back ſuch an award to the arbitrator, though
be no charge of corruption, but merely upon the ground that he had
efore had ſufficient materials, muſt be made before the laſt day of
ext term.

2 Ter. Rep 781.

was holden by Lord *Talbot* that in awards under the ſtatute the
rmation of the ſubmiſſion muſt precede the making of the award; but
hath been over-ruled; and properly enough, for it may happen that
ward may be made in the vacation, and before any term after the
iſſion.

3 P. Wms. 362. 1 Barnard. 152. Kyd, 235.

he ſtatute of *W.* 3. being made to put arbitrations where no cauſe
depending upon the ſame footing as thoſe where there was one,
being only declaratory of what the law was in the latter caſe, it
to follow, that objections which ariſe upon the face of the award
be made at any time; and that the limitation to the ſecond term
nfined merely to ſuch objections as affect the conduct of the ar-
ors.

2 Burr. 701. Barnes 56, 57. Id. 55. *contr.*

was formerly holden, that, on a ſubmiſſion by conſent under an
of a court of equity, exceptions might be made to the award, as to
ſter's report. But Lord *Thurlow* diſapproved of this practice, con-
g that if it lay open to exceptions, it ſeemed rather a reference than
ward: that the proper way is to move to ſet aſide the award; and
opicks in the exceptions will apply to ſuch a motion.

Creſsly v. Carrington, 1 Vern 409. 1 Ch. Ca. 186. Hide v. Cooth, 2 Vern. 109. Wood-

v. Hilton, 1 Br. Ch. Rep. 398. Price v. Williams, 3 Br. Ch. Rep. 164. It is admitted
exceptions will lie to an award; but they muſt be only to ſuch matters as appear on the face
award, not to the facts in the award, or any matter *debors:* an objection of that nature
be made upon motion to ſet aſide the award, ſupported by affidavit. Dick v. Milligan,
Ch. Rep. 117.

a bill in the Exchequer to ſet aſide an award, for undue practice,
efendants pleaded (among other things) that the ſubmiſſion was made
of the court of King's Bench, and that there had been no applica-
o that court purſuant to the ſtatute of 9 & 10 *W.* 3. A queſtion
fore aroſe upon the ſtatute, Whether a court of equity were not pre-
d from examining into the award? The Lord Chief Baron and
n *Comyns* were of opinion that it was not, (the time in B. R. being
ed,) but Baron *Carter* that it was, Baron *Hale dubitante.* At laſt
hole court agreed, that the plea ſhould ſtand for an anſwer, with
y of excepting to it.

Bunb. 265. 1 Barnard 75. 152.

bill in equity will not lie againſt an arbitrator for a diſcovery of the
ds upon which he made his award; but if there be any palpable miſ-
or miſcalculation, the party aggrieved may bring his bill againſt the
in whoſe favour the award is made, to have it rectified.

3 Atk. 644.

ſeems now to be ſettled, that the ſound conſtruction of the act of 9
W. 3. *c.* 15. is, that if a motion be made to ſet aſide an award for
ſick matter, it muſt be made within the time limited by the act, that
efore the end of the next term: but that an application for an at-
ment for not performing an award may be reſiſted at any time *for*
appearing on the face of the award itſelf.

Pedley v. Goddard, 7 Term Rep. 73. Holland v. Brooks, 6 Term Rep. 161.

If

Preſton v. Eaſtwood, 7 Term Rep. 95. If an award be made on an improper ſtamp, and no application be made to enforce it, the court will not ſet it aſide.

Aſſault and Battery.

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(B) In what Manner they are to be charged.

(A) What ſhall be ſaid to be an Aſſault.

2 Salk. 552. 7 Mod. 81. The act of criminal converſation with another man's wife is an aſſault, force and violence being ſuppoſed in law to accompany this atrocious injury to the huſband, in reſpect of whom the conſent of the wife is nothing.

(B) What ſhall be ſaid to be a Battery.

(*Any Injury*) And the act cauſing the injury need not proceed from the *immediate* aſſault of the defendant: as where the defendant threw a lighted ſquib into a market-place, which being toſſed from hand to hand by different perſons, at laſt hit the plaintiff in the face, and put out his eye; it was adjudged that this was actionable as an aſſault and battery. *Per* three juſtices, *contr.* Blackſtone, J. Scott v. Shepherd, 2 Bl. Rep. 892. 3 Wilſ. 403. S. C. So if a perſon puſhes a drunken man againſt another, and hurts him. Short v. Lovejoy, *coram* Lee, Ch. J. Guildhall 1752. Bull. Ni. Pri. 16.

(*So if Two*) But ſee the caſe of Boulter v. Clark, at *Abingdon* aſſizes, *coram* Parker, C. B. who held that it was no defence to allege that the plaintiff and defendant fought together by conſent, the fighting itſelf being unlawful. Bull. *Ni. Pri.* 16. 4th ed. So if one licenſe another to beat him, ſuch licence is no defence, becauſe it is againſt the peace. Matthew v. Ollerton, Comb. 218.

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(*So if One*) Nothing but inevitable neceſſity ſhall excuſe a treſpaſs. Dickenſon v. Watſon, Sir T. Jones, 205. Underwood v. Hewſon, Str. 595. Raym. 467. 2 Bl. Rep. 896.

Gibbons v. Pepper, 4 Mod. 405. 2 Salk. 637. S. C. 1 Ld. Raym. 38. S. C. So if by a ſudden fright a horſe runs away with his rider, and runs againſt a man, it is no battery, and this may be given in evidence on the general iſſue: but if it were occaſioned by a third perſon whipping the horſe, ſuch perſon would be the treſpaſſer.

(B) In what Manner they are to be charged.

Michell v. Neale, Cowp. 828. THE declaration cannot lay the aſſault on a day certain, and on *divers other days and times*: for an aſſault is one entire individual act, and cannot be laid with a *continuando*; and upon ſuch a declaration the defendant could not prepare himſelf with a defence, becauſe he could not know whether the plaintiff meant to go for one or twenty aſſaults.

In the King's Bench, where the action is by bill, the offence ſhould be charged poſitively, and not by way of recital, with a whereas, &c.: but this is not material in the Common Pleas (a), for in that court the writ being ſet out in the declaration, helps the want of a poſitive averment.

Amyon v. Shore, 1 Str. 621.

(a) White v. Shaw, 2 Wilſ. 203. Douglas v. Hall, Barnes, 360. 1 Wilſ. 99.

The plaintiff may lay in his declaration many things in aggravation, for which he himſelf could not maintain an action; as "for making an aſſault upon his ſervants."

Newman v. Smith, 2 Salk. 642.

In an action by huſband and wife for a battery on her, *per quod* the huſband's buſineſs remained undone; on motion in arreſt of judgment, the declaration was holden good, becauſe the battery itſelf is actionable, and the *per quod* only aggravation; and *Holt* ſaid he would not intend the judge ſuffered that to be given in evidence.

Ruſſel v. Corne, 1 Salk. 119, 2 Str. 1094.

The defendant gave in evidence that he was married to the plaintiff; and to encounter that evidence the plaintiff was permitted to prove that ſhe had another huſband living when ſhe married the defendant.

Weſtbrook v. Struttville, 1 Str. 79.

(C) In what Caſes they may be juſtified, and what Pleas may be pleaded to them, and herein of the Manner of ſetting forth the Juſtification.

(*If an Officer*) Where defendant juſtifies under a ſheriff's warrant, the production of it is not required: for it muſt be returned to the ſheriff. Bateman v. Woodcock, Cro. Ja. 372. But a battery cannot in this caſe be juſtified by the *mere arreſt:* the defendant muſt either plead that he gently laid his hands on the plaintiff in order to arreſt him, and that he actually did arreſt him; as in Patrick v. Johnſon, 2 Lutw. 927. 3 Lev. 403. though that way of pleading has been doubted of; or that the plaintiff made reſiſtance, and was going to reſcue himſelf, and by reaſon thereof he beat him in order to ſecure him. for though an arreſt implies an aſſault, yet it does not admit a battery; and further, an officer cannot juſtify beating a man without reſiſtance. Truſcott v. Carpenter, 1 Ld. Raym. 229. Williams v. Jones, Caſ. temp. Hardw. 298. 2 Str. 1049. S. C. Where the injury is a mere breach of a cloſe in contemplation of law, the defendant cannot juſtify a battery *without a requeſt to depart*; but it is otherwiſe where any actual violence is committed, for there it is lawful to oppoſe force with force. Green v. Goddard, 2 Salk. 691. 2 Inſt. 316. Seeman v. Cuppledick, Owen, 150. So a churchwarden may juſtify taking off the hat, or laying hands on a perſon who is diſorderly in church, and turning him out for diſturbing the congregation; but it muſt be by a *mollitèr manus impoſuit*; Howe v. Planner, 1 Saund. 13. So the defendant may juſtify even a *maihem*, if done by him as an officer in the army for diſobedience of orders, or other military offence; and he may give in evidence the ſentence of a council of war upon a petition againſt him by the plaintiff; and if by their ſentence the petition was diſmiſſed, it will be concluſive evidence in favour of the defendant. Lane v. Degberg, H. 11 W. 3. *per* Treby, C. J. Bull. *Ni. Pri.* 19.

(*And on an*) Matter of excuſe may in ſuch caſe be either pleaded, or given in evidence under the general iſſue; but matter of juſtification muſt be always pleaded. Bull. *Ni. Pri* 17. Co. Litt. 282. b. But where in an action for an aſſault and falſe impriſonment againſt the captain of a ſhip, who pleaded *not guilty*; the defendant croſs-examined the plaintiff's witneſſes as to expreſſions uſed by the plaintiff, which would have juſtified the impriſonment, they tending to create mutiny and diſobedience; though this evidence was objected to, yet the judge admitted it, holding *what was ſaid at the time* to be good evidence in mitigation of damages: for every thing which paſſed at the time was part of the tranſaction on which the plaintiff's action was founded, and therefore he could not be ſurpriſed by the evidence. Bingham v. Garnault *coram* Buller, J. London 1788. Eſpin. Ni. Pri. 317.

It

Bull. Ni. Pri. 16. 1 Str. 68.

It is no plea that the defendant hath been convicted on an indictment for the ſame aſſault, and paid a fine to the king; for this ſuit is inſtituted for the private redreſs of the party injured. So *vice verſâ*.

Fetter v. Beale, 1 Salk. 11. Yelv. 68.

A former recovery is a good plea, notwithſtanding ſubſequent damages; for the conſequence of the battery is not the ground of the action, but the meaſure of the damages.

So if a battery be committed by ſeveral, and a recovery had againſt one, ſuch recovery may be pleaded in bar to an action for the ſame battery brought againſt another.

St. 21 J. 1. c. 16. Blackmore v. Tidderly, 2 Salk. 423.

The defendant may plead *not guilty within four years* next preceding the commencement of the ſuit: but *not guilty within ſix years* will be bad.

Co. Litt. 282. See the ſtatute 7 J. 1. c. 5. which empowers juſtices of the peace, &c. to plead the general iſſue, and give the ſpecial matter in evidence.

This being a tranſitory action, in which the time or place are merely inducement, the place cannot be traverſed without ſpecial cauſe of juſtification, which extends to ſome certain place, as if a conſtable of a town of another county arreſts the body of a man that breaketh the peace there, he may traverſe the county, but he muſt not reſt there; he muſt traverſe all other places, ſaving in the town whereof he is conſtable.

Gibbon v. Pepper 2 Salk. 637. Ld. Raym. 38. S. C.

If the defendant *juſtifies* the aſſault and battery, he muſt *confeſs* it, or, on demurrer, the plaintiff ſhall have judgment.

Pendlebury v. Elmott, Cro. El. 268. Truſcott v. Carpenter, 1 Ld. Raym. 229. Jerome v. Phear, Cro. El. 93.

Son aſſault goes to the whole declaration; but a juſtification in any other way applies only to thoſe parts, which it particularly takes notice of, and is therefore bad; nor will a general traverſe as to the reſt ſupply the omiſſion.

Dr. Groenvelt v. Dr. Burwell, 1 Ld. Raym. 472.

To the *vi et armis*, battery, and wounding, the defendant pleaded not guilty; and as to the *reſidue*, juſtified; it was objected, that here was no anſwer to the aſſault: but the objection was over-ruled, for the reſidue includes the aſſault.

Barfoot v. Reynolds, 2 Str. 953. So in the caſe of a wife in defence of her huſband. Leward v. Baſely, 1 Ld. Raym. 62.

In an action againſt a ſervant, if he pleads a juſtification in defence of his maſter, he muſt plead it thus: "That the plaintiff would have beaten "his maſter if he had not interpoſed, *prout ei bene licuit.*" For the ſervant can only ſtrike to prevent an injury, not by way of revenge; and therefore where the ſervant pleaded, "That the plaintiff having aſſaulted "the maſter in his preſence, he, in defence of his maſter, ſtruck the "plaintiff," the plea was holden ill on demurrer, for the aſſault on the maſter might be over, when the ſervant ſtruck the plaintiff.

Hay v. Kitchin, 1 Wilſ. 171. S. C. 2 Str. 1271. by the name of Guy v. Kitchiner. Bull. *Ni. Pri.* 17.

The plea of *ſon aſſault* admits an aſſault; and therefore where the memorandum was generally of the term, and the plaintiff, on the defendant's failure in his plea, went on and proved an aſſault on a day within the term, the Court held it well enough, for it was unneceſſary for him to give any evidence at all, unleſs to aggravate damages, and he ſhall not be nonſuited, becauſe it is amendable by a new bill. If this come out on the defendant's evidence, who has otherwiſe proved his plea, the defendant ought to have a verdict, unleſs plaintiff prove another battery

previous,

ious, which in ſuch caſe ought to be deemed the foundation of the

n aſſault and battery, the defendant pleaded that he was ſeiſed of the ory of *D.* in fee, and that the corn was ſevered from the nine parts, for that the plaintiff would have carried away his corn, he ſtood in nce thereof, and kept the plaintiff from carrying it away; ſo that the n which the plaintiff received was of his own wrong, *&c.* The plain- replied *de injuriâ ſuâ propriâ abſq. tali cauſâ*; and upon demurrer the ication was holden to be good, becauſe the plaintiff claimed nothing he land or corn, but only damages for the battery, which is collateral he title; and therefore a general replication was good; for in a mere lt and battery, the poſſeſſion only can be material; but it is otherwiſe n the right may come in queſtion. Taylor v. Markham, Cro. Ja. 224. Yelv. 157. S. C. 1 Brownl. 215. S. C.

To a plea of ſon aſſault, the plaintiff replied that the defendant at- pted with his whole force to beat and wound a horſe which the plain- had in his care; and that in defence of the horſe he laid his hands n the defendant, *prout ei bene licuit:* this replication was adjudged in- icient; for it ought to have alleged that the defendant had actually ten the horſe before the plaintiff laid his hands upon the defendant; as he plea of *ſon aſſault*, in which the defendant always alleges that the intiff made an aſſault upon him, before he ſays that he defended him- *&c.* Shingleton v. Smith, 2 Lutw. 1481.

A *molliter manus impoſuit* will include a battery where the cauſe is ſuf- ent; for to lay hands on another, againſt his will, is a battery: it will indeed be a defence for a wounding: but if the battery be ſo outrage- , that a *molliter manus impoſuit* is not true, it ought to be ſpecially wn by the plaintiff, elſe it ſhall be a good juſtification. King v. Tebbart, Skin. 387. S. C. Comb. 227. by the name of King v. Peppard.

Where to a plea of *ſon aſſault*, the plaintiff replies *molliter manus impo-* , and the parties agree in the time, there is no occaſion for an averment t it is the ſame treſpaſs, *&c.* *Ibid.*

For damages in this action, ſee tit. *Damages*, D. E.; and for coſts, *Coſts*, B 3.

ASSIGNMENT.

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(A) What Things are Aſſignable.

(*A Poſſibility*) But all rights, titles, and actions may be releaſed to the terretenant, for this vents ſuits and contentions. Lampet's caſe, 8 Co. 48. a.

(*But though*) The king was always an exception to this rule, and his aſſignee may ſue in his n name. Dy. 30. b. p. 208. Equity has ever protected aſſignments of choſes in action, 1 411. 412. and courts of law will now take notice of them; as, where the obligee had aſſig- over a bond, and afterwards became a bankrupt, it was holden, that he himſelf might bring action upon it, notwithſtanding the bankruptcy. Winch v. Keeling, 1 Term Rep. 619. So has been holden that in an action brought on a bond given to the plaintiff in truſt for another, defendant may ſet off a debt due from the perſon beneficially intereſted in like manner as if action had been brought by him. Bottimley v. Brooke, M. 23 G. 3. C. B. Rudge v. Birch, M. 25.

M. 25 G. 3. B. R. cited in 1 Term Rep. 621. and 4 Term Rep. 340. The assignment of a chose in action is a good consideration for a promise: 1 R. Abr. 29. Sid. 212. T. Jones, 222.; though the debt assigned be uncertain. Moulsdale v. Birchall, 2 Bl. Rep. 820.

(*If there be a*) But interests in contingency, respecting personal estates, are assignable in equity for a good consideration. Goring v. Bickerstaffe, 1 Ch. Cas. 8. Cookes v. Bellamy, 1 Sid. 188. Wind. v. Jekyll, 1 P. Wms. 572. Kimpland v. Courtney, 2 Freem. 250. Theobald v. Duffey, 9 Mod. 101. Higden v. Williamson, 3 P. Wms. 132. Duke of Chandos v. Talbot, 2 P. Wms. 608. And a possibility, whether in real or personal estate, is transmissible and devisable; Sheriff v. Wrotham, Cro. Ja. 509. Pinbury v. Elkins, 1 P. Wms. 566. King v. Withers, Ca. temp. Talb. 117. Chauncy v. Graydon, 2 Atk. 616. Peck v. Parrot, 1 Vez. 25. Selwin v. Selwin, 2 Burr. 1131. 1 Bl. Rep. 231. S. C. Dawson v. Killet, 1 Br. Ch. Rep. 119. Barnes v. Allen, 1 Br. Ch. Rep. 181. Moor v. Hawkins, 1 H. Bl. Rep. 34. Roe v. Jones, 1 H. Bl. Rep. 30. 3 Term Rep. 88.

(*b*) Barwicke v. Reade, 1 H. Bl. Rep. 627.

Neither the full (*b*) pay, nor the (*c*) half pay of an officer in the army, can be assigned.

(*c*) Lidderdale v. Duke of Montrose, 4 Term Rep. 248. Flarty v. Odlin, 3 Term Rep. 681. *Contr.* Stewart v. Tucker, 2 Bl. Rep. 1137. By 1 G. 2. st. 2. c. 14 § 7. all assignments of seamen's wages are declared void.

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ASSUMPSIT.

(*An Assumpsit*) The rise and progress of this species of action is very accurately traced in the third and last volumes of Mr. Reeves' Hist. of the law.

(*But here*) There is no foundation for this proposition. It is much more plausible to say, "That where debt lies an action on the case ought *not* to be brought." And that was the point relied upon in Slade's case, 4 Co. 92. but the rule then settled and followed ever since is "that an action of *assumpsit* will lie in many cases where debt lies, and in many where it does *not* lie: *Per* Ld. Mansfield, 2 Burr. 1008.

(A) In what Cases an Assumpsit is the proper Action.

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(*But if the*) Wherever a man resorts to a higher security, the law will not raise an *assumpsit*. Toussaint v. Martinnant, 2 Term Rep. 100 So a promise by a defendant to pay a judgment debt obtained against him, in consideration that the plaintiff would stay execution thereon, is no ground for an *assumpsit*, for it is turning a judgment debt into a debt upon simple contract. But the promise would be sufficient if made by a third person. Anon. Cowp. 129. *Assumpsit* may be maintained on an *express* promise to pay the balance found due on the settlement of accounts upon the dissolution of a partnership, notwithstanding a covenant in the articles of co-partnership to account and pay the balance, and that notwithstanding most of the items in such settlement relate to partnership transactions. Foster v. Allanson, 2 Term Rep. 479. Moravia v. Levy, *Ibid.* 483, notes. And the mere taking of a pledge by the lender of money for his security, will not preclude him from resorting to an *assumpsit*; for, to discharge the person of the borrower, there must be a special agreement to stand to the pledge only. South-Sea Company v. Duncomb, 2 Str. 919. Where the obligor of a *respondentia* bond by indorsement thereon agreed to pay it *to any assignee*, it was determined that the assignee might maintain a general *assumpsit* for it. Fenner v. Meares, 2 Bl. Rep. 1269.

(*So if a Man*) Where the demiſe is not by deed, the landlord is empowered by * ſtat. 11 o. 2. c. 19. § 14. to bring the action for the uſe and occupation; and if in evidence on the al, any parol demiſe, or any agreement (not being by deed) whereon a certain rent was reſerv- , ſhall appear, the plaintiff ſhall not, therefore, be nonſuited, but may make uſe thereof as evidence of the *quantum* of damages to be recovered. Before the above ſtatute was paſſed, it s holden that this action was maintainable for uſe and occupation, where there was no ſtipu- ion for any expreſs rent, Maſon v. Welland, Skin. 238. 242. S. C. in 3 Mod. 73. by the me of Maſon v. Beldham. It ſeems, from the argument, though not directly ſtated by the porters, that there was a demiſe by deed in this caſe, but no particular rent reſerved.

* This ſtatute ſeems to have eſcaped the recollection of the late Vinerian profeſſor, in his mment on this ſpecies of action. See 3 Wooddeſ. 152, 3.

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(*If a Lord*) Evelyn v. Chicheſter, 3 Burr. 1717. Whitfield v. Hunt, B. R. Hil. 24 G. 3. Dougl. 727, in not.

(*An Indebitatus Aſſumpſit*) That it will lie for tolls, ſee Mayor of Exeter v. Trimlet, 2 Wilſ. 5. Seward v. Baker, 1 Term Rep. 616. adjudged in the laſt caſe on a ſpecial demurrer.

An action of *aſſumpſit* is maintainable, where the demand ariſes by virtue of a publick or private act of parliament. Rann v. Green, Cowp. 474.

Dougl. 402. *arguend.* Bell v. Burrows, C. B. E. 5 G. 3. Bull. *Ni. Pri.* 129.

An *indebitatus aſſumpſit* lies againſt the aſſignees of a bankrupt for a creditor's ſhare under an order of the commiſſioners for a dividend. Brown v. Bullen, Dougl. 407.

An *indebitatus aſſumpſit* may alſo be maintained on the judgment of a foreign court, without ſtating the original cauſe of action. Crawford v. Whittal, Dougl. 4. in not.

Debray, an officer, drew a bill on the agent of a regiment payable out of the firſt money which ſhould become due to him, on account of arrears or non-effective money. The agent did not accept the bill, but marked it in his book, and promiſed to pay when effects came to hand. *Debray* dying before the bill was paid, his adminiſtratrix was allowed to maintain an action for money had and received againſt the agent, Lord *Manſfield* conſidering it as an aſſignment for valuable conſideration with notice to the defendant. Debray v. Adair, Sittings after *Eaſter*, 4 G. 3. cited in 4 Term Rep. 343.

An *indebitatus aſſumpſit* will not lie for money *lent* to a third perſon at the requeſt of the defendant. Marriot v. Liſter, 2 Wilſ. 141.

Butcher v. Andrews, 1 Salk. 23.

(*Neither Debt*) Hodges v. Steward, Salk. 125. 12 Mod. 347. S. C. Skin. 346. Morg. Prec. 548. a declaration by adminiſtratrix of payee againſt drawer of a promiſſory note. So Ld. Manſfield held, that it may be brought by an indorſee againſt the perſon who indorſed it to him. Kiſſebower v. Tims, B. R. E. 22 G. 3. Bailey 47.

A. being indebted to *B.* for brocage, and *B.* indebted to *C.* for money lent, *B.* gives an order to *A.* to pay *C.* the money due from *A.* to *B.* (the order not expreſſing how much, the *quantum* being then unaſcertained); whereupon *C.* lends *B.* a further ſum: the order was afterwards accepted by *A.* It was holden by Lord *Loughborough*, Ch. J. *Gould* and *Heath*, J., *Wilſon*, J. *diſſentiente*, that *C.* might maintain an action for money *had and received* to his uſe againſt *A.*: but the whole Court concurred in thinking that an action could be maintained on the *inſimul computaſſet*. Iſrael v. Douglas 1 H. Bl. Rep. 239.

An action for money had and received will not lie for ſtock. Nightingal and others v. Deviſme, 5 Burr. 2589. 2 Bl. Rep. 684. S. C.

Where

Dutch v. Warren, 1 Str. 406. 2 Burr. 1011.

Where a man has received money for the transfer of ſtock to be made at a certain day, and fails therein, an action for money had and received will lie againſt him for the difference-money or damages ſuſtained by not transferring the ſtock at the limited time; but in ſuch action more than the conſideration-money cannot be recovered.

An 1 Str. 407.

Where money has been paid on a contract to transfer one ſpecies of ſtock, and the party contracting to do ſo transfers another ſpecies, an action for money had and received will lie to recover back the whole conſideration-money.

Stuart v. Wilkins, Dougl. 18. Power v. Wells, Cowp. 818.

An *aſſumpſit* is a proper form of action where there has been an expreſs warranty, but a warranty cannot be tried on a count for money had and received only.

Rex v. Bp. of Cheſter, 1 Term Rep. 403.

It lies by a perſonal repreſentative for the arrears due on a compoſition for ſmall tithes, and for the profits of a donative (*a*) before, and of a perpetual curacy (*b*) after the biſhop's licence.

(*a*) But *qu.* If the donative have been twice augmented, whether the licence be not neceſſary? *Ib.* (*b*) Powell v. Milbank, 1 Term Rep. 399. n.

Page 166 (*So if One*) But Q. Whether, when the defendant claims title, an action of *aſſumpſit* for the rents received will lie againſt him? Wilſon, J. in ſuch an action, nonſuited the plaintiff; and was of opinion that the mode of proceeding was either by ejectment; or in caſe that could not be brought, by an action againſt the tenant for the rent wrongfully paid by him to the perſon not entitled to it. Cunningham & Ux. v. Lawrents, Clk. *Worceſter* Spring aſſizes 1788. An action for money had and received will not lie to recover back money paid for the releaſe of cattle *damage feaſant*, though the diſtreſs were wrongful; for various rights and queſtions may ariſe, which the defendant cannot in ſuch an action be prepared to meet or controvert. Lindon v. Hoſper, Cowp. 414.

(*So where A. took out*) See *contra* Pond v. Underwood, 2 Ld. Raym. 1210. And where money is paid to a known agent, the action to recover it back ought to be againſt the principal, unleſs indeed it has been paid *malâ fide*, or under notice. Lady Windſor's caſe, 4 Burr. 1984. It will not lie againſt a revenue-officer for an over-payment, after he has paid it over. Whitbread v. Brookſbank, Cowp. 69. Greenway v. Hard, 4 Term Rep. 553. In the caſe of Campbell v. Hall, which was an action againſt a cuſtomhouſe-officer to recover back ſome duties, the duties were allowed by the attorney-general to remain in the officer's hands for the purpoſe of trying the queſtion with reſpect to the right of impoſing them. Cowp. 204. Where money had been paid to the clerk of a company, who had paid it over to the company, but not entered it in his books, Pratt, C. J. held that an action would not lie againſt him for it; but if he had not paid it over, it would have lain againſt him or the company. Cary v. Webſter, 1 Str. 480. Buller v. Harriſon, Cowp. 565. The depoſit-money paid to an auctioneer, whether paid over by him to his principal or not, may be recovered in an action againſt him, upon objection to the title, or concealment of circumſtances. Borough v. Skinner, 5 Burr. 2639.

Allen v. Dundas, 3 Term Rep. 125. (*a*) Upon this principle money paid upon a judgment afterwards reverſed for error, cannot be recovered back.

But an authority given by *a Court having competent juriſdiction* (*a*) is not a *void* authority, though it may be afterwards vacated: therefore an action for money had and received will not lie, to recover back money which has been paid to an executor who has obtained probate of a forged will, notwithſtanding the probate be afterwards declared null, and adminiſtration be granted to the inteſtate's next of kin. But if the ſuppoſed teſtator be *living* at the time of granting the probate, ſuch action will lie, for in that caſe the authority is *void*, the eccleſiaſtical court having no juriſdiction. Mead v. Death and Pollard, 1 Ld. Raym. 742.

And

And in all cases where the authority is merely void, a payment made under it is no discharge. As where the defendant, who had a house both in *America* and *London*, drew two bills in *America* of the same tenor and date on their house in *London*, in favour of the plaintiffs; one of them being lost, came into the hands of a third person, who *forged the payees' indorsement*, and received the amount of it from the defendants: afterwards the real payees sued them on the other bill, and recovered. Cheap v. Harley, cited in 3 Term Rep. 127.

Where *A.* pays a debt he owes to *B.* to the attorney of a person suing *A.* in *B.*'s name, but without any authority from *B.*, the attorney is in that case answerable to *A.* in an action for money had and received, though he has actually paid over the money to his employer; and though he conceived that he was acting under the real authority of *B.* Robson v. Eaton, 1 Term Rep. 62.

Where money was ordered by the High Commission Court to be paid by the plaintiff to the defendant, it was allowed to be recovered back, as paid under a *void* authority. So it will if an agent has only given credit for it to his principal, in his books, or on an account between them. Newdigate v. Davy, 1 Ld. Raym 742.

Assumpsit for money had and received lies for the value of a masquerade ticket, or such like ticket. Longchamp v. Kenny, Dougl. 137.

A shipwright who had repaired a ship, which by accident was burnt while in defendant's dock, was allowed to recover in this action the amount of the repairs. Menetone v. Athawes, 3 Burr. 1592.

(*If Three are*) It is difficult to discover what the action in this case was brought for: if it was merely to recover back what had been paid in satisfaction of principal and legal interest upon the usurious contract, the determination may be supported; for so far as that went, the debtor was obliged, in natural justice, to pay; and therefore could not recover it back. But for all that had been paid beyond that, clearly an action would lie. Dougl. 696. Cowp. 200. And see Astley v. Reynolds, 2 Str. 915. *contr.* In cases of this kind, the true distinction is this: if the act is in itself immoral, or a violation of the general laws of publick policy, there the party paying shall not have this action; for where both parties are equally criminal against such general laws, the rule is *potior est conditio defendentis*. The case of the Solicitor, cited in Salk. 22. Skin. 412. Lewis v. Bourdieu, Dougl. 468. Andrèe v. Fletcher, 3 Term Rep. 266. Browning v. Morrice, Cowp. 790. But there are other laws, which are calculated for the protection of the subject against oppression, extortion, deceit, &c. If such laws are violated, and the defendant takes advantage of the plaintiff's condition or situation, there the plaintiff shall recover. Smith v. Bromley, Dougl. 696. Cockshott v. Bennet, 2 Term Rep. 763. Nerot v. Wallace, 3 Term Rep. 17. Jaques v. Golightly, 2 Bl. Rep. 1073. Jaques v. Withy, 1 H. Bl. Rep. 65. Clarke v. Shee and Johnson, Cowp. 197. But if one of two parties concerned together in an illegal act, (illegal only as being *malum prohibitum*, not as *malum in se*,) pay money with the *privity*, and at the *express request* of the other, such money may be recovered back; though in such a case the law will raise no *implied* promise. Petrie v. Hannay, 3 Term Rep. 418. Faikney v. Reynous, 4 Burr. 2069. And where money has been paid for another on a *legal* transaction, an action will lie for the recovery of it, though such transaction may be complicated with others that are illegal, and furnish no ground for its support. 3 Term Rep. 418. And with respect to the recovering back of money paid on illegal accounts, a distinction has obtained as to the state of the transaction at the time of bringing the action, whether the contract be then *executed*, or only *executory*: in the former case, it cannot be recovered, in the latter it may. Lowry v. Bourdieu, Dougl. 468. Andrèe v. Fletcher, 3 Term Rep. 266.

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(*So if a Man*) In this form of action a man may recover back money paid, under a warrant of distress upon a conviction, afterwards quashed, Feltham v. Terry, cited in Cowp. 565, or in consequence of the judgment of a court not competent to enter into the merits of the case, Moses v. Macfarlane, 2 Burr. 1005. 1 Bl. Rep. 219. S. C., and wherever the consideration on which it has been paid happens to fail, Shove v. Webb, 1 Term Rep. 732; but the contract must be entirely rescinded, Towers v. Barrett, 1 Term Rep. 133, for if it be still open, the plaintiff can only recover damages for the breach of it, and therefore must state it specially, Weston v. Downes,

Downes, Dougl. 23. Power v. Wells, Cowp. 818. And the contract, where it does not determine by the original terms of it, but requires ſome act of the plaintiff to put an end to it, muſt be reſcinded within a reaſonable time, elſe he will be entitled only to damages, Compton v. Bell, cited in 1 Term Rep. 136. Eſpin. 13.

Cripps v. Reade, 6 Term Rep. 606. Where a perſon, ſuppoſing himſelf to be the legal repreſentative of leſſee for years, ſold the term, and delivered the leaſe to the vendee, but without any aſſignment or formal conveyance, ſaying only, that the premiſes were his, and that if any thing happened, he would ſee the vendee righted; and the vendee was afterwards ouſted upon an ejectment brought by the rightful adminiſtrator of the leſſee; it was holden, that as the whole paſſed by parol, and proceeded on a miſapprehenſion of both parties that the vendor was the legal repreſentative of the leſſee, the vendee might recover back from him the money he had paid in an action for money had and received.

Marriott v. Hampton, 7 Term Rep. 269. Where money has been paid under the compulſion of legal proceſs, it cannot be recovered back in an action for money had and received, though it be afterwards diſcovered not to have been due.

Page 168 (B) What Words create ſufficient Certainty in a Promiſe.

(*If A., in*) See a ſimilar caſe, 1 Roll. Rep. 193. Cro. Ja. 417.

Page 169 (*So if A. be*) If *A.* promiſe to pay *B.* ſuch a ſum, if *C.* does not, there *A.* is but a ſecurity for *C.* But if *A.* promiſe that *C.* will pay ſuch a ſum, *A.* is the principal debtor, for the act done is upon his credit, and not upon *C.*'s. *Per* Lee, J. Fitzg. 303.

Page 170 (C) What is a ſufficient Conſideration to create an Aſſumpſit.

(*Therefore if a Man*) So where a carpenter had undertaken to build a houſe, and had not done it, it was holden that an action would not lie. 2 H. 4. 3. b. 11 H. 4. 33. Ld. Raym. 919. & 5 Term Rep. 149. S. C. cited and agreed. It does not indeed appear that this caſe was decided upon the ground of its being a mere *nudum pactum* for want of any conſideration, though Broke in his abridgment of it, tit. *Act. ſur Caſe* 40, has ſtated it to be ſo: the want of a written covenant, and the repugnance which the judges of thoſe times felt to extending an action of treſpaſs to inſtances of mere non-feazance, are the only reaſons for the judgment aſſigned by the report.

(*If a Leſſee*) A promiſe to pay the debt of a perſon illegally arreſted, in conſideration of his being ſet at liberty, Randal v. Harvey, Godb. 358. or to pay money upon forbearance of a ſuit, when in point of law there is no cauſe of action, Lloyd v. Lee, 1 Str. 94. or to revive a ſecurity, which is void in its creation, Cockſhott v. Bennett, 2 Term Rep. 763. or to fulfil an engagement entered into by an agent beyond the extent of his commiſſion, Fenn v. Harriſon, 3 Term Rep. 757. all theſe are promiſes without a conſideration: for the conſideration is the *material cauſe* of the contract, Fulb. Paral. 5, 6, and of courſe cannot be predicated of a nullity.

(*If B. in*) But Q. for the action is founded merely upon the contract, and the leſſor's title cannot be controverted in it. 2 Wilſ. 218.

2 Bl. Com. 445. Hawkes v. Saunders, Cowp. 290. Trueman v. Fenton, Cowp. 544. If a debt be due in conſcience, though the remedy at law for recovering it may be gone, it is a good conſideration for a promiſe. Thus a promiſe to pay a debt barred by the ſtatute of limitations; a promiſe by a man when he comes of age to pay a meritorious debt contracted during his minority, though not for neceſſaries; and a promiſe by a certificated bankrupt

pt to pay the whole of his debts; all these shall bind, for the obligation conscience is not extinguished.

Mutual promises must be both binding as well on the one side as on e other, else they will be *nuda pacta*. Where an action was brought a bet of 14 guineas to 8 guineas on a horse-race, it was holden, at as the plaintiff might have refused under the statutes of 16 *Car.* *c.* 7. and 9 *Ann.* *c.* 14. to pay the 14 guineas, if he had lost; there s no mutuality in the wager, and therefore he could not recover the guineas. Harrison v. Cage, Salk. 24. Blaxton v. Pye, 2 Wilf. 309.

So where *A.*, having proposed to sell goods to *B.*, gave him a certain me at his request to determine whether he would buy them or not, thin which time *B.* determined to buy them, and gave notice thereof *A.*; *A.* is not liable to an action for not delivering them; for *B.* t being bound by the original contract, there was no consideration to nd *A.* Cooke v. Oxley, 3 Term Rep. 653.

An accord executory is no consideration for a promise; for as it would no bar, if pleaded, so no remedy can lie for it. Lynn v. Bruce, 2 H. Bl. 217.

A breach of trust, it seems, may be the ground of an assumpsit. Smith v. Johnson, 5 Term Rep. 602. *Sed vide ex parte* Aspey, 3 Br. Ch. Rep. 265.

The mere relation of landlord and tenant is a sufficient consideration or the tenant's promise to manage a farm in a husband-like manner. Powley v. Walker, 5 Term Rep. 373.

(D) Where the Consideration shall be said to be executed, or continuing. Page 173

(*A Consideration*) If a man work for another merely with a view to a legacy, he cannot afterwards resort to an action upon an implied *assumpsit*. Osborn v. Governors of Guy's Hospital, 2 Str. 728. If a person pay money which another was under a *legal* or *moral* obligation to pay, *though without his knowledge or request*, the law raises an *assumpsit*: as in the case of goods distrained by the commissioners of the land-tax, if a neighbour should redeem the goods and pay the tax, he may maintain an action against the owner for the money so paid: so if a person bury the wife or child of another, he may recover back the expences incurred by it from the father or husband. Jenkins v. Tucker, 1 H. Bl. Rep. 90. Church v. Church, B. R. 1656, cited in Sir T. Raym. 260. Nor is it any bar to such an action against the husband, that the wife lived apart from him, and had a separate maintenance, for at her death the separate maintenance is at an end. Anon. B. R. M. 31 Geo. 3. reported in Vaillant's edition of Dyer, 272. b. note b.

Where the plaintiff declared, that, in consideration he had bought three parcels of land on such a day, the defendant afterwards promised to make him a sufficient assurance; the consideration was adjudged not to be absolutely past, for the assurance was the substance of the sale. Warren v. Morse, Cro. El. 139.

(E) Where the Promise shall be void, the Consideration being against Law. Page 174

(*If an Officer*) The like law on a promise of a bribe to a bailiff for taking bail. Stoteſbury v. Smith, 2 Burr. 924. 1 Bl. Rep. 204. S. C.

(So

Page 175 (*So if an*) But the case in Rolle does not warrant this; it is as follows:—"If *A.* delivers an execution to the sheriff at his suit against *B.*, and in consideration that the sheriff without any fee will execute it, promises the sheriff to pay to him a certain sum, which is as much as the sheriff is allowed to take by the statute of 28 Eliz.: though it be admitted that the sheriff cannot have any remedy for his fees, yet because it was lawful for the sheriff to take his fees, and he made the execution at the plaintiff's request, and this is for his benefit, this is a good consideration." By the reports of this case in Moore and Croke it appears, that the sheriff declared for the money, as for his lawful fees of office under the statute: in the other case in the text he declared for a gross sum for executing the writ; thence the difference between the cases as to the *legality* of the consideration, the present subject of inquiry; for it would not affect the consideration in that respect, whether the promise were made, or the money were to be paid by the plaintiff himself, or a stranger, Cro. El. 654. Mo. 468. p. 669. 699. p. 972.

Parsons v. Thompson, 1 H. Bl. 322. Where *A.* was in possession of an office in a dock-yard, and *B.*, in order to induce him to procure himself to be superannuated, and retire on the usual pension, agreed (without the knowledge of the navy-board in whom the appointment belonged) in case he (*B.*) should succeed him to allow him his extra pay from the yard-books; and *B.* was afterwards appointed to the office; it was holden, that an *assumpsit* would not lie upon this agreement, the consideration being illegal, as a fraud upon the publick, and an injury to the service.

Garforth v. Fearon, M. 27 G. 3. 1 H. Bl. Rep. 327. So where *A.*, who was appointed by the interest and on the application of *B.* to be customer of a port, had previously signed an agreement declaring that his name was used on the application in trust for *B.*, that he would appoint such deputies as *B.* should nominate, and would empower *B.* to receive the profits of the office to his own use; it was holden, that the consideration in this case would not support an *assumpsit*, being equally against the principles of the common law, and the statutes of 12 *R.* 2. *c.* 2. and 5 & 6 *E.* 6. *c.* 16.

Stackpole v. Earle, 2 Wils. 133. So a promise to pay 2*l. per cent.* to procure a purchaser of defendant's place in the customs is bad, and will not raise an *assumpsit*.

Page 176 (*But if it Appears*) So where two boxed for a wager of five guineas; on *assumpsit* for that sum brought by the winner, it was holden the action would not lie, the act being a breach of the peace. Webb v. Bishop, Gloster ass. 1731. Bull. *N. P.* 16.

1 Leon 180 3 Term Rep. 17. S. P. If *A.* promise *B.* money in consideration that he will not give evidence in a cause, such promise cannot be enforced, for it is unlawful and iniquitous so to suppress testimony.

(*If A. is in*) It could not be void by the statute, for that does not extend to parties in execution, but speaks only of persons arrested on mesne process. 1 Term Rep. 421.

(*If A. is Arrested*) The reason is, that the promise being made to the plaintiff, or to one on his behalf, is not within the statute of 23 H. 6. c. 9., for the illegality of the consideration in this case arises merely upon that statute. *Therefore* it is, that undertakings by attornies for the appearance of a defendant are enforced by the courts, for they are given to the plaintiffs in the action. But where any engagement is entered into for this purpose with the sheriff, it must be in the particular form chalked out by the statute, otherwise it is void. Accordingly it was holden that an agreement in writing to put in good bail for a person arrested on mesne process at the return of the writ, or surrender the body, or pay debt and costs, made by a third person with the bailiff of a sheriff, in consideration of his discharging the party arrested, was void by the statute of H. 6.; for, since the passing of that statute, the usage has been to take the security by bond; and that bond, by the words of the statute, must be entered into to the sheriff, or to such officer as has the return of process; whereas here was no bond, but a mere simple contract, and that with the sheriff's officer; and farther, the bond must be given only for the appearance of the party, and for no other purpose. Rogers v. Reeves, 1 Term Rep. 418.

If

If a performer engage to dance at the King's Theatre in the *Hay* Gallini v. Laborie, 5 Term Rep. 242.
rket, yet no action will lie againſt him for a breach of the agreement, t appear that the theatre was not licenſed purſuant to the 10 *Geo.* 2. 28. But in ſuch caſe the performer may recover from the manager ſalary which he had ſtipulated to pay him; for being engaged and dy to execute the agreement on his part, he ought not to ſuffer for want of a licence which it was the manager's buſineſs to have pro- ed.

Money lent for the purpoſe of paying a gambling debt may be recovered Barjeau v. Walmſley, 2 Str. 1249. Robinſon v. Bland, 2 Burr. 1080. Alcinbrook v. Hall, 2 Wilſ. 309.
k, for the ſtatute of 9 *Ann. c.* 16. only annuls the *ſecurity*, and not *contract*.

Where the plaintiffs, who were merchants living at *Dunkirk*, ſold tea Holman v. Johnſon Cowp. 341.
the defendant *there*, and delivered it to him *there*, though this tea was ſold for the purpoſe of being ſmuggled into *England*, and that purpoſe s known to the plaintiffs at the time; yet they not being concerned in e ſmuggling, and it being a fair ſale as to them, and good by the laws the country where they lived, they were allowed to recover the price the tea in *England*.

But where the plaintiffs were four partners, three of whom lived in Biggs v. Lawrence, 3 TermRep. 454.
ngland, and the fourth in *Guernſey*, and this laſt ſold brandy at *Guern-*, packed up in a particular manner for the purpoſe of ſmuggling, but ithout the privity or perſonal participation of the others; in an action rought for the price of this brandy, they were nonſuited: for in this caſe he parties were natives of *England*, and the contract was made in con- ravention of the laws of *England*; whereas in the caſe of *Holman* v. *ohnſon* the contract was made abroad by foreigners, who are not bound o take notice of the revenue laws of this country.

So where the plaintiff, an inhabitant of *Guernſey*, ſold goods to the Clugas v. Penaluna 4 TermRep. 466.
efendant in *Guernſey*, which it appeared were to have been ſmuggled nto *England*, and the defendant gave bills, on which an action was rought for the price; it was adjudged, that the plaintiff could not reco- er, for the bills were given on an illegal contract, and to a ſubject of his country.

Where the vendor of goods abroad packed them up by order of the Waymell v. Reed, 5 Term Rep. 599.
buyer in a particular manner for ſmuggling them into this country, and knew at the time that they were to be ſmuggled, he was not allowed to recover the value of them againſt the buyer, although he was not concern- ed in the riſk of importing the goods into this country. And the court diſtinguiſhed this caſe from that of *Holman* v. *Johnſon*, *Cowp.* 341: for there, the ſeller did not aſſiſt the buyer in the ſmuggling; he merely ſold the goods in the common courſe of trade. But here the ſeller not only knew the uſe intended to be made of the goods, but actually aſſiſted in the act of ſmuggling by packing the goods up in a manner the moſt con- venient for that purpoſe. And if he undertook to deliver the goods in that manner, knowing the uſe intended to be made of them, he was of- fending againſt the laws of this country in the very contract itſelf.

A contract which ariſes wholly and *immediately* out of an illegal tran- Booth v. Hodgſon, 6 TermRep. 405. Mit- chell v. Cockburne, 2 H. Bl. 379.
ſaction, is no foundation for an action: as where *A.*, *B.*, and *C.* became partners in inſuring ſhips, contrary to the ſtatute of 6 *G.* 1. *c.* 18. § 12. (*vide* vol. iv.) and it was agreed, that the policies ſhould be under-written in

in the name of *A.* only, and ſeveral policies were ſo effected, and the premiums received by *C.* and *D.* as brokers; it was holden, that *A.* could not maintain an action to recover theſe premiums from *C.* and *D.*

6 Term Rep. 70

It ſeems, that a ſpeculative intereſt may afford a ground for an aſſumpſit; for even gambling in the funds was not conſidered to be illegal till the *ſtat.* 7 *G.* 2. *c.* 8. before which ſeveral contracts on ſtock-jobbing tranſactions were enforced in courts of juſtice.

(F) Where the Conſideration and Promiſe ſhall be ſaid to be ſufficiently ſet forth and averred.

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(*The Plaintiff*) Where there is a ſpecial contract or agreement, the plaintiff ought to declare upon it, for the defendant ſhould have notice that he is ſued on it; but if the plaintiff fails of proving the caſe ſtated in the ſpecial count, after an attempt for that purpoſe, it is now the courſe to permit him to go into evidence on the general counts, if he have given notice that he means to rely on them as well as the other ſpecial ground, the neceſſity of which notice is in order to prevent a ſurpriſe on the defendant. Dougl. 651. 24. 1 Term Rep. 134. Bull Ni. *Pri.* 153.

(*So if in an Aſſumpſit*) See Lee v. Welſh, 2 Str. 793. 2 Ld. Raym. 1516. S P.

(*If in an Indebitatus Aſſumpſit*) In an aſſumpſit on the judgment of a foreign court, it is not neceſſary to ſtate in the declaration the grounds and cauſe of action upon which the judgment was founded. Crawford v. Whittal, Dougl. 4.

Leneret v. Rivet, Cro. Ja. 503.

Where the plaintiff declared upon two conſiderations, and failed in a proper averment of the performance of the one; the judgment was arreſted, for the *aſſumpſit* of the defendant muſt be preſumed to be founded on the two conſiderations taken together.

Collins v. Gibbs, 2 Burr. 899.

If a defendant undertake to pay money in conſideration of the plaintiff's executing a releaſe; here the releaſe is a condition precedent, and the plaintiff muſt aver that he has executed a releaſe, or was ready to do it, elſe the declaration will be bad on demurrer, and in arreſt of judgment, if the judgment be by default; though it would be helped by a verdict.

Courtney v. Strong, 2 Ld. Raym. 1217. 1 Salk. 364. S. C.

Where the plaintiff declared in conſideration of a promiſe that the defendant ſhould hold an eſtate clear of a rent-charge granted to *J. S.*, without moleſtation of the plaintiff; but did not ſhew any title in himſelf to the rent-charge; the declaration was holden ill after verdict; for the promiſe, as it ſtood, was a promiſe not to do a thing which the promiſer could not do, and was therefore merely *nudum pactum.*

Powley v. Walker, 5 Term Rep. 373.

Where the declaration ſtated that the defendant became, and was tenant to the plaintiff of a certain farm, in conſideration whereof, he undertook to manage it in a huſbandlike manner; it was objected that there was no conſideration, becauſe it was not alleged that the defendant had become tenant on the terms of cultivating the farm in a good and huſbandlike manner; *ſed non allocatur*, for the bare relation of landlord and tenant is a ſufficient conſideration for ſuch a promiſe.

Martindale v. Fiſher, 1 Wilſ. 88.

The *aſſumpſit* laid was, that the plaintiff had agreed to deliver ſo much cloth to the defendant, and the defendant agreed on a certain contingency happening to pay 5*l.* for it; but, if the contingency did not happen, it was agreed that he was to pay nothing: the contingency did happen, and on action brought the plaintiff had a verdict; when it was moved in arreſt

arreſt of judgment that the plaintiff had not averred the delivery of the cloth; but it was reſolved that this being promiſe for promiſe, no ſuch averment was neceſſary; but if the defendant had undertaken to pay if plaintiff *would deliver* ſo much cloth, in that caſe an averment would have been neceſſary.

Aſſumpſit on an agreement to forfeit a depoſit of five guineas, and to pay a further ſum of 10*l.*, if the defendant did not accept the poſſeſſion of certain premiſes from the plaintiff, and alſo pay for certain fixtures therein at a fair appraiſement by two appraiſers. In an action on this agreement, it was adjudged on a ſpecial demurrer, that the declaration was ill, becauſe the plaintiff had not ſhewn his right to the premiſes, ſo that he could have delivered poſſeſſion according to his agreement, and, as each was to name an appraiſer, that he had named one. Luvton v. Robinſon, Dougl. 620.

In *aſſumpſit* on an agreement to pay 30*l.*, in conſideration of the plaintiff's relinquiſhing a rent-charge to the defendant, the plaintiff averred that he did relinquiſh the rent, and did not claim it; but the judgment was arreſted, becauſe he did not ſhew *how* he had relinquiſhed the rent, for it might be by words, which was no diſcharge. Gregory v. Nevill, Cro. El. 292.

The defendant promiſed to deliver a horſe to the plaintiff, on the plaintiff's becoming bound to him by writing obligatory in 11*l.*; the plaintiff in his declaration only averred *his offer* to become bound, upon which, judgment was arreſted, for he ſhould have averred a tender of the bond ready ſealed to the defendant, and alſo the ſum he was bound in, that the Court might judge of the performance. Auſtin v. Jervoiſe, Hob. 69. 77.

Where the plaintiff declared for money *lent* by him to one *J. S.*, at the requeſt of the defendant, the judgment was arreſted, for the word *lent* is a technical term, and imports a loan to *J. S.*; if ſo, *he* was the debtor, and therefore the *defendant* could not alſo be the debtor, for there cannot be a double debt on a ſingle loan. But it had been otherwiſe, if the plaintiff had declared for money *delivered* to ſuch a perſon at the defendant's requeſt; for then the loan would have been to the defendant himſelf. Martiot v. Liſter, 2 Wilſ. 141. Butcher v. Andrews, 1 Salk. 23. But a declaration for money *lent to the defendant's wife*, at his requeſt, is good; for a loan to the wife, at the huſband's requeſt, is a loan to the huſband himſelf. Stevenſon v. Hardy, 3 Wilſ. 388. 2 Bl. Rep. 872, S. C.

(G) What may be pleaded as a Good Diſcharge and Performance of the Promiſe. Page 179

(*An Aſſumpſit is*) The general iſſue to this action is, that the defendant did not undertake "and promiſe in manner and form alledged." But as the action is an action of *treſpaſs* upon the caſe, the plea of "*not guilty*" was formerly uſed as the general iſſue; Elrington v. Doſhant, 1 Lev. 142. and it is ſtill effectual after verdict, though it will not be allowed on demurrer. Marſham v. Gibbs, Ca. temp. Hardw. 173. 2 Str. 1022. S. C.

(*If the Plaintiff*) A ſtated account is no plea to a debt on ſimple contract; for both being equal, the latter is not merged in the former. Roades v. Barnes, 1 Burr. 9. 1 Bl. Rep. 65. But a plea that the defendant indorſed a promiſſory note, of which he was the payee, to the plaintiff "for and on account of the debt," is good. Kearſlake v. Morgan, 3 Term Rep. 513. So is a plea that the plaintiff and defendant accounted together; and that the defendant drew a bill of exchange upon himſelf in favour of the plaintiff, for the ſum he was found in arrear, and delivered it to the plaintiff. Richardſon v. Rickman, B. R. M. 16 G. 3. cited in 5 Term Rep. 517.

Seddon v. Tutop, 6 Term Rep. 608.

The plaintiff in a former action declared on a promiſſory note, and for goods ſold; but upon executing a writ of inquiry after judgment by default, he gave no evidence upon the count for goods ſold, and took his damages for the amount of the promiſſory note only. It was therefore ruled, that the judgment in that action was no bar to his recovery in a ſubſequent action for the goods ſold: for the recovery in the former action was only *primâ facie* evidence that the demand had been inquired into; it was not concluſive.

Reeve v. Farmer, 4 Term Rep. 146-7.

So, it hath been holden, that an award made on a reference of all matters in difference between the parties, is no bar to any cauſe of action which the plaintiff had againſt the defendant at the time of the reference, if the plaintiff can prove that the ſubject-matter of the action was not inquired into before the arbitrator.

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ATTACHMENT.

(*An Attachment*) If for a contempt in the face of the court, the commitment is by rule of court, unleſs the party eſcape out of court before he is ſecured. Jac. Law. Dict tit. *Attachment*.

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(A) In what Caſes an Attachment is to be granted.

(*But if there be*) In contempts to inferior juriſdictions, the court of B. R. it ſeems, never interpoſes. Rex v. Burchett, 1 Str. 567. But it will, for diſobeying an order of ſeſſions, confirmed in B. R. Rex v. Holland, Ca. Tem. Hardw. 160.

(*Alſo an Attachment*) An attachment was granted againſt a mayor for making a return to a *mandamus* in the name of the town-clerk and burgeſſes without their knowledge or conſent. Rex v. Hoſkins, Ca. Temp. Hardw. 188. If coroners do not return an attachment of contempt againſt the ſheriff, an attachment will be granted againſt them in the firſt inſtance directed to eliſors. Andrews v. Sharp, 2 Bl. Rep. 911. The King v. Peckham, *id.* 1218.

For the ſame reaſon an attachment will not be granted againſt him for neglecting to take a replevin-bond. The King v. Lewis, 2 Term Rep. 617.

(*Attornies are liable*) A notice of action given in compliance with the requiſition of a penal ſtatute, is not ſuch a commencement of the ſuit, as will ſubject a plaintiff or his attorney to an attachment for miſbehaviour before ſuing out the writ. Gordon v. Powis, 2 Bl. Rep. 781. per three Judges, *dubit.* Blackſtone, J.

(*And all other*) A bailiff refuſing to make affidavit of ſervice of proceſs will be attached. Rex v. Rudge. 1 Bl. Rep. 432.

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(*Gâolers are*) No attachment againſt a gaoler for a voluntary eſcape, but an information. The gaoler of Shrewſbury caſe, 1 Str. 332.

A conſtable in any part of England refuſing to execute a warrant of a judge of B. R. for apprehending one charged with felony, is puniſhable by attachment, Rex v. White and others, Ca. Tem. Hardw. 42.

(*Attachment*

(*Attachments have*) Tho' contemptuous words were ſpoken of a *ſubpœna*, and the perſon ſerving it ſeverely beaten; yet as theſe facts were proved by only one witneſs, the court of Chancery would not order the party to ſtand committed in the firſt inſtance, but only granted a rule upon him to ſhew cauſe why he ſhould not be committed. 3 Atk. 219. Lord Hardwicke was inclined to adopt the ſame rule, and to require two affidavits to ground an attachment in the firſt inſtance at law. North v. Wiggins, 2 Str. 1068.

(*An Attachment is the proper*) Attachment in the firſt inſtance for non-delivery of poſſeſſion purſuant to rule of court in ejectment. Davies v. Doe, 2 Bl. Rep. 892. Attachments for non-performance of an award, or non-payment of coſts, are not granted now as for contempts, but are in the nature of a civil execution. Rex v. Stokes, Cowp. 136. Rex v. Myers, 1 Term Rep. 265. 1 Bl. Rep. 638. S. P.

(*But an Attachment*) Therefore it hath been adjudged that the affidavit to ſupport a rule for an attachment for contempt, muſt ſhew that the defendant was ſerved perſonally with a copy of the rule, and that the original rule was ſhewn to him at the ſame time. The King v. Smithies, 3 Term Rep. 351. But where a *mandamus* was granted for the election of a mayor, under 11 G. 2. c. 4. ſ. 2., and a rule made that publick notice ſhould be affixed in the market-place, which was done accordingly, an attachment was granted for diſobedience of the *mandamus* againſt a member of the corporation who was ſerved with a copy of the rule, notwithſtanding neither the original *mandamus*, nor rule was ſhewn him at the time; for the publick notice by the act is *prima facie* ſufficient. But the application for an attachment might be well anſwered, if the party could ſhew that he had no notice of the *mandamus*. The King v. Edyvean, 3 Term Rep. 352. Motions for attachments in civil ſuits are proceedings on the civil ſide of the court of K. B. till the attachments iſſue, and therefore the affidavits on which they are grounded are to be entitled with the names of the parties; but when the attachments iſſue, the king is to be named as proſecutor, for the proceedings are then on the crown ſide. 3 Term Rep. 253. Wood v. Webb.

(*An Attachment is proper*) Granted againſt the plaintiff in an action, and his attorney, for entering up judgment on a bond and warrant of attorney executed whilſt the defendant was under arreſt, and without calling in his attorney. Woodin v. Colledge, Ca. Tem. Hardwicke, 177. The inſtituting a ſuit, though there be a real demand, either for the purpoſe of injuring a third perſon, or of getting the opinion of the court, is a contempt puniſhable by attachment. Coxe v. Phillips, Ca. Tem. Hardw. 237. Da Coſta v. Jones, Cowp. 729. Hoſkins v. Lord Berkley, 4 Term Rep. 402. So is putting in bail by feigned names, no ſuch perſons being in exiſtence. Str. 384. Or aſſigning for error the death of the plaintiff in ejectment. Moore v. Goodright, 2 Str. 899. Or arreſting a plaintiff whilſt attending arbitrators under a rule of court in order to injure his cauſe. Rex v. Hall, 2 Bl. Rep. 1110. Or the mere ſerving of proceſs on a party attending his cauſe in a court of juſtice. Cole v. Hawkins, 2 Str. 1094. Andr. 275. S. C. Or bringing a writ of error, after having obtained an injunction on the terms of giving a releaſe of errors. 3 Atk. 297. Where the court will puniſh for contempts in the challenging of juries, ſee 1 Str. 593. 2 Lord Raym. 1364. 8 Mod. 245. 2 Str. 1001. An attachment was granted againſt a perſon for threatening the life of a proſecutor, who had indicted another for perjury, in an affidavit on which an information had iſſued againſt him. Rex v. Carroll, 1 Wilſ. 75.—It is a high contempt of a court puniſhable by attachment, either to ſcandalize the court itſelf, or to abuſe parties who are concerned in cauſes in it, or to publiſh any thing in order to prejudice mankind againſt parties before the cauſe is heard. 2 Atk. 469. 2 Vez. 520.

If a defendant in a penal action obtain a rule to ſtay proceedings, on paying a ſum agreed upon between him and the plaintiff, the court will grant an attachment againſt him, if he refuſe to pay ſuch ſum. King v. Clifton, 5 Term Rep. 257.

The court of King's Bench cannot grant an attachment againſt a peer of the realm for not paying a ſum of money awarded, even though the defendant conſent on condition that the attachment ſhall lie in the office a certain time. Walker v. Earl Groſvenor, 7 Term Rep. 171.

Although a plaintiff diſcontinue under the common rule on payment of coſts, yet he is not liable to an attachment for non-payment. Stokes v. Wooddeſon 7 Term Rep. 6.

If an attorney required to anſwer the matters of an affidavit, ſwear in his exculpation to an incredible ſtory, the court will grant an attachment againſt him, though he poſitively deny the mal-practices imputed to him. In the matter of Croſſley, 6 Term Rep. 701.

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(B) How the Perſon againſt whom an Attachment is granted is to be proceeded againſt, and how diſcharged.

(*Attachments are*) The court will never grant an attachment for one party at the ſuit of another, where the affidavits on which it is moved for are ſworn before the proſecutor's agents. Rex v. Wallace, 3 Ter. Rep. 403. But he cannot come in and confeſs the contempt till after the interrogatories are filed, unleſs in the caſe of a reſcue, or a contempt in the face of the court. Rex v. Edwards, 4 Burr. 2105. 1 Bl. Rep. 637. S. C. Rex v. Elkins, 1 Bl. Rep. 640. In the caſe of a reſcue, however, it has been ſince adjudged, that he muſt anſwer interrogatories, if the proſecutor inſiſt upon it, R. v. Jane Horſley, 5 Term Rep. 362. In the King's Bench the interrogatories muſt be ſigned by counſel. *Reg. gen* Mich 1793, 5 Term Rep. 474., and are referred to the Maſter of the Crown-office to examine the party upon them; and he is to report to the court whether in contempt or not. Ca. Temp. Hardw. 239. But the party may demur to improper interrogatories, ſuch as may tend to convict him of any other offence, R. v. Barber, 1 Str. 444., or ſubject him to a penalty. Ca. Temp. Hardw. 239 If reported in contempt, he immediately receives ſentence, unleſs the court, by conſent, wave giving judgment, and order the recognizance to be diſcharged. Rex v. James Wheeler, 3 Burr. 1256.; or the attorney-general conſent that he may be continued on his recognizance. R. v. Beardmore, 2 Burr. 797.—It is not uſual to allow coſts to a party who purges himſelf of a contempt which he is charged with; but where the charge has appeared quite groundleſs and vexatious, the court has given them. R. v. Plunket, 3 Burr. 1329. R. v. Vaughan, Dougl. 516. It is a rule of the court of K. B. that the maſter's report cannot be moved for on the laſt day of term, without previous leave of the court, except in extraordinary caſes; and there muſt be always a perſonal ſervice of notice. R. v. Wheeler, 1 Bl. Rep. 311. But attachments for non-payment of coſts, and not returning the writ, are expreſsly excepted out of this rule. 1 Burr. 651.

By a rule of the Court of K. B., *Eaſter* 34 *G.* 3., it is ordered, "That in future, whenever any writ of attachment ſhall iſſue in order "to compel any perſon to anſwer upon interrogatories, and on which "judgment ſhall not be given in the courſe of the term, the name of the "cauſe ſhall be inſerted in the liſt of motions appointed to come on peremptorily in the enſuing term, in order that the Court may be informed what ſhall have been done in proſecution of ſuch writ."

Rex v. Dr. Windham, Cowp. 377. London v. Lynn, 1 H. Bl Rep. 208. Biſhop of Chicheſter v. Harward, 1 Ter. Rep. 652.

In Chancery, if a corporation is in contempt, there is no remedy by way of proceeding for a contempt perſonally, againſt the real parties who offend; but the mode of compulſion is by ſequeſtration. At law a corporation cannot be attached for contempt in their corporate character for not returning a writ directed to them, but an attachment in the nature of a *pone* is the proper way to compel an appearance. But where a *mandamus* goes to a corporate body to compel an election, the Court of B. R. it ſeems will attach the individuals who refuſe to proceed to it.

ATTORNEY.

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(A) Of admitting Perſons to act as Attornies, and the Qualifications neceſſary for ſuch Perſons.

(*By t'e 2 Geo. 2.*) No attorney of B. R. cannot be admitted of C. B. without a new ſtamp. Barnes, 38.

A ſolicitor

A ſolicitor in Chancery may practiſe in the equity ſide of the Exchequer without being admitted a ſolicitor in that court. Meddowcroft v. Holbrooke, 1 H. Bl. Rep. 50.

By 12 *Geo.* 2. *c.* 13. § 7. None but regular attornies ſhall act in the county courts, under a penalty of 20*l.*

By the ſame, § 8. Quakers may be admitted upon their affirmation.

By 22 *G.* 2. *c.* 46. § 34. An affidavit of the actual execution of the articles of clerkſhip ſhall be made and filed within three months by the maſter and clerk, and none ſhall be admitted before ſuch affidavit ſhall be produced and read in open court. § 10. Affidavit ſhall be made by the clerk or maſter, of actual ſervice to ſuch maſter or his agent for the term of five years. § 7. None ſhall take or retain any clerk after diſcontinuing buſineſs.

§ 10. A clerk, in caſe of his maſter dying, or diſcontinuing buſineſs, or of his being diſcharged, if he ſerves the reſidue of his time in the manner preſcribed by the act to another, and makes the proper affidavits, may be admitted.

§ 16, 17. Sworn clerks in Chancery, or their clerks bound and actually ſerving for five years, or being admitted and ſerving as a waiting clerk the two laſt years, may be admitted ſolicitors; and ſo if their maſters die, and they ſerve under articles with others.

§ 18. No ſworn clerk to have more than two clerks.

§ 19. This act not to extend to the officers in the king's remembrancer's, treaſurer's remembrancer's, pipe office, or office of pleas in the exchequer.

§ 11. Attornies acting as agents for unqualified perſons, or permitting them to uſe their names, to be ſtruck off the roll, and committed to priſon for any time not exceeding one year.

§ 12. None ſhall act as attornies at the ſeſſions who have not been admitted according to 2 *Geo.* 2, *c.* 23., under a penalty of 50*l.*, with double coſts; and attornies ſuffering ſuch perſons to practiſe in their names ſhall incur the like penalty.

§ 13. The attornies of the duchy court of *Lancaſter*, or of the great ſeſſions in *Wales*, or of the counties palatine of *Cheſter*, *Lancaſter*, and *Durham*, acting within their reſpective juriſdictions, are exempted.

§ 14. No clerk of the peace or his deputy, or under-ſheriff or his deputy, ſhall act as attornies at the ſeſſions for the county, *&c.* where they ſhall execute ſuch offices, under the like penalty of 50*l.*

By 25 *Geo* 3. *c.* 80. it is enacted, "That every ſolicitor, attorney, notary, proctor, agent, or procurator admitted, enrolled, or regiſtered in any of his majeſty's courts at *Weſtminſter*, or in any eccleſiaſtical court, or in any of the courts of admiralty, or cinque ports, or in any of his majeſty's courts in *Scotland*, the great ſeſſions in *Wales*, or in any courts in the counties palatine, or in any other court in *Great Britain*, holding pleas where the debt or damage ſhall amount to forty ſhillings or more, ſhall, previous to his commencing any ſuit or proſecution, take out annually a certificate of ſuch his admiſſion, enrolment, or regiſter; That for and upon every ſuch certificate ſo taken out by any ſolicitor, *&c.* who ſhall reſide in any of the inns of court, or in the cities of *London* or *Weſtminſter*, the borough of *Southwark*, the pariſh of *Saint Pancras*, and *Saint Mary-le-Bone*, or within the bills of mortality, or within the city of *Edinburgh*, there ſhall be charged a

"ſtamp-

" ſtamp-duty of five pounds: That for and upon every ſuch certificate ſo
" taken out by any ſolicitor, &c. who ſhall reſide in any other part of
" *Great Britain*, there ſhall be charged a ſtamp-duty of three pounds."
And by § 6. " Any ſolicitor, &c. reſiding forty days or more in any
" one year within the limits of the higher duties, ſhall be liable to the
" payment of thoſe duties, notwithſtanding he may at other times, in
" ſuch year, reſide elſewhere without thoſe limits."

In order to obtain ſuch certificate, § 3. directs, That every acting ſolicitor, &c. ſhall annually deliver into ſome one of the courts in which he ſhall have been admitted, ſworn, enrolled, or regiſtered, a paper or note in his proper hand-writing, containing his name and uſual place of reſidence, and marked and ſtamped with the proper mark or ſtamp of the duty by this act impoſed upon certificates, according to the place of his reſidence, and thereupon every ſuch ſolicitor, &c. ſhall be entitled to have a certificate (if the ſame ſhall be required) in manner next hereafter mentioned.

§ 4, and 5. The officers appointed to enrol attornies by 2 *G.* 2. *c.* 23. § 18. ſhall, upon payment of the fee of one ſhilling, enter, in alphabetical order, the name and place of reſidence of every ſuch attorney and ſolicitor, enrolled an attorney or ſolicitor in the ſaid courts reſpectively, (who ſhall have delivered in ſuch paper or note in writing duly ſtamped, and required a certificate of his enrolment as aforeſaid,) in rolls or books to be provided and kept for that purpoſe in the ſeveral offices in the act mentioned; and ſhall, at the time of making ſuch entry, ſubſcribe to every ſuch paper or note in writing ſo delivered in, a certificate ſigned by every ſuch officer, according to the form of the ſchedule annexed to the act; to all which rolls or books all perſons may, at reaſonable times, have acceſs without fee or reward: certificates ſhall then be iſſued to the perſons requiring the ſame, which ſhall bear date the day on which they are iſſued, and ſhall continue in force for one year, and be renewed every year at leaſt ten days before the expiration of the year for which they were granted.

By § 7. Every perſon acting in his own name, or in that of another, without a certificate, or giving in a falſe place of reſidence, with intent to evade the payment of the higher duties, ſhall forfeit fifty pounds, and is made incapable of maintaining any action for the recovery of any fee, reward, or diſburſement, on account of proſecuting, carrying on, or defending any ſuit or proceeding in which he hath ſo acted. But by § 8. Perſons who have taken out certificates may act for others who have alſo taken them out. And by § 9. Any perſon who hath duly obtained a certificate in one court, may act in any other court in which he is ſworn, without taking out a certificate in that court.

By § 10. It is required, that none of thoſe perſons who are expreſsly excepted out of the act of 2 *G.* 2. *c.* 23., by the 26th, 27th, and 28th ſections of that act, touching their admiſſion and enrolment, ſhall act as attorney or ſolicitor, unleſs they ſhall for the purpoſes of this act cauſe their name to be enrolled, and take out a certificate in like manner as required of ſworn attornies and ſolicitors. And § 11. extends this requiſition to all officers and clerks of any of the courts excepted in ſtat. 2 *G.* 2. But § 12. exempts from the payment of this duty all clerks in court who are charged with the land-tax in reſpect of their offices, whilſt they act merely officially.

By

By a rule of the court of *King's Bench*. Tr. 31 *G.* 3. (in aid and ...rtherance of the diſpoſitions of the legiſlature manifeſted in the above ...ſts,) It is ordered, "That, from and after the laſt day of *Michaelmas* term then next enſuing, no attorney, who ſhall be retained or employed as a writer or clerk by any other attorney, ſhall, during the time of ſuch employ, take or have any clerk under articles; and that no ſervice to any ſuch attorney under articles during the time that ſuch attorney ſhall be ſo employed by any other attorney ſhall be deemed good ſervice. And it is further ordered, That, from and after the ſame laſt day of *Michaelmas* term, no perſon who ſhall enter into articles with an attorney or attornies ſhall be at liberty to ſerve the agent or agents of ſuch attorney or attornies, under ſuch articles, for a longer time than one year of his clerkſhip, and that any ſuch ſervice to an agent or agents beyond that time ſhall not be deemed good ſervice. And to the intent that better information may be obtained, touching the fitneſs and qualifications of perſons applying to be admitted attornies, it is further ordered, That, from and after the ſame, *&c.* every perſon who ſhall apply for admiſſion as an attorney in that court, and who ſhall not have been admitted an attorney or ſolicitor of any other court, ſhall, for the ſpace of one full term, previous to the term in which ſuch perſon ſhall apply to be admitted, cauſe his name and place of abode, and alſo the name or names and place or places of abode of the attorney or attornies to whom he ſhall have been articled, written in legible characters, to be affixed on the outſide of the court of *King's Bench*, in ſuch place as publick notices are uſually affixed, and alſo in ſome conſpicuous place in the chambers (*a*) of each of the judges of that court, and in the *King's Bench* office; and that no perſon who ſhall not have regularly complied with this order ſhall in future be admitted an attorney of that court."

This rule has been ſince adopted by the court of C. P. But inſtead of fixing up his name and place of abode in the judges' chambers, it is ordered by a ſubſequent rule 1 r. 33 G. 3. That he ſhall enter, or cauſe to be entered, in a book to be kept for that purpoſe at each of the judge's chambers of that court, his name and place of abode, and alſo the name and place of abode of the attorney or attornies to whom he ſhall have been articled; and that no perſon who ſhall not have complied with this rule ſhall in future be admitted an attorney.

As a further means of reducing the number of this body of men, by ſtat. 34 *G.* 3. *c.* 14. the legiſlature have impoſed a duty of 100*l.* upon every contract in writing, to ſerve as a clerk, in order to admiſſion as a ſolicitor or attorney in any court at *Weſtminſter*, and a duty of 50*l.* upon every ſuch contract, in order to admiſſion into any court of great ſeſſions in *Wales*, *Cheſter*, *Lancaſter*, or *Durham*, or in any court of record in *England* holding pleas, where the debt ſhall amount to forty ſhillings. And § 2. no clerk can be admitted unleſs the indenture or writing containing the contract be enrolled, together with an affidavit of the due execution thereof, in the court in which ſuch clerk propoſes to be admitted, within ſix months next after the execution thereof; and in default of enrolment within that time the ſervice ſhall be deemed to commence from the time of the enrolment, and not from the execution of the indentures. And by § 3. every perſon ſhall, previous to his being permitted to practiſe, make an affidavit of the payment of the duty, and ſpecify in it the ſum paid, and the name and place of abode of the perſon or perſons with whom the contract of ſervice was entered into, the time of the execution thereof, and of the enrolling of it; and, in caſe he ſhall have been previouſly admitted a ſolicitor or attorney in ſome other court, ſhall ſpecify in ſuch affidavit the court in which he has been ſo admitted, and time of

his

his admiſſion, and cauſe the ſame to be filed in the court in which he propoſes to be admitted; which affidavit ſhall be produced and openly read in the court in which he propoſes to be admitted before he ſhall be enrolled therein.

The § 4. impoſes a penalty of 100*l.* upon any perſon, other than ſuch as ſhall have been admitted in one of the courts of great ſeſſions in *Wales*, &c. by virtue of a contract made before the 5th and 10th days of *February* 1794, and a ſervice in purſuance thereof, who ſhall in his own name, or that of any other perſon, ſue out any writ or proceſs, or commence, proſecute, or defend any action or ſuit, or any proceedings in any of the courts at *Weſtminſter*, without being admitted in one of them according to the directions of the ſeveral acts now in force for the better regulation of attornies; and further incapacitates him from maintaining any action for the recovery of his fees, &c. on account of ſuch proceedings.

But by § 5. perſons admitted in any court at *Weſtminſter*, who ſhall have paid the 100*l.* duty, may be admitted in any other court mentioned in the act without paying any further duty; and by § 6. a ſimilar proviſion is made for the admiſſion of thoſe who have paid the 50*l.* duty into any other court but thoſe at *Weſtminſter*. And by § 7. any perſon admitted in any of the above courts, by virtue of a contract and ſervice thereunder, before the ſaid 5th and 10th days of *February*, may be admitted to any of the other courts without the payment of the duties impoſed by this act. And § 8. protects articled clerks who ſhall have paid the duty from the payment of it again, upon any new contract with other maſters.

Barnes, 39. An apprentice to a man as a ſcrivener, though he be alſo an attorney, cannot be admitted.

Ex parte Cole, Dougl. 113. A barriſter cannot be admitted an attorney: if he is deſirous of being ſo, he muſt firſt apply to his ſociety to be diſbarred.

Moody's caſe, Barnes, 42. An attorney who had at his own inſtance been ſtruck off the roll, and had been put into the commiſſion of the peace, and made a commiſſioner of the land-tax, moved to be reſtored; and on an affidavit ſetting forth his reaſons, the motion was granted, he conſenting to take no advantage of any action pending, if there ſhould be any.

Page 185 **(B) Who may appear by Attorney, and in what Caſes.**

(*The Statute of*) By reaſon whereof, Lord Coke obſerveth, there were but few ſuits, Co. Lit. 128. a.

Page 187 **(C) Of retaining an Attorney, what ſhall be an Appearance; and herein of the Warrant of Attorney.**

(*An Attorney is not*) Where an attorney of either bench has accepted a warrant, or ſubſcribed a proceſs, declaration, or warrant to appear, the rule is, "that he ſhall be compelled to cauſe an "appearance, or be liable to an attachment, or put out of the roll, as the caſe requires; and "the party is not to be received to countermand ſuch appearance after his retainer." Tidd's Pr. 124. The uſual mode of proceeding upon this rule is by attachment, 6 Mod. 42. 86; and if

attorney expreſsly undertake to appear, the court will oblige him to do it in a proper manas, if for an *infant*, he muſt appear by *guardian*, Goodwright v. Wright, 1 Str. 25. Stratton rgiſs, *ibid.* 114. Power v. Jones, *ibid.* 445. And though he may have been impoſed upon heriff's officer, yet the court will oblige to fulfil his undertaking. Lorymer v. Holliſter, 696.

here an Attorney) But *Qu.* Whether an appearance under a forged warrant of attorney be and ſee the caſe of Robſon v. Eaton, 1 Term Rep. 62. where it was adjudged, that if *A.* debt which he owes to *B.* to the attorney of a perſon ſuing him in *B.*'s name, but without thority, he ſhall be obliged to pay it over again.

or where he once appears, or undertakes to be attorney for ano- he ſhall not be permitted to withdraw himſelf; and it is ſaid (*b*) to s duty to proceed in the ſuit, though his client neglect to bring him y. 1 Sid. 31. (*b*) Mordecai v. Solomon, Say. Rep. 173.

ttornies were anciently appointed in court, when actually preſent: hey are now uſually appointed out of court by warrant, which ſhould arly be in writing; but an authority by parol is ſaid to be ſufficient to ort a judgment. 1 Wilſ. 39. 2 Keb. 199. 1 Lill. Pr. Rep. 134. 137.

f Warrant of Attorney) At any time *pendente lite*. 1 Str. 526. Noke v. Caldecot, 2 Str. Henriques v. The Dutch Eaſt India Company, 2 Ld. Raym. 1532. S. C. Brooke v. ning, Fitzg. 191.

t was formerly the courſe of the court of K. B. to enter the warrants ttorney on a particular roll kept for that purpoſe: but this courſe was red by *Wright*, Ch. J. who cauſed them to be entered on the top of plea-roll, as the practice is at this day. 1 Salk. 88. R. E. 4 J. 2.

t is to be obſerved with reſpect to the warrant of attorney, that by 25 3. *c.* 80. above-mentioned, § 13, 14, 15. "No attorney ſhall ſue ut any writ or proceſs, or commence, proſecute, or defend any action, unleſs he ſhall have delivered to the officer or his deputy, appointed to ſign or iſſue the firſt proceſs for the plaintiff, or to enter, file, or record the bail or appearance for the defendant, a *memorandum* or minute of his warrant duly ſtamped, containing the names of the parties, the court, and the attorney; and where a *præcipe* is required (except for an original), the nature and denomination of the proceſs, and the return of it; which *memorandum* or minute the ſaid officer or his deputy ſhall receive, and forthwith enter or file on record, and ſhall ſign thereon the day of delivering it." A ſimilar memorandum is required § 19. previous to entering up judgment on a *cognovit actionem*, or warnt of attorney. But by § 17. No action ſhall be ſtayed, or judgment ſet aſide on account of the omitting to enter a *memorandum*.

If there be a) *Vide* ſupra, tit. *Amendment*, (D 3.) the caſe of Richards v. Brown, Dougl. 114. here the very reverſe to this was done; the name in the warrant of attorney altered to that the declaration.

In Phillips v. Smith, which was a penal action, a miſtake in the addition of the defendant in e warrant of attorney, was amended after error brought. 1 Str. 136.

The want of a warrant of attorney is aided after verdict (*b*), or judgent by *nil dicit* (*c*), &c. by the ſtatutes of jeofails. (*b*) 18 El. c. 14. (*c*) 4 & 5 Ann. c. 16.

(D) Of

Page 188 **(D) Of the Power of an Attorney, when a pointed; and the Regularity of his Proceedings.**

(*By the* 2 *Geo.* 2) Where the attorney ſues for himſelf, his name need not be indorſed on t writ. 4 Term Rep. Fields one, &c. v. Lewen.

(*All Warrants for*) By a ſubſequent rule, Paſch. 4 Geo. 2. the attorney required to be p ſent, muſt be an attorney on the behalf of the defendant. 2 Str. 902. He muſt be an ac attorney at the time; therefore one who had ſerved a clerkſhip, though he was ſworn an att ney ſoon after the execution of the warrant, and before any motion was made to ſet aſide ſubſequent proceedings, was not thought ſufficient. Barnes v. Ward, Barnes, 42. Theſe r are univerſal; they extend to warrants of attorney executed abroad. Fitzgerald v. Plunket Str. 1247. But they are limited to the caſe of arreſts upon meſne proceſs; for one in execu may give a warrant of attorney to confeſs a new judgment, though an attorney on his part be n preſent. Watkins v. Hanbury, 2 Str. 1245. Fell v. Riley, Cowp. 281. Birch v. Sharland, Term Rep 715. But even in execution, if the party had been prevailed upon to acknowledg judgment for more than was really due, the court would give relief. Cowp. 281. They are limi too to the particular cauſe, and the particular perſon at whoſe ſuit the defendant is in cuſto to warrants to confeſs judgments in other actions, to other perſons they do not extend. 5 Mo 144 Churchy v. Roſſe, 2 Ld. Raym. 797. Finn v. Hutchinſon, 3 Burr. 1792. Holcomb Wright, Cowp. 141. Of courſe they do not apply to the caſe of a perſon in cuſtody on crim nal proceſs. Charlton v. Fletcher, 4 Term Rep. 433.. Though in ſtrictneſs they are confi to the caſe of perſons in cuſtody of ſheriff's officers, yet where a *cognovit actionem* was taken fro a priſoner in cuſtody of the marſhal, no attorney on his part being preſent, the court thoug that the plaintiff's attorney had acted improperly, and relieved the priſoner. Parkinſon Caines, 3 Term Rep. 616. But theſe rules, intended for the protection of defendants, are n to be converted by them into inſtruments of fraud: therefore, where it appeared that a w rant of attorney given by one in cuſtody without an attorney on his part being preſent, was given *purpoſely with a view to cheat the plaintiff*, the court refuſed to ſet it aſide. Gilman v. Hil Cowp. 141. Where the defendant is himſelf an attorney, the preſence of another attorney o his part is not neceſſary. Walton v. Stanton, Barnes, 37.

(*In Aſſumpſit*) See tit. *Arbitrament*, (C). Payment of a debt to the attorney, is payment to the party; but payment to an agent employed by the plaintiff's attorney, merely to ſue the defen dant, is not ſo. Yates v. Freckleton, Dougl. 623. But if an agent in town take money out o court, which the defendant has irregularly paid in under a judge's order, that ſhall bind th plaintiff, and be a waver of the irregularity. Griffiths v. Williams, 1 Term Rep. 710.

Earl of Yarmouth. v. Ruſſel. 2 Ld Raym. 1142. A *remittit damna* may be entered by attorney.

2 Inſt. 378. Gilb. Exec. 92. The warrant of attorney continues in force until the judgment, and for a year and a day afterwards, in order to have execution.

Page 189 **(E) Of the Determination of his Power; and herein of diſmiſſing or changing him.**

(*By an Order*) Kaye v. De Mattos, 2 Bl. Rep. 1323. Macpherſon v. Roriſon, Dougl. 217 Walmeſley v. Booth, 2 Atk. 27. Ld. Hardwicke ſaid, that he did not know that a 60 clerk could not be changed merely at the pleaſure of the party. Taylor v. Lewis, 2 Vez. 112. Payment to the plaintiff's late attorney, chahged without leave of the court, is good. Powell v. Little 1 Bl. Rep. 8.

(*A Warrant of Attorney*) Where the plaintiff after judgment received the money, and gave a warrant to an attorney to acknowledge ſatisfaction, and afterwards and before ſatisfaction acknowledged, revoked his warrant, the court would not ſuffer any proceeding upon the judgment without their leave. Manſer v. Shelley, Raym. 69.

A judgment entered up by an attorney, on a warrant of attorney given to him after the death of his teſtator, as of a term when his teſtator was alive, will be ſet aſide. Gainſborough v. Follyard, Str. 1121. If it be made appear to the court that the party is dead at the time of moving

g to enter up judgment, they will not allow it to be done. 2 Str. 1081. But this rela-
oes not opperate in adverſary ſuits. Sibbet v. Ruſſel, Ca. Tem. Hardw. 183.

Of his Fees and Diſburſements, and the Remedy for the Recovery of them. Page 190

y the 3 *Jac.*) But the law is otherwiſe now, for if *any part* of the demand ariſe from the
act of buſineſs in the ſuperior court, the whole bill will be referred. Doug. 199. 4 Term
124. So if the whole be for buſineſs done at the ſeſſions, *ex parte* Williams, 4 Term Rep.
Clarke v. Donovan, 5 Term Rep. 694. And therefore in ſuch caſe the bill muſt be
d and delivered, *ibid.* A ſimilar rule prevails in equity, and it makes no difference if part
e buſineſs be done for ſeveral other perſons, as well as the party who applies. Merzennot
ndiford. 3 Bi. Ch. Rep. 233. But if the *whole* demand be for conveyancing, the courts at
miſter will not interfere. *Id.* Hillier v. James, Barnes, 41.
t on the defendant's undertaking to pay, the court will, in the caſe of an executor, refer it
taxed, Imp. K. B. 482. Weſton v. Pool, 2 Str. 1056. though the practice ſeems to have
different formerly. Andr. 276. Wellis v. Nicholſon, Barnes, 119. Lee v. Knight, *id.*
Chapple v. Chapman.

By the 2 *Geo.* 2. *cap.* 23.) But under the general juriſdiction of the courts, an agent's bill may
eferred to be taxed; and it hath accordingly been done, the employer bringing into court
ſum remaining due on the amount of the plaintiff's claim, the ſum that ſhould be deducted,
ny, to be afterwards repaid. *Ex parte* Bearcroft, E. 7 G. 3. Dougl. 200. Dixon v. Plant,
19 G. 3. *Ibid.* If action be brought before the expiration of a month after the delivery
the bill, it is a ground of nonſuit, but not of motion to ſtay proceedings. Harper v. Leech,
nes, 123. But in order to enable an attorney to *ſet off* his bill, it is not neceſſary that he
uld deliver it a month before; he muſt not indeed produce it at the trial by ſurpriſe; Mur-
y v. Cunningham, Exchequer, 1793. But if he deliver it time enough for the plaintiff to have
axed before the trial, that is ſufficient. Martin v. Winder, E. 23 G. 3. Dougl. 199. The
ect of the legiſlature in making this requiſition was, that the client may have due time to ex-
ine the charges, and take advice upon them if neceſſary: and therefore the attorney muſt not
y deliver the bill, but *leave* it with the client; if he take it back again, the ſtatute is not
nplied with. Brooks v. Maſon, 1 H. Bl. Rep. 290. 1 Str. 633. It ſeemeth to have been
merly a common practice with attornies to deliver in their bills at any time pending the ſuit.
rnard. K. B. 316. But the client having this time given him to examine the bill, and a ſum-
ry way of trying the reaſonableneſs of the items by reference to the maſter, ſhall not be al-
ed if he put the attorney to his action to diſcuſs the items at the trial; for if the buſineſs
e really done, the delay of the defendant for more than a month in objecting to the *quantum*,
an admiſſion that he thinks *that* reaſonable. Dougl. 198, 199. Williams v. Frith, Harper v.
ll. But a bill may be taxed after action brought, and at any time before verdict, or judgment,
the money be not paid. Shaw v. Pickering, B. R. M. 30 G. 3. Dougl. 198. *notes.* By 12
2. c. 13. ſ. 5 the bill may be written with ſuch abbreviations as are commonly uſed in the
gliſh language. Taxation cannot regularly be applied for before bill delivered. Cowper v.
ilburn, Barnes, 126. but the delivery of the bill may be compelled. Imp. K. B. 479. Where
perſon who has obtained an order of taxation dies, his repreſentative ſhall not revive it, but
an undertaking to pay. 2 Atk 114. Heretofore, it ſeemeth, that no rule could properly
made for taxation, unleſs there was an action pending upon the bill. Springate v. Springate,
lk 332. The year before this ſtatute paſſed, Lord Chancellor King declared, that *he* firſt in-
oduced the practice of bringing in the money into the courts of law when he was Lord Chief
ſtice C. P; and that the ſame rule was afterwards adopted by the court of K. B.; for the party
ing ſtopped from ſuing at law, he thought it reaſonable that the attorney ſhould have ſecurity
r his money; but his lordſhip refuſed to do it in chancery. Moſ. 68. p. 40. And this was
ought, ſaith Lord Hardwicke, a great hardſhip on clients at the time of making the act, be-
uſe an attorney might make a very unreaſonable bill, and put a burthen on his client to raiſe
: the act therefore varied the rule both of courts of common law and equity; ſo that the
ient ſubmitting to pay what ſhould become due, the bill ſhould be taxed, and that without
inging the money into court. 2 Ves. 451. In general, accounts cannot be taken on taxation
a bill, much leſs can the client after taxation allege an antecedent demand, and deſire to
ave that deducted; this would be to open a judgment, (for this is a judgment of the court upon
he client's own ſubmiſſion to pay what may be due,) and would make theſe things ſo uncertain
hat there would be no end of them. *Ibid.* In equity, after taxation, the ſolicitor may take
ut an attachment for the bill without firſt of all taking out a *ſubpœna*. But he muſt previouſly
ave a copy of the order of taxation, and the maſter's report of the ſum at which the bill is
taxed,

taxed, at the client's houſe. 2 Atk. 134. Barnard. Ch. 266. But the executor of an attorney pays no coſts, although above a ſixth part be taken off. Weſton v. Pool, 2 Str. 1056. Where an attorney accepted a leſs ſum than he demanded in diſcharge of his bill, and the bill was afterwards taxed, and a ſixth part of the ſum originally demanded taken off; the court conſidered the ſum accepted in full of his bill, as his demand; and therefore that he was not abſolutely liable to pay the coſts of taxation. Ecollier v. Dutour, Barnes, 128.

Parry v. Owen, Ambl. 109. Oſbaldiſton v. Croſs, Com. Rep. 611.

A ſolicitor cannot bring a bill in equity for his bill: nor can he go there for an account after his bill has been taxed, upon the ground that the officer has not made proper allowances.

Walmeſley v. Booth, 2 Atk. 27. See too Sir William Sanderſon v. Glaſs, 2 Atk. 296. Proof v. Hines, Caſ. Temp. Talbot, 115.

Where a client, unaſſiſted by an attorney, has paid a law-bill, and accepted of a receipt for it, a court of equity has allowed him to open the whole account notwithſtanding, and to take exceptions to any improper or extravagant charges. And where a client has given an attorney a bond or mortgage to ſecure the payment of what was charged to be due to him on account of a law-ſuit, the courts of equity have relieved the client and ordered the bill to be taxed: and the ground on which this relief is given, is, the great power and influence which the attorney has over his client. *Per* Lord *Hardwicke*. Newman v. Payne, 4 Br. Ch. Rep. acc.

Draper's Company v. Davis, 2 Atk. 295. 4 Br. Ch. Rep. S. P.

A ſolicitor having taken a judgment of his client for 400*l.* whilſt the cauſe was depending, and ſeveral extraordinary charges appearing in the bill, Lord *Hardwicke* referred it to be taxed, though it had been adjuſted and allowed ſeventeen years before, and ordered the judgment and ſecurities to be given up.

Comb. 43. 337 4 Term Rep. 123. Moſ. 319.

An attorney cannot be compelled to deliver up any deeds, or writings belonging to his client, which may come into his hands in the courſe of the buſineſs in which he hath been engaged, untill his bill, taxed by the proper officer, hath been paid. But whether he have ſuch a lien upon deeds and writings the property of third perſons, which he hath ſo become poſſeſſed of, is a matter of doubt.

Park v. Carter, C. P. Tr. 1788. *Ex parte* Buſh, Mich. 1734. 7 Vin. Abr. 74. 1 Co. Bankrupt Laws, 514.

Where an attorney had been employed by one who afterwards became bankrupt, and the aſſignees petitioned to have the papers delivered up, and that the attorney might come in for his demands *pari paſſu* with the other creditors; the Lord Chancellor ſaid, that the attorney had a lien upon the papers in the ſame manner againſt the aſſignees, as againſt the bankrupt; and though it doth not ariſe by any expreſs contract or agreement, yet it is as effectual, being an implied contract by law. But, he ſaid, that papers received after the bankruptcy could not be retained.

Dougl. 238. 3 Atk. 720. 1 H. Bl. Rep. 122.

An attorney hath, in conſideration of his trouble, and the money he is in diſburſe for his client, a right to be paid out of the duty decreed, or money recovered by him. If ſuch money come to the attorney's hands, he may retain to the amount of his bill. He may ſtop it *in tranſitu*, if he can lay hold of it. If he apply to the court, they will prevent it from being paid over till his demand is ſatisfied; and it ſeemeth, that a payment by a defendant after notice from an attorney not to pay it till his bill is diſcharged, would be a payment in his own wrong, and like paying a debt, which hath been aſſigned, after notice. He is entitled to be paid out of money levied by a ſheriff upon an execution under a judgment recovered by his client; notwithſtanding the ſheriff may have had notice from the party againſt whom the execution iſſued, to retain the money, as the court would

would be moved to ſet aſide the judgment for irregularity; and notwithſtanding a docket may have been ſtruck againſt the client becoming a bankrupt.

The aſſignees of a bankrupt cannot take out of court money paid in by a defendant in an action at the bankrupt's ſuit, till they have paid his bill. Owſton v. O'Bryan, Barnes, 115.

It hath been determined in equity, that he hath a lien on a lunatick's eſtate for money expended by him in ſuits at law and in equity. But the reporter queſtions this doctrine. However, in a caſe in the following year, on a petition by a ſolicitor to be paid his bill of coſts for taking out a commiſſion of lunacy, out of the lunatick's eſtate, and not to be obliged to come under a commiſſion of bankrupt which had iſſued againſt the perſon who took out the commiſſion of lunacy; Lord *Hardwicke* ſaid, that ſolicitors have this equity allowed them to be entitled to a ſatisfaction out of the fund for their expences, whether in the way of ſuit, or proſecution in lunacy, or bankruptcy. Barnſley v. Powell, Ambl. 102. *Ex parte* Price, 2 Vez. 407.

His lien upon a duty decreed his client gives him a preference to ſpecialty creditors. 3 Atk. 720.

If employed in a ſuit by huſband and wife for a term of years in right of the wife, and the huſband die leaving no aſſets, equity will decree him ſatisfaction out of the profits of the term. Sharſton v. Hipſley, 4 Vin. Abr. 103.

The courts will not permit an attorney to be defeated of this remedy for his coſts by colluſion between his client and the defendant; as where a client, at whoſe ſuit a defendant was in cuſtody for non-payment of coſts taxed for ſcandal and impertinence, executed a mere voluntary releaſe to the defendant without the knowledge of the clerk in court, the chancellor would not diſcharge the defendant till he had paid the clerk his fees. 2 Vez. 25.

This however is to be confined to caſes of fraud and colluſion; for if the client has fairly and honeſtly terminated the affair with his adverſary, and the *whole* debt and coſts have been paid, this equity cannot be ſet up againſt the defendant. Dougl. 238. 2 Vez. 25.

The attorney's lien upon the coſts is ſubject to the equitable claims of the parties in the cauſe. 1 H. Bl. Rep. 23. 2 Bl. Rep. 827.

But where a party againſt whom a judgment hath been obtained applies to get rid of the judgment, the court will take care that the attorney's bill is ſatisfied. 4 Term Rep. 123.

As where *A.* recovered againſt *B.*, and *B.* recovered againſt *A.* and *C.*, and *B.* moved to ſet off the damages which he had recovered againſt thoſe obtained by *A*; the court inſiſted upon his undertaking to ſatisfy the bill of *A.*'s attorney in the firſt action, he having a lien on the judgment for his coſts.

If a ſolicitor recover an eſtate for his client in equity, and the client die, he loſes his lien upon the eſtate in the hands of the heir at law; but if the ſuit be revived, the lien will revive too. *Per* Lord *Hardwicke.* Ambl. 102.

If *any part* of an attorney's bill be for buſineſs done in the court, the bill muſt be delivered a month before the action is brought, otherwiſe the plaintiff cannot recover. And charges "for drawing and engroſſing an "affidavit of debt in order to hold a party to bail; paid for ſwearing," *&c.* have been conſidered as buſineſs done in court. Winter v. Payne, 6 Term Rep. 645.

To

Ford v. Maxwell, 2 H. Bl. 589.

To maintain an action by one attorney againſt another, for buſineſs done by the plaintiff for the defendant, before the defendant became an attorney, it is not neceſſary for the plaintiff to leave his bill ſigned with the defendant, purſuant to the directions of the ſtat. 2 *G.* 2. *c.* 23. § 23. for the ſtat. 12 *G.* 2. *c.* 13, applies to the caſe of both parties being attornies when the action is brought.

White v. Milner, 2 H. Bl. 357.

An attorney's bill had been referred to the prothonotary by a judge's order, and on the taxation more than one-ſixth part was taken off. But the deduction was occaſioned, not by any overcharges of particular *items*, but by the whole of the expences of defending two actions for one *B.* being diſallowed; which it was ſtated the defendant had undertaken to pay to the plaintiff, but which the prothonotary, and afterwards the court, upon reading the affidavits, thought he had not undertaken to pay. On motion that the attorney might pay the coſts of the taxation, the court held, that the ſtatute of *G.* 2. was applicable only where an attorney made exorbitant charges on his client, in the particulars of his bill, and the foundation of the demand was not denied, but only the amount of it: that in the preſent caſe, the plaintiff's charges for defending *B.* were not objectionable, provided he could have proved that the defendant was liable to pay them, and the other *items* of the bill were not reduced one-ſixth.

Webb v. Stone, Anſt. 260.

A ſolicitor delivered in a bill of coſts including an *item*, which, though fairly due, could not be allowed on taxation. He delivered a ſecond bill without that *item*. On referring this bill for taxation leſs than a ſixth part was taken off. The court would not give coſts on either ſide.

Murphy v. Cunningham, Anſtr. 271.

Leave was granted by the court of Exchequer to ſet off coſts in a ſuit in the Common Pleas, for which the plaintiff in the Exchequer (though not himſelf the party in the ſuit) had retained the defendant as the attorney, againſt the judgment in the Exchequer.

Piſtor v. Dunbar, *Id.* 186.

Where ſeveral bills of coſts have been delivered in, ſettled, and paid, in the courſe of a long cauſe, and a receipt in full given, a client ſhall not be permitted at the end of the cauſe to refer them for taxation.

Mitchell v. Oldfield, 4 Term Rep. 123. Morland v. Hammerſley, 2 H. Bl 441. n. Randle v. Fuller, 6 Term Rep. 456. Gabbett v. Chaytor, Anſtr. 229.

It ſhould ſeem from the current of authorities in the court of King's Bench, that the equitable right of ſetting off in one action the ſum recovered in another, is always ſubject to the attorney's lien for his bill. And the ſame opinion ſeems to prevail in the Exchequer. However the contrary hath been ruled both in the court of Chancery (*a*) and in the court of Common Pleas. For (*b*) where *A.* had obtained a verdict againſt *B.* for a ſmall ſum, and *B.* had previouſly recovered judgment againſt *A.* for a larger ſum, and had taken him in execution, the court of Common Pleas permitted the ſum recovered by *A.*, and the coſts to be deducted from the amount of *B.*'s judgment, and ſatisfaction to be entered for ſo much, notwithſtanding *A.* was inſolvent, and had no means of paying his attorney's bill, but by the ſum for which he obtained the verdict.

Smith v. Brockleſby, *Id.* 61. Barton v. Etherington, cited by Buller, J. in 2 H. Bl. 441. Vaughan v. Davies, 2 H. Bl. 440.

Read v. Dupper, 6 Term Rep. 361.

If the defendant's attorney pay to the plaintiff the debt and coſts recovered, after notice from the plaintiff's attorney not to do ſo till his bill has been firſt ſatisfied, the former is liable to pay to the latter the amount of his lien on ſuch debt and coſts of the ſuit.

Where

Where a ſolicitor has been guilty of great delay in bringing in his bills, the court will not give him the coſts of taxation, although leſs than one-ſixth is taken off. Yea v. Yea, Anſtr. 589.

(G) Of the Privileges which an Attorney has. Page 192

(*Attornies have*) But actions *qui tam* are not conſidered as the king's ſuits. T. Raym. 275. 1 Bl. Rep. 373. Cowp. 367.

For if of different courts, the plaintiff is entitled to his privilege. 2 Str. 1141. 1 Bl. Rep. 19.

Vide tit. *Privilege*, (B).

An attorney cannot ſue an attorney by attachment of privilege, and hold him to bail: if he do, the defendant may plead his privilege in abatement, or the court will ſtay the proceedings without coſts. Barber v. Palmer, 6 Term Rep. 524.

A bill may be filed againſt an attorney in the vacation, and in ſuch caſe the day of filing it may be inſerted in the memorandum. Waghorne v. Fields. 5 Term Rep. 173. Dodſworth v. Bowen, *Id.* 325.

An attorney (defendant) is entitled to only four days notice to plead, though he reſide more than twenty miles from *London*. Mann v. Fletcher, Fletcher, *Id.* 369.

The privilege does not neceſſarily attach upon a perſon's inveſting himſelf with the character of attorney, but he muſt be a practiſing attorney. The rule of court in 1654 confines the privilege to attornies who have practiſed within a year. In order to preſerve the privilege the party therefore muſt continue to act as ſuch; for the very foundation of it is a preſumption that an attorney is already in court attending his duty, and therefore the iſſuing of proceſs merely to bring him there is nugatory. That reaſon conſequently does not apply to an attorney who is not practiſing at the time. Brooke v. Bryant, 7 Term Rep. 25.

An attorney is not liable to be aſſeſſed in the poor rates in reſpect of the profits of his profeſſion. Rex v. Startifant, 7 Term Rep 60.

(H) Of Offences and Misbehaviour for which he is puniſhable; and herein of the Form of the Proceedings againſt him.

(*Attornies are Officers*) An attorney, convicted of felony and puniſhed for it, was ſtruck off the roll as a perſon unfit for the profeſſion, though no particular miſconduct was imputed to him. *Ex parte* Brownfall, Cowp. 829.

So if he put another attorney's name to proceſs without his authority.

(*But if an*) 2 Str. 1197. 1 Wilſ. 30. Oppenheim v. Harriſon, 1 Burr. 20.

(*Attornies are alſo*) R. v. Tew, Say. Rep. 50. Where they are guilty of groſs negligence, the courts will, upon motion, compel them to indemnify their clients from the conſequences, Fawkes v. Pratt, 1 P. Wms. 593. But for a mere miſtake, the clients will be left to their ordinary remedy. Barker v. Butler, 2 Bl. Rep. 780.

But in the caſe of Strong v. How, though it appeared that the deeds did not come into the hands of the attorney in the way of his profeſſion, yet the court ordered him to deliver them up, otherwiſe attachment. Str. 621. 8 Mod. 339. S. C. And a like order was made in 3 Term Rep. 276. where they came into his poſſeſſion as ſteward of a court and receiver of rents. Where an attorney accidentally loſt a deed entruſted to his care, an attachment was granted, but ordered to lie in the office till farther directions. The mode of proceeding in this caſe ſeems to be, for the plaintiff to file a bill in equity againſt the attorney for a diſcovery of the deed; the expence of doing ſo to be paid by the attorney. Court v. Gilbert, 2 Barnard. K. B. 263. Where an attorney delivered back to his client a deed which he had received from him, the court would not, upon the motion of a third perſon by whom the deed had been lent to the client, grant a rule againſt the attorney to deliver it up. Dottin's caſe, Str. 547. Where it appears that a third perſon is intereſted in the deeds, the court will take a ſecurity from the perſon to whom they are delivered to produce them on demand for the inſpection of ſuch third perſon. Hughes v. Mayre, 3 Term Rep 275 An attorney of one court practiſing in another court, thereby becomes ameſnable in this inſtance to the juriſdiction of ſuch other court. 8 Mod. 340.

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(*Attornies are Puniſhable*) See too ſeveral other inſtances where attornies are puniſhable. Str. 420. 576. 899. 1024. C. T. H. 131. 237. Andr. 275. 2 Barnard. K. B. 219. Bl. Rep. 2. The ſtriking off the roll is not to be underſtood as a perpetual diſability, but may be conſidered in the light of a ſuſpenſion only, and the party may, if the court ſees cauſe, be re-admitted. Rex v. Greenwood, Bl. Rep. 222.

Evans v. P——, 2 Wilſ. 382. If attornies do any thing wrong *quà* attornies in inferior courts, the ſuperior courts will puniſh them for it, for they cannot act in the former, unleſs they are admitted of the latter.

Croſs v. Kaye, 6 Term Rep. 663. The *ſtat.* 25 G. 3. *c.* 80. which impoſes a penalty upon attornies proſecuting or defending without a certificate a ſuit *in any court holding pleas, where the debt or damage ſhall amount to forty ſhillings or more*, does not extend to the ſheriff's court, though an attorney proſecute a ſuit there by virtue of a writ of juſticies for more than forty ſhillings.

Audita Querela.

Page 194 (A) Who may be relieved by *Audita Querela*, and againſt whom.

(*But if A.*) So in a *ſcire facias* on a judgment, if defendant has a releaſe, but omits to plead it, he ſhall not have an *audita querela*. 1 Wilſ. 98.

(*If a Statute be made*) *Contr.* 48 E. 3. 12. Br. *Brief*, pl. 81. *Audita Querela*, pl. 11. *Barn and Feme*, pl. 24.

Page 195 (B) In what Caſes an *Audita Querela* will lie.

(*So in Treſpaſs*) Bro. Contin. p. 27 *Infra*, tit. *Pleas and Pleading*, P. See the caſe of Lovell v. Eaſtaff, 3 Term Rep. 554. where the bankruptcy of the plaintiff, between the trial and the day in bank, was pleaded as a plea *puis darrein* continuance.

(*If a Man*) It muſt be obſerved that the only point determined in the caſe of Price v. Goodrick was, that where the plaintiff conſents to the diſcharge of one defendant in execution, the court will not relieve the other upon motion, but put him to his *audita querela*. Whether entitled to relief or not upon the *audita querela*, was left open by that caſe. So conſidered by the court of

of Common Pleas, who acted accordingly in a like case of Williams v. Jaques and Griffin, Mich. 28 Geo. 3.

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(*If a Statute is Erroneously*) Where a *feme sole* married between interlocutory judgment and the final judgment, and after the final judgment, the husband and wife brought a *scire facias* thereupon for the defendant to shew cause *quare executionem non, &c.* the court of Exchequer would not set aside the judgment upon motion, but put the defendant to his *audita querela*. Lord Sutherland & Ux. v.——, Bunb. 282. So where a *feme* married after the interlocutory judgment, and before executing the writ of inquiry, the court refused to interpose upon motion, and left the defendant to his *audita querela*. Chubbs v. Billington, Bunb. 283. The court will not relieve upon motion if the law is doubtful, though the facts are admitted, but will oblige the party to resort to an *audita querela*. Lord Portchester v. Petrie, K. B. Tr. 23 G. 3. Williams v. Jaques and Griffin, C. P. M. 28 G. 3.

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(*If A. brings an*) After two *nihils* returned the court will relieve upon motion, but not after the *scire facias* hath been served. But they will not do so in the former case if the fact on which the motion is grounded be controverted. 2 Str. 1198. Mitford v. Cordwell.

AUTHORITY.

(C) Where an Authority is well pursued and executed.

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(*Here it is*) Lodon v. Lodon, 2 Freem. 136. and 1 Ch. Ca. 179. Garfoot v. Garfoot, 1 Ch. Cas. 35. Pitt v. Pelham, 2 Freem. 134. 1 Ch. Rep. 283. and 1 Ch. Cas. 176. T. Jon. 25. 1 Lev 304. Yates v. Compton, 2 P. Wms. 308. One devises the residue of his personal estate to *J. S.*, provided she marries with the consent of his two executors: upon the death of one, the condition is gone, for this is a bare authority, not coupled with an interest, and therefore cannot survive without express words for that purpose. Peyton v. Bury, 2 P. Wms. 626.

(*But if a Man*) This distinction between a devise *of lands to be sold by executors*, and a devise that *executors shall sell lands*, seems rather to consist in the arrangement of the words, than in any thing substantial; and the learned editor of the 13th edition of the 1st Inst. hath a very full note upon this passage of Lord Coke, in which he contends, that the power to sell being given to the executors *by reason of an office or interest*, which go to the survivor, may well survive with them in either case.

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(*If a Warrant of Attorney*) Alexander v. Alexander, 2 Vez. 640. Adams v. Adams, Cowp. 651.

(*If the king grants*) But Rolle adds, "*dubitatur*;" and Lord Coke Page 202 saith, that "it was touched (but not resolved) that they had *not* pur-"sued their authority."

(*But if a Sheriff*) Where the king directed the deputy and council of *Ireland* to cause a bishop to be installed, and the deputy was changed, it was holden, that the successor and council might do it. Palm. 27.

(*Where a Person*) Hob. 160. 1 Atk. 559. Hardr. 395. 1 Ch. Cas. 103. 1 Lev. 150.

(E) When it ſhall be ſaid to be determined and revoked.

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(*So if the King*) In both theſe caſes an intereſt paſſeth with the authority, and therefore it is that it doth not determine by the death of the king. But where a bare authority paſſeth, and no or meth to be otherwiſe. Pl. Com. 457. Hardr. 444. 1 Freem. 85. 115. 137.

Bail in Civil Cauſes.

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(*Bail and Mainprize*) So they may juſtify the breaking and entering the houſe, (the outer door being open,) in which the principal reſides, (whether he is ſolely poſſeſſed of ſuch houſe, or reſide in it by the conſent of another,) in order to ſeek for him, for the purpoſe of rendering him. Sheers v. Brooks, 2 H. Bl. Rep. 120.

(B) In what Caſes Special or Common Bail is required. And herein.

8. Whether a Defendant be holden to Bail twice for the ſame Cauſe of Action?

(D) Of the Proceedings on the Bail-Bond.

(E) Within what time the Bail muſt ſurrender the principal.

(F) Of the Bail-Bond.

Page 206 **(A) What Perſons are authorized to take Bail.**

(*This the Sheriff is*) This, it is now ſettled, is a publick act, of courſe, need not be pleaded. Samuel v. Evans, 2 Term Rep 569.

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(*And if the*) For he is not obliged to do ſo. Rex v. Dawes, 1 Ld. Raym. 722.

And by the laſt ſection, "any judge of aſſiſe, in his circuit, ſhall and "may take and receive all and every ſuch recognizance and recognizan- "ces of bail or bails, as any perſon ſhall be willing and deſirous to make "and acknowledge before them, &c."

(*Before this ſtatute*) But in *C. B.* a copy of the writ whereon bail is required muſt be written on parchment, and upon that the recognizance of bail engroſſed. Rules and Orders of *C. B.* 108.

Anon. 1 Str. 479. The ſheriff cannot bail on an attachment, though a judge at his chambers may.

(B) In what Caſes Special or Common Bail is required.

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(*But if one*) See the form of this writ, and that *C. P.* may ſend to the marſhal of *B. R.* for ſuch a priſoner, and in what form it ſhall be. Dyer, 364. b.

(*If*

(*If in an Homine*) The doctrine here laid down is objected to in the case of Moor v. Watts, 2 Salk. 582. where it is ruled that a defendant taken upon a *withernam* may, if he plead *non capit*, be admitted to bail. Wife v. Lawrence, Barnes, 59. S. P.

(*And now by the*) And 19 Geo. 3. by which the cause of action in inferior courts is raised from 40*s.* to 10*l.* But a debt of 20*l.* must be sworn to, to hold to bail in the counties palatine, or in *Wales*, on process from Westminster-Hall; for this statute being in the affirmative, without negative words, is not a repeal of the 11 & 12 W. 3. c 9. which requires a debt to that amount in order to hold to bail in those places. Smith v. Dudley, 2 Str. 1102. Rayner v. Brough, Barnes, 89. *Vide* tit. *Soldiers* (B.)

The affidavit to hold to bail under this statute must shew how the debt arose; and that plainly and distinctly, neither in general terms, nor in terms of art. Jacks v. Pemberton, 5 Term Rep. 552.

Cooke v. Dobree, 1 H. Bl. Rep. 10. Hubbard v. Pacheco, *Id.* 218. Cope and another v. Cooke, Dougl. 467.

It must be a *positive* oath of the debt, made at the time of suing out the process. It must not be argumentative, point to any further evidence, refer to any thing *debors*, or leave any thing to be collected by inference, or rest only on *belief*; but must be expressed in terms of direct absolute assertion. Heathcote v. Goslin, 2 Str. 1157. Jennings v. Martin, 3 Burr. 1437.

Bright v. Purrier, *Id.* 1687. Anon. 1 Wils. 121. Champion v. Gilbert, 4 Burr. 2126. Wheeler v. Copeland, 5 Term Rep. 364. Mackenzie v. Mackenzie, 1 Term Rep. 716. Powell v. Portherch, 2 Term Rep. 55. Williams v. Jackson, 3 Term Rep. 575. Collier v. Hague, 2 Str. 1270. See the case of Moultby v. Richardson, 2 Burr. 1032., where the words "as he com-"putes it," added to a positive oath of the debt were holden by Foster and Wilmot, (the only judges then in court,) not to invalidate the affidavit: and the case of Charter v. Jaques, Cowp. 519., where in trover against several, an affidavit that *all* the defendants had possessed themselves of the goods, and had refused to deliver them up, and that *some or one of them* had converted them," was allowed to be sufficient, the cause of action being expressed with precision in the preceding parts of the sentence, and those parts being independent on the subsequent words, "*some or one of them*," which are merely surplusage. In the case of Loveland v. Basset, Tr. 16 G. 2. cited in 1 Wils. 232.; an affidavit by the assignee of a bond that went only to *belief* of the existence of the debt was admitted, the bond itself being considered as some evidence of the debt; a presumption that it was not paid, arising from its neither being cancelled, nor given up to the obligor.

Nor is this strictness required only where it is made by the plaintiff himself: for it must be equally direct and substantive when it comes from a third person. And a defective affidavit by such person cannot be helped by one made by the plaintiff himself in another country; for the oath *abroad* is no ground for process *here*. Clapham-son v. Bowman, 2 Str. 1226. Rollin v. Mills, 1 Wils. 279.

Van Morsell v. Julian, *Id.* 231. Rios v. Belisante, 2 Str. 1209. Pomp. v. Ludvidgson, 2 Burr. 655.

But it is sufficient if assignees of bankrupt, executors, *&c.* swear that they *believe* the debt to be due, because from their situation *belief* is the highest degree of certainty which they can be expected to attain. But it must not be forgotten, that, in these cases, the insertion of the *belief* of the deponent is essential, and can on no account be dispensed with. And this exception, it seemeth, is not confined to persons suing in this representative character, but wherever from the nature of the question the party can have but a ground of belief, an affidavit to that extent only will be admitted. Walrond v Franfham, 2 Str. 1219. Barclay v. Hunt, 4 Burr. 1992. Tonna v. Edwards, *Id.* 2283. Sheldon v. Baker, 1 Term Rep. 83. *Id.* 717. Hobson v. Campbell, 1 H. Bl. Rep. 245.

A still

Davis v. Mazzinghi, 1 Term Rep. 705. Rex v. Baptiſt Rebord, 3 Burr. 1569. Watſon v. Shaw, 2 Term Rep. 654. A miſ-recital of the year in which the ſtatute paſſed, is fatal; though the inſertion of it be unneceſſary. *Ibid.*

A ſtill looſer form of affidavit is allowed in actions upon penal ſtatutes. It is enough in thoſe if the plaintiff ſtate in general terms the nature of the offence, and ſhew the amount of the penalty: he need not ſpecify the particular acts which conſtitute the offence, or charge in words directly that the defendant hath committed it; nor need he ſwear that the defendant is *indebted to him* in the ſum forfeited, or that the debt is ſtill due; becauſe it is poſſible that the right of action may have previouſly attached in another perſon; and beſides, as no one is entitled to the penalty until proceſs is actually ſued out, it is not a debt due to him at the time of making the affidavit.

1 Term Rep. 717. 1 Bl. Rep. 249. Emerſon v. Hawkins, 1 Wilſ. 335. Roche v. Carey, 2 Bl. Rep. 850. Cope v. Cooke, Dougl. 467. Jacks v. Pemberton, 5 Term Rep. 552. Nichols v. Dalyhanty, Barnes, 79. Reeks v. Groneman, 2 Wilſ. 224. Cooke v. Dobree, 1 H. Bl. Rep. 10.

It is to be obſerved that there is a difference between the practice of the court of *King's Bench*, and that of the court of *Common Pleas*, with reſpect to the affidavits to hold to bail. In the latter, the defendant is ſuffered to file a croſs affidavit, and the plaintiff may afterwards file an additional one in order to ſupply the defects of the firſt. In the former court, the plaintiff can file only one affidavit, which nothing can be received from the defendant to explain or contradict, or from the plaintiff to ſtrengthen, or even impeach. In this court therefore it is abſolutely neceſſary that the affidavit ſhould have all that poſitiveneſs and preciſion above ſtated. In the other the ſame neceſſity doth not exiſt, as that court will reſort to other media of proof, and allow the plaintiff to explain himſelf more fully in a ſubſequent affidavit. Not that that court, though leſs ſtrict in the firſt affidavit, is wholly inattentive to it, or will in all events permit a ſupplemental one to be filed: for if the firſt be not a ſufficient one to found the proceſs, as, if it be made by a perſon infamous; if it be ſo drawn, though by a mere ſlip of the pen, as that perjury cannot be aſſigned upon it; if it wholly omit to ſtate the conſideration of the debt, a ſupplemental one cannot be received.

R. E. 15 G. 2 B. R. Howard v. Nolder, Barn. 60.

It is no objection to the affidavit that it was ſworn before a commiſſioner, who is concerned as attorney for the plaintiff.

2 Str. 1148. 2 Wilſ. 225. Barnes, 79. 5 Burr. 2690.

It is inadmiſſible, if made by a perſon convicted of felony, or other infamous crime.

Dougl. 217. 5 Term Rep. 254. Huſſey v. Baſkerville, cited in 2 Wilſ. 225. 1 Burr. 332.

In every action there muſt be a ſeparate affidavit; as one will not ſerve for different actions againſt one, or ſeveral defendants. And if there be only one in ſuch caſe, it is a fatal irregularity, and cannot be waved by any act of the defendant.

If there be *no* affidavit, or if it be defective or not duly filed, or if the ſum ſworn to be not indorſed on the writ, the court will diſcharge the defendant on common bail.

(*In debt upon*) But a defendant may be arreſted for the penalty of a bond conditioned for the performance of a promiſe of marriage, &c., where the penalty is the real debt, or rather in nature of ſtated damages. 1 Wilſ. 59. 3 Burr. 1351. Dougl. 449.

Tidd's Prac. 35.

So in debt upon bond, conditioned for *the payment of money*, though the penalty is, ſtrictly ſpeaking, the legal debt; yet, as it is now conſidered upon the ſtatute of 3 & 4 *Ann. c.* 16. § 13. to be merely a ſecurity for principal,

principal, intereſt, and coſts, the defendant cannot be holden to bail for more than the ſum really due by the condition.

In *trover*, the defendant may be arreſted of courſe, though the action be brought for uncertain damages; for this is more an action of property than a *tort*. 6 Mod. 14. 2 Str. 1192. 1 Wilſ. 23. S. C. 1 Wilſ. 335. Say. Rep. 253. S. C. Cowp. 529. But it is ſaid, that where the defendant, being a cuſtom-houſe officer, was arreſted in an action of trover, brought againſt him for ſeizing goods, and it appeared by affidavit that there was a reaſonable foundation for the ſeizure, that the goods were depoſited in the king's warehouſe, and that the defendant had uſed due diligence in proceeding towards a condemnation in the Exchequer, the court ordered common bail to be accepted. 2 Bl. Rep. 1018. 1 Wilſ. 335. Say. 53. *ſemb. contr.*

Where there have been mutual dealings between the parties, the *balance* is conſidered as the debt at law as well as in equity. Tidd's Prac. 35. 4 Burr. 1996.

8. Whether a Defendant can be holden to Bail twice for the ſame Cauſe of Action?

Regularly, a man cannot be twice arreſted for the ſame cauſe: and this rule was formerly ſo rigidly adhered to, that, where the plaintiff was non-pros'd for want of a declaration, he could not afterwards arreſt the defendant in a ſecond action (*a*). But a different doctrine now prevails; for the plaintiff is ſaid to ſuffer enough by paying coſts in the firſt action, and therefore ought not to be in a worſe condition than before (*b*).

(*a*) Almanzor v. Daviſack, 1 Ld. Raym. 679, Com. Rep. 94. S. C.

(*b*) Turton v. Hayes, Str. 439. Olmius v. Delany, 2 Str. 1216.

Where the bail in the firſt action are forſworn and inſufficient, the court will permit the plaintiff to arreſt the defendant again in a ſecond action, even without diſcontinuing.

Where the plaintiff, having miſconceived his action, moves to diſcontinue upon payment of coſts, he may after the coſts are taxed and paid (*d*) take out a new writ for the ſame cauſe, and arreſt the defendant *de novo*.

(*c*) Belſiante v. Levy, 2 Str. 1209.

(*d*) Bates v. Barry, 2 Wilſ. 381. Belchier v. Ganſell, 4 Burr. 2502.

But where the plaintiff, not liking the bail in the former action, obtained a ſide-bar rule for leave to diſcontinue, upon payment of coſts, and afterwards proceeded to charge the defendant in cuſtody; the court, conceiving this to be a trick, diſcharged the ſide-bar rule; ſo that the bail ſtill continued liable.

And wherever the ſecond action appears to be *vexatious* (*e*), or the defendant is arreſted or detained in cuſtody therein, after being *ſuperſeded* or *ſuperſedable* in a former action by the *laches* (*f*) of the plaintiff, the court will diſcharge the defendant on common bail. Nor will a promiſe to pay the debt (*g*) *ſubſequent* to the *ſuperſedeas* entitle the plaintiff to require ſpecial bail.

(*e*) Cox v. Chubb, 2 Bl. Rep. 809.

(*f*) Chambers v. Robinſon, 2 Str. 782. Maud v. Branthwaite, *Id.* 945. Hall v. Howes, *Id.* 1039. Ca. Temp. Hard. 244. S. C. Cratchfield v. Seward, 2 Wilſ. 93. Blandford v. Foot, Cowp. 72.

(*g*) Taylor v. Waſteneyes, 2 Str. 1218.

In an action of debt on a judgment, whether after verdict or by default, the defendant cannot be arreſted, if he was previouſly arreſted in the original action: even though the bail in that action have ſince become inſolvent (*a*), or the plaintiff has releaſed them by declaring in a different county (*b*), or the defendant has ſurrendered in their diſcharge, or obtained a *ſuperſedeas* (*c*). 2 Str. 788. Newton v. Swynmer, Say. Rep. 43.

(*a*) Bowen v. Barnett, *Id.* 160.

(*b*) 2 Wilſ. 93.; but ſee *contr.* De la Cour v. Read, 2 H. Bl. Rep. 278.

(*c*) 2 Str. 1039. R. H. 8 G. 2. C. B.; but ſee Caſ. Pr. C. B. 34.

It

Nightingale v. Nightingale, 2 Bl. Rep. 1274. Lewis v. Pottle, 4 Term Rep. 570.

It is now the ſettled practice as well of the court of K. B. as of that of C. P., to hold to bail in an action on a judgment, where the damages and coſts amount to 10*l.* or upwards, though the original debt or demand were under that ſum.

Sellon's Pr. 49.

So it is now ſaid to be the practice of both courts to hold to bail in an action of debt upon a judgment, notwithſtanding error brought, provided no bail was given in the original action.

De Balf v. Mackenſie, 2 Str. 1243.

In an action on a recovery in a foreign court, there ſhall be only common bail.

Davies v. Leckie, 1 Barnard. K. B. 94.

In an action on a judgment of an inferior court, though bail were given in the original action below, yet defendant may be holden to ſpecial bail, becauſe no bail has been given in the ſuperior court before.

Collins v. Powell, 2 Term Rep. 156.

Where a cauſe in which the defendant has been arreſted is referred to *arbitration*, and the arbitrator awards to the plaintiff a ſum exceeding 10*l.*, the defendant may be arreſted again in an action upon the award.

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(*On a Penal Statute*) Several modern ſtatutes expreſsly require bail. 3 Burr. 1569. 1 Term Rep. 705. And where an action is brought on a *remedial* ſtatute as on the ſtatutes of 9 Ann. c. 15., by the loſer for money won at play, the defendant may be holden to bail. Turner v. Warren, 2 Str. 1079. Andr. 70. S. C.

Mackenzie v. Mackenzie, 1 Term Rep. 716.

If an heir, executor, or adminiſtrator perſonally promiſe and undertake, in writing, to pay any debt or legacy, he is liable to be arreſted upon it.

(*So if there be*) (*a*) But it ſhould be an actual *devaſtavit*, returned by the ſheriff, or at leaſt grounded on an affidavit. Duprett v. Teſtard, Carth. 264. A mere ſuggeſtion of a *devaſtavit* is not ſufficient. *Ibid.*

(*If Baron and Feme*) Barnes, 96 1 Term Rep. 486. 1 H. Bl. Rep. 235. 1 Wilſ. 264. If the coverture be doubtful, or the defendant have committed any fraud in order to procure credit, ſhe ſhall not be diſcharged upon motion; but ſhe muſt plead her coverture, which plea * muſt be in abatement, not in bar. Pearſon v. Mary Meadon, 2 Bl. Rep. 903. Partridge v. Clarke, 5 Term Rep. 194. Holland v. Ereſkine, Barn. 100. 6 Mod. 105. 7 Mod. 10. *Milner v. Milner, 3 Term Rep. 631.

Bailey v. Dillon, 2 Burr. 736. But where the commiſſion, 2 Bl. Rep. 725.

If a bankrupt, having obtained his certificate, conſcientiouſly promiſe to pay a debt, contracted previouſly to his bankruptcy, he cannot be arreſted thereon; for that would be taking advantage of his conſcientiouſneſs to uſe it againſt conſcience.

Cowp. 824., or certificate, Dougl. 228. appear to be fraudulent, he may be arreſted.

Turner v. Schomberg, 2 Str. 1233. (*b*) Cowp. 527. The ſheriff, however, is not bound to take notice of their privilege, Dougl. 671. Nor do the clauſes reſpecting fugitives extend to perſons who have reſided abroad; 1 Wilſ. 85.; or who have been abroad, merely in the courſe of their trade, and not for the purpoſe of avoiding their creditors. Say. Rep. 368.

Inſolvent debtors, and fugitives, diſcharged under inſolvent acts, cannot be holden to bail upon *ſubſequent* promiſes to pay debts contracted *before* the time preſcribed by the acts: but they may (*b*), for debts contracted afterwards, and before they were actually diſcharged.

By

By ſtat. 19 *Geo.* 3. *c.* 70. § 6. no cauſe under 10*l.* ſhall be removed into any ſuperior court, unleſs the defendant who ſhall be deſirous of removing it, ſhall enter into a recognizance with two ſufficient ſureties, for payment of debt and coſts, in caſe judgment ſhall paſs againſt him.

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(*By the* 3 *Jac.*) The 19 Geo. 3. c. 70. ſ. 5. enacts, That no writ of error ſhall be brought on any judgment in any inferior court of record where the damages are under 10*l.*, unleſs the party bringing it ſhall be firſt bound with two ſufficient ſureties (ſuch as the court wherein ſuch judgment is given ſhall allow of) unto the party for whom ſuch judgment is given in double the ſum adjudged by the former judgment, to proſecute the ſaid writ of error with effect; and alſo to ſatisfy and pay, if the ſaid judgment be affirmed, or writ of error be *non-pros'd*, all and ſingular the debt, damages, and coſts adjudged, and all the coſts and charges awarded for the delay of execution. A bond given by a third perſon as a ſecurity for the payment of a ſum of money by inſtalments, is a bond conditioned for the payment of money only within this act. Chauvet v. Alfray, 2 Burr. 746. So a bond conditioned for the payment of money according to the true intent and meaning of an indenture, or for the payment of money at ſuch a day, being the ſame ſum mentioned in a certain indenture, is a bond within this act, Littleton v. Hanſon, Barnes 8. Deſbordes v. Horſey, 2 Str. 959. But a bond conditioned for the performance of covenants in an indenture, in which there are other covenants beſides that for the payment of money, is not within the act. Gerrard v. Danby, Carth. 38. Show. 14. S. C. Comb. 105. S. C. A bottomry bond, after the contingency hath happened, is in every reſpect a bond for the payment of money only. Pitt v. Coney, Str. 476. A bond to pay ſo much money as *J. S.* ſhall declare to be due on account, is within the act; for though the ſum be uncertain at the time when the bond was entered into, it is aſcertained at the time of bringing the action. Dean and Chapter of St. Paul v. Capell, 1 Lev. 117. 1 Keb. 613. 690. S. C. But a bond to pay for ſo much beer as ſhall be delivered to *J. S.*, not exceeding 100*l.* is not ſo, for here the ſum is uncertain, and reſts upon a *quantum meruit*. Thrale v. Vaughan, 2 Str. 1190. Where a defendant had confeſſed judgment in an action upon a bond conditioned for payment of money only, and afterwards debt was brought upon that judgment, and judgment obtained thereon, it was ruled that, in a writ of error upon this ſecond judgment, bail was not requiſite; that this was *caſus omiſſus* out of the act, which was to be taken literally, and not extended by conſtruction. Bidleſon v. Whytel, 3 Burr. 1545. 1 Bl. Rep. 506. S. C. So it ſeemeth that bail is not requiſite on a writ of error in parliament upon a judgment in B. R. in an action of debt on a recognizance in error. Trinder v. Watſon, 3 Burr. 1566. See the caſe of Chriſty v. Manucaptors of Anſtruther, 8 Mod. 237.

In error on a judgment upon debt on *bond*, the bail need be bound only in the ſum recovered, for that is double the ſum due. Moor v. Lynch, 1 Wilſ 213. It is obvious from the nature of this recognizance, that the bail in error have not the alternative of ſurrendering the principal; and therefore though the principal become a bankrupt, and be diſcharged by his bankruptcy, yet the plaintiff may have recourſe to them. Southcote v. Braithwaite, 1 Term Rep. 624.

Common bail in K. B. is entered on a piece of parchment, called a bail-piece, with a triple ſixpenny ſtamp, and filed with the clerk of the common bails; who, by a rule of *Eaſter* 30 *Geo.* 3. 3 *Term Rep.* 660., is to mark the bail-pieces numerically as they are received.

Before the ſtatute of 12 *G.* 1. *c.* 29. common bail could only have been filed, or a common appearance entered by the defendant, or his attorney. But now, by that ſtatute, as altered by 5 *G.* 2. *c.* 27., "if "the defendant, having been ſerved with proceſs, ſhall not appear at "the return thereof, or within eight days after ſuch return, the plaintiff, "upon affidavit of the ſervice of ſuch proceſs, made before a judge, or "commiſſioner of the court for taking affidavits, or before the proper "officer for entering common appearances, or his deputy, (which affidavit "ſhall be filed *gratis*,) may enter a common appearance, or file common "bail for the defendant; and proceed thereon, as if ſuch defendant had "entered his appearance, or filed common bail."

But common bail thus filed is not ſuch a general bringing the defendant into court as to warrant delivering a declaration by the bye; and therefore to prevent miſtakes, theſe words are written on the bail-piece: "Filed according to the ſtatute." 2 Str. 1027. Caſ. Tem. Hardw. 207. Bail filed under this act muſt be filed *of the term* in which the

the writ is returnable; if of a *subsequent term*, the case is out of court. Edgar v. Farmer, Ca. Tem. Hardw. 138. Smith v. Painter, 2 Term Rep. 719. Common bail may be filed, or a common appearance entered, by the plaintiff's attorney, without his entering or filing of record a memorandum, or minute of his warrant, pursuant to the 25 Geo. 3. cap. 80. § 22. But the defendant's attorney must not plead or carry on any further proceedings in the action, until such *memorandum* or *minute* shall have been delivered to the proper officer, to be entered or filed of record according to the directions of the 23d § of that act.

R. H. 1 W. & M. R. T. 4 W. & M. — It is necessary to authorize judgments by warrant of attorney, default, or *non sum informatus*.

Stinton v. Hughes, 6 Term Rep. 13. — An affidavit to hold to bail for stipulated damages for not performing an agreement must state a breach of the agreement.

Hatfield v. Linguard, 6 Term Rep. 217. — An affidavit to hold to bail, "that the defendant was indebted to the "plaintiff in 1000*l.* under an agreement in writing, whereby the defendant undertook to pay the plaintiff the balance of accounts, *&c. which "balance is still due and unpaid*," without stating that the balance was 1000*l.*, was holden to be defective: for a defendant cannot be holden to bail for a penalty, but only for the sum secured by the penalty.

Spalding v. Mure, 6 Term Rep. 363. De la Cour v. Read, 2 H. Bl. 278. — If the declaration vary from the affidavit to hold to bail, the defendant is entitled to be discharged on a common appearance. But if the plaintiff afterwards obtain judgment in that action, he is not thereby precluded from holding the defendant to bail in an action upon the judgment.

Dean and Chapter of Exeter v. Seagell, 6 Term Rep. 688. — Two causes of action shall in no instance be included in one affidavit to hold to bail: therefore, where an affidavit stated two sums of money to be due from the defendant to two plaintiffs, the court set aside the proceedings, though only one writ was sued out upon it.

Brander v. Robson, 6 Term Rep. 336. — Bail to the sheriff cannot be holden to bail.

Housin v. Barron, 6 Term Rep. 218. — Although it be generally true that a defendant cannot be holden to bail twice for the same cause; yet if he be discharged out of custody the first time for some act for which the plaintiff is not answerable; as, for instance, an alteration in the warrant to arrest by the sheriff's officer without the plaintiff's knowledge, the defendant may in such case be again holden to bail for the same cause of action.

Lumley v. Fitz, Tr. 37 G. 3. B. R. — The *English* notice to appear must be added to all common process, where the defendant *is not* holden to bail, whether the cause of action do or do not amount to ten pounds.

(C) Where Bail shall be said to be put in regularly: And herein,

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(*By the Printer*) *Vide supra.* The origin of bail *de bene esse* is thus related by Glynn, C. J. "A bishop," says he, "having arrested a man for a large debt, he tendered bail to Justice "Richardson, who took it in his chamber, and the bail being insufficient, the bishop represented "the matter to parliament, and prayed their remedy for it; upon which it was enacted, that no "bail, taken before a judge in his chamber, should bind the plaintiff without his assent thereto, "or the confirmation of such bail, taken by all the court." 2 Sid. 91. R. M. 1654. s. 7, 8. The notice of bail is, either that they are put in, or, if taken before a commissioner, that the bail-piece is *filed*, with an affidavit of the due taking thereof, at a judge's chambers. Imp. 124. The notice in either case should be properly entitled. Lofft. 237. The *p rish*, or *town* wherein they live, without the *street*, or other certain place of their residence, is too vague a description. *Id.* 72.

Id 72. 194. *Per Cur* M. 25 G. 3. If the bail above are the ſame perſons who were bail to the ſheriff, it is uſually ſo expreſſed in the notice. Imp. 118.

No notice neceſſary in C. P. if bail put in, *in due time*; otherwiſe it is ſo. Dawkins v. Reid 1 H. Bl. Rep. 529.

When the bail already put in do not mean to juſtify, others ſhould be *added*, before a judge, on the bail-piece by bill, or in the filacer's book by *original*, within the time allowed for their juſtification: and if there be not time enough, the defendant's attorney may take out a ſummons, and obtain an order for further time; and they muſt actually become bail before the notice of juſtification is given. When other bail are added, the court will order the names of thoſe who were excepted to, and did not juſtify, to be ſtruck out of the bail-piece. But until this be done, they are liable to be proceeded againſt, and may alſo ſurrender the principal. And if it be not done till after proceedings have been had againſt them, they muſt pay the coſts of ſuch proceedings. Tidd's Pr. 136. Imp. 119. 1 H. Bl. Rep. 291. Say. Rep. 58. 1 Wilſ. 337. S. C. Say. Rep. 338. 5 Term Rep. 633. 1 Bl. Rep. 462. 4 Burr. 2107.

The bail juſtify either in *perſon*, or by *affidavit*. If they live in *London*, or *Weſtminſter*, they muſt juſtify in *perſon*, and in *open* court, unleſs the plaintiff conſent to their juſtifying before a judge at his chambers. If they live at a greater diſtance, they may be juſtified, without their perſonal attendance, by affidavit duly taken before a commiſſioner. In both caſes, they muſt ſwear that they are houſekeepers, and reſpectively worth double the ſum ſworn to, after all their debts are paid. 6 Mod. 24. 2 Bl. Rep. 1064. R. T. 8 W. 3. Reg. 3. 5. R. E. 5 G. 2. Reg. 1. Imp. 124.

The notice of juſtification ſhould ſet forth, that the bail already put in will, on a certain day, juſtify themſelves in open court, or that others will be added, and juſtify themſelves, as good bail for the defendant. And if the bail were put in before a commiſſioner, the notice ſhould expreſs that they will juſtify themſelves by *affidavit*. *Id.* 119.

Notice of juſtification by *three* bail has been holden good; but notice that *A.*, *B.*, and *C.*, or *two* of them, will juſtify, is irregular. Imp. Lofft. 26.

Where the bail already put in intend to juſtify, *one* day's previous notice of juſtification, or notice for the next day, is deemed ſufficient; unleſs *Sunday* intervene, and then notice muſt be given on *Saturday* for *Monday*. But where other bail are added to thoſe already put in, there muſt be *two* days previous notice of juſtification; one *incluſive*, and the other *excluſive*, as *Monday* for *Wedneſday*, *&c.* And *Sunday* is not reckoned as a day for this purpoſe; therefore notice of added bail on *Saturday* for *Monday* is not ſufficient. Imp. 119. *Ibid. per Cur.* M. 21 G. 3. Imp. 125. Caſe of Overton's bail, M. 26 G. 3.

Bail may be put in on a *dies non juridicus*. Baddeley v. Adams, 5 Term Rep. 170.

One ground of oppoſing bail is, ſome defect in the *form*, or irregularity in the *ſervice* of the notice of juſtification. *Vide ſupra.*

Another ground is, that they have aſſumed names that are either feigned, or belong to other perſons. If they aſſume feigned names, the court will order them, and the attorney, to be ſet on the pillory. 1 Str. 384. And by ſt. 21 J. 1. c. 26. § 2.

" If any perſon ſhall acknowledge, or procure to be acknowledged, any recognizance of bail, in " the name of another perſon, not privy or conſenting to the ſame;" or (by ſt. 4 & 5 W. & M. " c. 4. § 4.) before a commiſſioner ſhall repreſent or perſonate another perſon, whereby he may " be liable to the payment of any debt or damages; he ſhall, on conviction, ſuffer death as a " felon, without benefit of clergy." But the court will not vacate the proceedings againſt the party perſonated, until the offender be convicted. 1 Ld. Raym. 475. Nor can a conviction take place, until the bail-piece be filed. 2 Sid, 90.

A third

Lofft. 148. *Id.* 328. A third ground is, that they are not houſekeepers: but if they are, the rent of their houſes is immaterial, though under ten pounds: nor is it neceſſary that they ſhould have been aſſeſſed to the poor's rate.

Tidd's Pr. 140. Mountain v. Wilkins, M. 21 G. 3. M. 26. G. 3. Lofft. 72. 194. 3 Bl. Com. 956. Cro. Car. 146. A fourth ground is, that they are not worth double the ſum ſworn to, after payment of all their debts. Under this head may be ranked bankrupts, who have not obtained their certificates; or ſuch as have been twice bankrupts, and not paid fifteen ſhillings in the pound. And bail have been rejected, who did not know the defendant; or had been bail before, but did not know in how many actions, or for what ſums. But it ſeems, that the circumſtance of not knowing the defendant, being only a mark of ſuſpicion, may be explained away. Their living within the verge of the court is an objection, but not ſufficient without other ſuſpicious circumſtances. If they forſwear themſelves, they are liable to the puniſhment of wilful and corrupt perjury.

4 Burr. 2526. Lofft. 34. 147. 1 Bl Rep. 444; and ſee 2 Bl. Rep. 1323. Fifthly, Foreigners are not admitted to be bail, merely in reſpect of property *abroad*, which is not liable to the proceſs of our courts. Though it has been ſaid, that merely having no property in *England*, is not of itſelf a ſufficient objection, without other auxiliary circumſtances.

K. B. R. M. 1654. J. 1. C. B. M. 6 G. 2. Sixthly, No attorney, or his clerk, can be bail: neither can any ſheriff's officer, or perſon concerned in the execution of proceſs, keeper of the *Poultry-Compter*, or *Marſhalſea*-court officers.

Dougl. 466. 1 H. Bl. Rep. 76. Tidd's Pr. 140, 1. But if a perſon who, by the rules of the court, is not permitted to become bail, be put into the bail-piece, and not excepted to, the plaintiff cannot take an aſſignment of the bail-bond, and proceed upon it, as if no bail had been put in. Thomſon v. Roubell, B. R., E. 22 G. 3. cited in Dougl. 466.

4 Term Rep. 440. Seventhly, Perſons outlawed after judgment, or convicted of perjury, cannot be bail.

Tidd's Pr. 142, and the caſes there referred to. Laſtly, The court will not permit a juſtification of bail, after the expiration of the rule to bring in the body.

R. 3 & 4 G. 2. C. B. Barnes 74. 82. If ſpecial bail put in by defendant be excepted to, the defendant ſhall perfect his bail within four days after ſuch exception taken, in default whereof the plaintiff may proceed upon the bail-bond. In *B. R.*, if notice of exception is in term, bail muſt juſtify in four days, or add others that will juſtify. If exception and notice be in vacation, juſtification to be the firſt day of next term. *E.* 5 *Geo.* 2. If notice of exception in vacation, juſtification to be on firſt day of term, as in *B. R.* [Of the four days allowed to perfect bail after exception, the firſt is reckoned excluſively, and the laſt incluſively. So that where the exception was on a *Wedneſday*, an attachment againſt the ſheriff could not regularly iſſue till the *Tueſday* following (*Sunday* being no day.) But though the attachment did iſſue on the *Monday*, the court would not ſet it aſide, becauſe the bail were not perfected.

2 H. Bl. Rep. 35.

Lofft. 72. 187. *Per Cur.* M. 25 G. 3. Tidd's Pr. 143. *Ibid.* & *per Cur.* 24 G. 3. 1 Crompt. 66. 7 Mod. 59. Where the bail do not attend, or are not permitted to juſtify on account of a defect in the notice of bail, or juſtification, the court will, in general, allow them further time to juſtify. But where they are rejected on account of ſome perſonal inſufficiency, the court will ſeldom allow further time to add and juſtify others. And if the bail do not juſtify at the time appointed, and no further time is given, they are out of court.

(Bail

(*Bail was put*) As to the continuance-day, ſee R. E. 11 W. 3. Reg. 2. 2 Str. 1215.

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(*If there be an*) Nor will they be diſcharged for a variance between the *capias* and count in *C. P.*, the *ac etiam* being *in caſe on promiſes*, but the declaration *in debt*, *if the ſum ſworn to be under* 40*l.* Lockwood v. Hill, 1 H. Bl. Rep. 310. Nor for a variance between the ſum in the *ac etiam* part of the *lacitat* and the declaration. Turing v. Jones, 5 Term Rep. 402. But where the writ was in plaintiff's *own right*, and the defendant holden to bail for 120*l.* due *in that right*, but the declaration was *as executor*, a common appearance was ordered. Hally v. Tipping, 3 Wilſ. 61.

Although the plaintiff declare in an inferior court in debt upon a *conceſſit ſolvere*, and the cauſe being removed into *B. R.*, he declare there in caſe, yet by this variance, he doth not loſe the bail, for it is the very ſame cauſe of action; for if he declare in the ſuperior court in the former way, the defendant may wage his law, which he cannot do in the court below. Gunn v. Mackhenry, 1 Wilſ. 277.

(*If* A. *arreſts* B.) It is now ſettled by rule of E. 5 G. 2. that "where the plaintiff declares "for or recovers a *greater* ſum than is expreſſed in the proceſs upon which he declares, the bail "ſhall not be diſcharged; but be liable for ſo much as is ſworn to, and indorſed on the proceſs, "or for any *leſs* ſum which the plaintiff in ſuch action ſhall recover;" and alſo, by ſubſequent determinations, for the coſts of the original action. Jackſon v. Haſſell, Dougl. 330. Peterken v. Sampſon, B. R. M. 25 G. 3. Sheddon v. Curnes, B. R. E. 29 G. 3. See Tidd's Practice, 130, where the hiſtory of this practice is neatly traced out.

Of the four days allowed in the court of Common Pleas to perfect bail after an exception, the firſt is reckoned incluſively and the laſt excluſively. And in that court, where a writ is returnable on the firſt return of a term in a country cauſe, the defendant has eight days after the *quarto die poſt* to put in bail. 2 H. Bl. 35. *Id.* 276.

A clerk to an attorney, though *not articled*, cannot be bail to the action. Corniſh v. Roſs, 2 H. Bl. 350.

Bail are not put in regularly, unleſs the name of the proper county be inſerted in the bail-piece. Smith v. Miller, 7 Term Rep. 96.

(D) Of the Proceedings againſt the Bail, and what Matters they may plead in their Diſcharge.

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(*The act of*) A *capias* teſted the term prior to that in which judgment is ſigned againſt the principal, will not warrant proceedings againſt the bail. 1 H. Bl. Rep. 74. The *capias* againſt the principal is now conſidered as little more than matter of form, and chiefly intended to intimate to the bail, in what ſpecies of execution the plaintiff means to proceed; and the leaving it in the ſheriff's office, being a notice to the bail that the plaintiff will proceed againſt the perſon of the defendant, it is incumbent on the bail to ſearch there for it: And the court will not enter into an examination by affidavit, whether the *ca. ſa.* was actually returned, or ſuch return actually filed, *before* the iſſuing of the *ſcire facias* againſt the bail: For though the bail plead to the *ſcire facias* that no *ca. ſa.* was returned and filed *before* the teſte of the *ſcire facias*, ſuch return may be filed at any time before putting in a replication. 3 Burr. 1360.

(*But though*) It was anciently the courſe of the court not to allow a render after the return of *non eſt inventus* to a *capias ad ſatisfaciendum*. Cro. Eliz. 738. But a great miſchief reſulted from this practice; for the plaintiff would ſue out a *capias*, returnable the next day, ſo that the bail had little or no time to bring in the body. 1 Ld. Raym. 157. To remedy this, the judges indulged the bail ſo far as to permit them to render the body upon the return of the firſt *ſcire facias*, if the *capias* were returnable *de die in diem*; Cro. Eliz. 618. 738.; but if it were returnable the next term, the bail were ſtrictly holden to render the principal by the return of it. *Ibid.* Popham, C. J. extended this indulgence ſtill farther; and permitted the bail to render any time before the return of the ſecond *ſcire facias*, or upon the return, *ſedente curiâ*. Cro. Jac. 109.

This

This practice, however, appears to have been diſallowed by Ld. Coke. Mo. 850. 3 Bulſtr. 182. S. C. But it was ſoon after revived by Croke, J., and is now fully eſtabliſhed. W. Jon. 139. Sty. Rep. 324. 8 Mod. 32. Before the return of the *capias ad ſatisfaciendum*, the render is a matter of right, and may be pleaded. 1 Ld. Raym. 156. But afterwards it is allowed by the grace and favour of the court, and not *ex debito juſtitiæ*; for the condition of the recognizance is broken upon the return of *non eſt inventus* to the *capias*. R. T. 1 Ann. Reg. 2. Ld. Raym. 721., and therefore a ſubſequent render cannot be pleaded. Kreley v. Medley, M. 24 G. 3. Barnes, 106.; though if made in time, the bail may be relieved by motion. But if the plaintiff, upon the return of *non eſt inventus* to the *ca. ſa.*, proceed againſt the bail, and deliver a declaration conditionally; the court will not ſtay proceedings againſt the bail on their paying the debt and coſts in the original action *only*, but will oblige them to pay the coſts of the ſecond action, although they have tendered the original damages and coſts before the end of eight days from the return of the *ca. ſa.*, within which time, by the practice of the court, they might have diſcharged themſelves by ſurrendering the principal. Perigal v. Melliſh, 5 Term Rep. 363.

3 Lev. 235. R.E. 2 G. 2. If the plaintiff declare againſt the defendant, for a different cauſe of action than that which is expreſſed in the proceſs; or, by *original*, in a different county from that where the action is brought, the bail are diſcharged.

(*b*) Trinder v. Shirley, Dougl. 45. (*c*) Langridge v. Flood, H. 26 G. 3. (*d*) Woolley v. Cobbe, 1 Burr. 244. They are alſo diſcharged, where the defendant is made a peer of the realm (*b*), or member of the Houſe of Commons (*c*); or where he becomes bankrupt (*d*), and obtains his certificate at any time pending the action, and before the bail are fixed: *ſecùs*, if not till after they are fixed. And in any of theſe caſes, the court, on motion, will order an *exoneretur* to be entered on the bail-piece.

Cockerill v. Ouſton, *Id.* 436. Martin v. O'Hara, Cowp. 823.

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(*If the principal*) Say. Rep. 7. 1 Burr. 409. Where the bail-piece had been previouſly delivered out to be filed to the plaintiff's attorney, who neglected to file it, proceedings againſt the bail for want of an *exoneretur* were ſtayed. 8 Mod. 280. 1 Burr. 409. Upon what terms, and at what time the court will ſtay proceedings againſt the bail, pending a writ of error, ſee 1 Str. 419. 443. 526. 2 Str. 717. 781. 872. 1270. 1 Burr. 340.

(*If A. ſues*) It was holden not to be a good render. 6 Mod. 238. And a render is not complete till the bail have paid the gaoler's fees. Com. Rep. 554. In K. B. it is neceſſary to make an entry of the render in the marſhal's book, which is kept in the King's Bench office; it being holden, that until ſuch entry be made, the defendant is not in cuſtody, ſo as to charge the marſhal in an action of eſcape. 1 Salk. 272. 2 Str. 1226. 2 Burr. 1049.

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(*In a ſcire facias*) A principal convicted of felony and under ſentence of tranſportation may, in proper circumſtances, be removed by *habeas corpus*, and ſurrendered in diſcharge of his bail. Caſe of the bail of Peter Vergun, 2 Str. 1217. Fowler v. Dunn, 4 Burr. 2034. How a ſoldier may be ſurrendered by his bail, ſee Bond v. Iſaac, 1 Burr. 339.

Hodſon v. Nugent, 5. Term. Rep. 277. A *cognovit* by the principal, without notice to the bail, will not diſcharge them.

R. K. B. Tr. 33 G. 3. 5 Term Rep. 368. The like liberty after an aſſignment of the bail-bond. The bail are at liberty to render the defendant before they juſtify, notwithſtanding a rule has been obtained againſt the ſheriff to bring in the body, at any time before the expiration of ſuch rule; the attorney for the defendant giving notice of ſuch render to the plaintiff's attorney without delay, and making affidavit thereof.

Edwin v. Allen, 5 Term Rep. 401, Meyſey v. Carnell. *Id.* 534. S. P.

Rawlinſon v. Gunſton, 6 Term Rep. 284. If the principal die after the return of the *capias ad ſatisfaciendum* and before it is filed, the bail are fixed, and the court will not ſtay the filing of the return in their favour.

If

If a defendant (an alien) be ſent out of the kingdom under the alien bill, 33 *G.* 3. *c.* 4. the court will permit the bail to enter an *exoneretur* on the bail-piece, unleſs they are indemnified, or have money in their hands belonging to the defendant ſufficient to anſwer the plaintiff's demand. But if the bail will defend the action, they are not entitled to have an *exoneretur* entered upon giving up the money depoſited with them, without paying the coſts likewiſe. Merrick v. Vaucher, 6 Term Rep. 50. Coles v. De Haynes, *Id.* 52. 246.

Where the defendant is under ſentence of tranſportation, the court will permit an *exoneretur* to be entered on the bail-piece. An application for a *habeas corpus* to bring up a defendant under ſentence of tranſportation, who was on board a ſhip in the river *Thames* juſt ready to ſail, in order that he might be ſurrendered in diſcharge of his bail, has indeed been rejected; but that was merely on account of the inconvenience of bringing up the defendant at that period. And where a defendant was confined under a charge of felony, the court felt no difficulty in granting a *habeas corpus* to bring him up for this purpoſe, though it was urged that the bail were indemnified. But the bail are not at liberty to make ſuch an application till they have juſtified. Wood v. Mitchell, 6 Term Rep. 247. Fowler v. Dunn, 4 Burr. 2034. Sharp v. Sheriff, 7 Term Rep. 226.

(*D*) Of the Proceedings on the Bail-bond.

IF bail above be not put in and perfected in due time, the bail-bond is forfeited; and the plaintiff may either take an aſſignment of it, or proceed againſt the ſheriff for not bringing in the body. Tidd's Pr. 153. Gilb. C. P. 20.

If he be diſſatisfied with the bail below, he ſhould not take an aſſignment of the bail-bond; for by ſo doing, he not only diſcharges the ſheriff, but if the ſame bail be put in above, he cannot afterwards except againſt them. 1 Salk. 99. 1 Will. 223. 1 Salk. 97. 7 Mod. 62. 117. 6 Mod. 122. Tidd's Pr. 134, 5. 153.

Before the ſtatute for the amendment of the law, the ſheriff was not compellable to aſſign the bail-bond; though if he had not aſſigned it, the court would have amerced him. 1 Mod. 228. *Vide ſupra.* 1 Sid. 23. 2 Mod. 84.

It hath been ſaid *arguendo*, that the bail-bond may be aſſigned *before* it is forfeited; though it cannot be put in ſuit till afterwards. Paradice v. Holiday, Barnes, 77.

Where the defendant has neglected to put in and perfect bail above, the plaintiff is not out of court by omitting to declare in the original action, within two terms after the return of the writ; but he may ſtill take an aſſignment of the bail-bond; for he is not bound to declare *de bene eſſe*, within the time limited for the defendant's appearance; and after that time he cannot declare, until the defendant has actually appeared. Tidd, 155. Str. 1262. See 2 Bl. Rep. 876. *contr.*

By a rule of the court of C. P. *Hil.* 9 *Ann.* no bail-bond, taken in *London* or *Middleſex*, can be put in ſuit till after four days, excluſive of the appearance-day of the return of the writ; and, taken any where elſe, till after eight days, excluſive of the appearance-day, of ſuch return, upon pain of having all proceedings thereon ſet aſide with coſts upon motion. The like rule was in B. R. *M.* 8 *Ann.*, except that in country cauſes, the time is limited to ſix days inſtead of eight. Sty. Pr. Reg. 257. Bellis v. Mitford, 2 Bl. Rep. 1009.

If

Studley v. Stort, 2 Str. 782. If the laſt of the four days happen on a *Sunday*, the defendant has the whole of the *Monday* to put in his bail.

3 Term Rep. 572. The court will not order the bail-bond to be delivered up to be cancelled, on the ground of a miſnomer.

R. M. 8. Ann. reg. 1. Cowp. 71. Where the plaintiff has *not* loſt a trial, the court, or a judge, will ſtay the proceedings on the bail-bond, upon putting in and perfecting bail above; paying the coſts incurred by the aſſignment of the bail-bond, to be taxed by the proper officer; receiving a declaration in the original action; pleading iſſuably; and taking ſhort notice of trial, ſo that the cauſe may be tried the ſame term.

Cowp. 769. And wherever the defendant is guilty of a neglect in not putting in bail in due time, by which the bail-bond becomes forfeited, the notice (in caſe the party means to put in bail, in order to ſtay proceedings on the bail-bond) ſhould be, that he will put in and *perfect* bail on ſuch a day; when the plaintiff may oppoſe them in court, without its being a waver of the bail-bond.

But if the plaintiff have *loſt* a trial, the court will further require, that the bail conſent that judgment be entered againſt them on the bail-bond for the plaintiff's ſecurity; after which they are liable to immediate execution, if the defendant ſhould fail in the action; and they cannot diſcharge themſelves by a ſurrender.

R. M. 8 Ann. reg. 1. (*a*) 2 Str. 1252. Carmichael v. Troutbeck, Tr. 24 G. 3. Tidd's Pr. 157.

Savage v. Weſt, 9 G. 3. cited in Cowp. 71. 1 H. Bl. Rep. 76. S. P. (*b*) R. M. 8 Ann. reg. 1. (*c*) Gilb. K. B. 362. The ſheriff's bail are liable to pay what is really due to the plaintiff, though beyond the ſum ſworn to, and coſts, to the full extent of the penalty of the bond; and the court will not relieve them on the death of the plaintiff in the original action, where the plaintiff might have had judgment againſt him (*b*), if bail above had been put in and perfected in time. But where the defendant dies, before the plaintiff could have had judgment (*c*), if there has been no delay in putting in and perfecting bail, the court will ſtay the proceedings, upon payment of coſts only.

Cowp. 71. Barnes, 112. (*b*) Cowp. 71. Barnes, 61. 70.

Hutchinſon v. Smith, 8 Mod. 240. If after the death of the plaintiff, his attorney take an aſſignment of the bond, the proceedings thereon will be ſet aſide.

Swayne v. Crammond, 4 Term Rep. 176. If the plaintiff take an aſſignment of the bond during the pendency of a rule to ſet aſide proceedings for irregularity, and *to ſtay proceedings in the mean time*, ſuch aſſignment will be ſet aſide, for the rule is a ſuſpenſion of proceedings to *all purpoſes*.

Francis v. Taylor, Barn. 92. Walton v. Bent, 3 Burr. 1923. The action upon the bail-bond muſt be brought in the ſame court where the bail is given, even though an attorney of another court happen to be one of the bail; for the ſtatute empowers no other court to do equitable juſtice between the parties.

Morris v. Rees, 2 Bl. Rep. 838. How v. Bridgwater, Barn. 117.

Kitſon v. Fagg, Str. 60. The under-ſheriff may aſſign the bond, but his clerk cannot.

Gregſon v. Heather, 2 Ld. Raym. 1455. 2 Str. 727. The ſheriff may aſſign the bond out of the county; and the action upon it may be brought either in the county where the aſſignment was made, or in that where the bond was taken.

There

There must be two witnesses to the assignment, else the bond is void. But (*d*) it is not necessary to set forth this or any other circumstance of the assignment in a declaration on the bond, or to make a *profert* of the assignment.

Neat v. Mills, Forteſc. 371.
(*d*) Leaſe v. Box, 1 Wilſ. 121. Miſtlin v. Morgan, 2 Ld. Raym. 1564.

Neither is it necessary to state that the debt was sworn to, or writ marked; for these omissions do not avoid the bond; though the sheriff, or perhaps the plaintiff, may be punishable for them. Nor (*e*) need it be shewn that the defendant in the original action was arrested; for the arrest is not traversable.

Whiskard v. Wilder, 1 Burr. 330.
(*e*) Watkins v. Parry, 1 Str. 444. Haley v. Fitzgerald, 1 Str. 643.

(E) Within what Time the Bail must render the Principal.

IN the King's Bench, if an action be brought on the recognizance, whether the recognizance be taken in that court or in the Common Pleas, the bail have eight entire days in full term, next after the return of the writ, in which they may render the principal, and if there be but four days in the term next after the return, then four days in the following term. But in the court of Common Pleas the bail have in such case only till the *quarto die post*; and this time they have, though the defendant be sued by attachment of privilege. In both courts where the bail are sued by *scire facias*, and the proceedings are by original, they have till the *quarto die post* of the return of the first *scire facias*, if *scire feci* be returned, or, if *nihil* be returned, till the *quarto die post* of the return of the second *scire facias*, to render the principal. Where the proceedings are by bill in *B. R.*, the time for rendering is the return-day of the *scire facias*; and in all these cases it is absolutely necessary that the return be made *sedente curiâ*.

1 Ld. Raym. 721. Imp. Pr. K. B. 448. 2 H. Bl. 117. 593. Fisher v. Branscombe, Tr. 37 G. 3. B. R.

(F) Of the Bail-Bond.

A Bail-bond given to the sheriff of the county of *Durham* under a writ issued immediately from the court of King's Bench to him, is not void, though the count palatine may interpose and claim his privilege.

Jackson v. Hunter, 6 Term Rep. 71.

Where a sheriff, under an original writ *in a plea of trespass on the case on promises*, took a bail-bond conditioned for the defendant's appearance *in a plea of trespass*, the bond was holden good: for if the cause of action be inserted in the condition, it may be rejected as surplusage; all that it is necessary to state being the names of the parties, and the time and place of the defendant's appearance.

Owen v. Nail, 6 Term Rep. 702.

If the defendant, who has given a bail-bond, surrender himself to the sheriff before the return of the writ, the bail-bond may be given up, and it will be considered as if no such bond had been given; and of course, no action can be maintained against the sheriff for not assigning it.

Jones v. Lander, 6 Term Rep. 753. Stamper v. Miltourne, 7 Term Rep. 122.

Vide 1 Str. 60. Nolan's edit. notes. — What is ſaid in the former part of this work under this diviſion of the ſubject, that an under-ſheriff's clerk cannot aſſign a bail-bond, ſeemeth not to be law.

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Bail in Criminal Cauſes.

(E) Where by the Houſe of Lords.

(C) Where by Juſtices of Gaol Delivery.

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Kelyng, 25. F. N. B. 251. G. Although the ſtatute of 3 *H.* 7. *c.* 1. is expreſs, that on an acquittal of murder within the year at the king's ſuit, the juſtices cannot diſcharge, but are bound *ex officio* to hold to bail; yet it has been the practice at the *Old Baily*, and in all circuits in *England*, not to hold the party to bail, unleſs an appellant appear, and apply by motion for bail.

(D) Where by the Court of King's Bench.

(*Or Where*) The indiſpoſition, upon which the court will bail, muſt be a preſent indiſpoſition ariſing from the confinement, and not from any conſtitutional or family diſtemper, or from the act of the priſoner. R. v. Wyndham, 1 Str. 4. See too Cowp. 333.

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(*And, Therefore*) See confirmations of this doctrine in Murray's caſe, 1 Wilſ. 299. Braſs Croſby's caſe, 3 Wilſ. 188. 2 Bl. Rep 755; and part of Lord Camden's argument in the caſe of Entick v. Carrington, 11 St. Tr. 317.

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(*And though the*) The court of King's Bench bailed the Earl of Caſtelmain, whom the commons had committed for high treaſon, the attorney-general not oppoſing. 4 St. Tr. 398.

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(*The Court of King's*) The King's Bench may bail in all caſes at their diſcretion. Com. Dig. tit. *Bail*, (F. 4.) Cowp. 333.; and they will in general do ſo in every caſe not capital: In every capital caſe where there is any circumſtance to induce a preſumption of the priſoner's innocence; and in every caſe where the charge is not alledged with ſufficient certainty. R. v. Judd, 2 Term Rep. 255. R. v. Remnant, 5 Term Rep. 169 They will, therefore, bail a perſon acquitted on an indictment of murder, and afterwards in cuſtody on an appeal, unleſs the judge certifies a diſſatisfaction with the verdict. Caſtell v. Bambridge, 2 Str. 854. So a perſon committed for manſlaughter, or even murder, if it appear to be no more than manſlaughter, on the depoſitions before the coroner. R. v. Dalton, 2 Str. 911. R. v. Magrath, *Id.* 1243. So in murder, and *pardon pleaded and allowed*, the defendant ſhall not give bail to anſwer the appeal, though the heir is beyond ſea, for this is not within the 3 H. 7. R. v. Chetwynd, 2 Str. 1203. In rape both principal and acceſſary will be bailed, if it appear they do not mean to abſcond. R. v. Lord Baltimore, 4 Burr. 2179 1 Bl. Rep 648 S. C. The court is bound *ex debito juſtitiæ* to bail an accomplice entitled to the king's pardon. R. v. Rudd, Cowp. 334. But they will not bail an appellee for murder, unleſs circumſtances of delay appear on the part of the appellant. Caſtell v. Bambridge, 2 Str. 854. Nor a perſon charged with a highway robbery, if the proſecutor attends and ſwears he is the man, notwithſtanding a number of affidavits are produced to ſhew an *alibi*. R. v. Greenwood, 2 Str. 1138. Or for aſſiſting in the running of contraband goods, &c. R. v. Norton, Bunb. 143. Nor will they order, at the inſtance of the priſoner, a medical man to attend the perſon wounded, in order to ſtate his ſituation for the purpoſe of bail. R. v. Sarah Saliſbury, 1 Str. 547. Nor will they bail after a bill for murder found, though the fact were plainly manſlaughter. Caſe of Kirk and Caſe for the murder

murder of Seymour Conway, M. 12 W. 3. See too 1 Salk. 104. Skin. 683. They have refuſed to bail on a ſpecial verdict on the ſtatute of Stabbing. Sty. 467. 5 Mod. 288. It is ſaid in ſome caſes never to be allowed in manſlaughter till clergy had. Sty. 371. Salk. 103. 5 Mod. 288. But it ſeems the court of K. B. may bail in this caſe, though juſtices of *oyer* and *terminer* or gaol-delivery cannot. Keilw. 70. 2 Inſt. 188. Salk. 61.

It is to be obſerved, that neither this court nor any other court can bail perſons in execution, or puniſhed under any ſtatute with impriſonment for their offence. And this is one reaſon why they cannot interfere where a party is committed for a contempt. Com. Dig. tit. *Bail* F. 2. 1 Mod. 158. 5 Wilſ. 199. 2 Term Rep. 190.

(E) Where by the other Courts of *Weſtminſter*.

(*The Courts of Common*) The court of C. P. may, by the common law, grant a *habeas corpus* in all caſes of miſdemeſnour. Wood's caſe, 3 Wilſ. 172. 2 Bl. Rep. 745. S. C. Wilkes's caſe, 2 Wilſ 151.

(E) Where by the Houſe of Lords.

THE Houſe of Lords may bail a peer committed upon an indictment for murder, if the indictment be removed before them by *certiorari*. Skin. 683. 4.

Upon impeachments by the commons for high crimes and miſdemeſnours, the recognizance of bail is taken by order of the Houſe of Peers, at their lordſhips' bar, the bail being previouſly approved by a committee, to whom it is referred to conſider of their ſufficiency. The condition of the recognizance in ſuch caſe is, that the criminal ſhall appear perſonally before the lords in parliament, and from day to day, until the further order of the houſe. Dr. Sacheverell's caſe Dom. Proc. 13th Jan. 1709. Caſe of Warren Haſtings, Dom. Proc. die Lunæ, 21° Maij 1787.

(F) What ſhall be ſaid to be ſufficient Bail.

(*No Perſon*) And according to Crompt. Juſt. 194. a. ſubſidy-men were ſuch as had 40*s.* a-year in the county. In felony four perſons are required for bail; but for any inferior offence two are ſufficient. In both caſes the number of the bail muſt be mentioned in the notice, otherwiſe the court will reject the whole. *Per* Lord Mansfield, Rex v. Bolton, M. 23 Geo. 3. Hawk. P. C. 141., notes, 6th edit. Sty. Pr. Reg. 110. In the caſe of the King v. Judd, though the commitment did not ſufficiently charge a felony, and therefore the defendant was entitled to bail; yet enough appearing to ſhew an offence of great enormity, the court inſiſted upon four ſureties. 2 Term Rep. 255. In an appeal of murder on the civil ſide, two bail only are required; but where it comes on the crown ſide by *certiorari*, there muſt be four. Caſtel v. Bambridge and Corbet, 2 Str. 855.

R. v. Bowes, Dougl. 466. notes.

The defendant's attorney may be bail for him; for the rule that no attorney or officer of the court ſhall be bail does not extend to criminal caſes.

Page 228 (I) The Offence of denying, delaying, or obſtructing it where it ought to be granted.

(*The principal*) The laſt-mentioned ſtatute is ſet out at length *infra*, tit. *Habeas Corpus*, B. 4. to which part the reader is referred.

Page 230 (K) In what Form it is to be taken.

(*Where a Perſon*) But this kind of bail is now in diſuſe. 2 H. H. P. C. 125.

(*But for a crime*) Where the principal is an infant, or in priſon, and ſo abſent, the recognizance is taken of the bail only; and the juſtice or juſtices grant a warrant under hand and ſeal to diſcharge the priſoner out of gaol. 2 H. H. P. C. 126. Burn's Juſt. tit. *Bail*. Bail muſt be taken for a time certain, elſe it will be erroneous. Rex v. Rainer, 1 Sid. 214.

(L) What ſhall forfeit the Recognizance.

BUT it ſeemeth, that the recognizance ſhall not be forfeited by the party's not appearing in court the firſt day of every term; after he hath pleaded to the information as it may be before he hath pleaded.

By ſtat. 4. G. 3. *c.* 10. reciting, that many recognizances had been eſtreated into the court of Exchequer againſt perſons for not appearing as parties or witneſſes, or for not proſecuting indictments, or otherwiſe not performing the conditions of ſuch recognizances; many of which neglects of duty had happened by the inattention of ignorant people, it is enacted, "That it ſhall be lawful for the barons of the Exchequer upon affidavit "and petition to be preſented to them by or on the behalf of the perſon "or perſons impriſoned, or liable to be impriſoned on the forfeiture of "any ſuch recognizances, to diſcharge ſuch perſon or perſons, by order "from the ſaid barons without any *quietus* to be ſued out for that pur-"poſe; for which order no more than one pound and one ſhilling ſhall "be taken by the officer appointed to give out the ſame: Provided that "no diſcharge ſhall be given on ſuch petitions where any debt is due to "the crown, other than by the recognizances ſo prayed to be diſcharged; "nor in any caſes of defrauding his majeſty's revenue by contraband trade, "or aſſaulting his majeſty's officers of the cuſtoms or exciſe in the exe-"cution of their duty, or any perſon or perſons lawfully aſſiſting them "therein."

Recognizances in caſes of felony, are to be certified to the general gaol delivery by 1 & 2 *P. & M. c.* 13.

(*a*) Ca. Temp. Hardw. 237. (*b*) 11 Mod. 200. (*c*) 10 Mod. 278.

Neither the defendant, nor his bail can be called upon their recognizance without notice, except on the day on which the defendant is bound to appear (*a*): And if the defendants do not appear on that day, the court will not diſcharge the recognizance, although the attorney-general conſent to it, but will reſpite it to the next term (*b*); for the judges of *oyer* and *terminer* are the proper judges whether recognizances ought to be eſtreated or ſpared (*c*).

1 Wilſ. 315.

If a defendant indicted for perjury be acquitted, the bail ſhall be diſcharged from their recognizance, on motion, though the acquittal be not entered on record, for it appears on the *poſtea*.

BAILIFF.

BAILIFF.

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(*Baily or bailiff.*) See Lambard's Expoſition of Saxon words. Dr. Johnſon ſaith, that this word is of doubtful etymology in itſelf, but borrowed by us from the French "*bailli.*" See too 3 Bl. Com. 344. Blount's Law Dict. tit. *Bailiff.*

(A) Of Sheriffs' Bailiffs.

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(*If an under-ſheriff*) Alleyn, 10. S. C. This was adjudged upon demurrer. But after verdict the objection would not avail. Weſton v. Maſon, 3 Burr. 1725. And Q. Whether for the purpoſe *of executing proceſs*, the authority of theſe bailiffs does not extend over the whole county?

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(*By the* 29 *Car.* 2.) But where the writ was returnable on a *Sunday*, and the officer arreſted the defendant on the *Monday* morning, the court diſcharged him out of cuſtody, notwithſtanding the writ was renewed within two hours after the arreſt, Loveridge v. Plaiſtow, 2 H. Bl. Rep. 29.

But ſee Brookes v. Warren, 2 Bl. Rep. 1273. *contr.* in the caſe of bail to the ſheriff.

And he may be taken on that day by the officer upon freſh purſuit; 2 Ld. Raym. 1028. 2 Salk. 626. 6 Mod. 95. S. C.

(B) Of Bailiffs of Liberties or Franchiſes.

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If the bailiff of a liberty, who hath the return and execution of writs, remove a priſoner taken in execution to the county gaol, and there deliver him into the cuſtody of the ſheriff, he is liable to an action for an eſcape. Boothman v. Earl of Surry, 2 Ter. Rep. 5.

(C) Of Bailiffs to Lords of Manors.

(*But if a diſtreſs*) If the diſtreſs be impounded, the tender is too late either to the bailiff or principal, for it is then *in cuſtodiâ legis*. But whether a tender to the bailiff before impounding be good, was not the point in Pilkington's caſe; for *there* the tender was after the impounding, and to a common ſervant, the maſter himſelf being preſent. Cro. El. 813.

BAILMENT.

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BAILMENT, properly ſo called, is a delivery of goods in truſt, on a contract, expreſs or implied, that the truſt ſhall be duly executed, and the goods re-delivered, as ſoon as the time or uſe for which they were bailed ſhall have elapſed or be performed. Improper bailment is, where the goods are legally in the hands of the poſſeſſor, upon ſuch truſt by

Law of Bailment, 117.

by *finding, or in conſequence of ſome diſtinct contract.*—Bailment is derived from the *French* verb, *bailler*, to deliver; which word, as well as the others of this origin, are applied in that language (*a*) to one only of thoſe ſpecies into which this contract is diviſible, *viz.* letting to hire.

(*a*) *Bail*, in *French*, is *contrat par lequel on donne une terre à ferme, ou une maiſon a lonage*; and *bailleur*, is the perſon, *qui baille à ferme.* Dict. de l'Academ.

(A) Of ſimple Bailment, by which the Bailee has only the naked Poſſeſſion.

(*If a man*) This notion, that to *keep*, and to *keep ſafely*, are one and the ſame thing, was denied by the whole court in the caſe of Coggs v. Barnard, 2 Ld. Raym. 911.

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(*If A. leaves*) *B.*'s knowledge or ignorance of the particulars would not affect the caſe at all under theſe circumſtances.

Hartop v. Hoare, 3 Atk. 44. 2 Str. 1187. S.C. 1 Wilſ. 8. S. C.

And if *B.* open the cheſt, and take the goods to a broker's, and borrow money upon them, and depoſit them with the broker as a ſecurity for the money ſo borrowed, *A.* may maintain trover (*a*) for them againſt the broker, without tendering him the money for which they were pledged by *B.*

(*a*) The like law in the caſe of a remainder-man, upon the death of a mere tenant for life of goods pawned. Hoare v. Parker, 2 Term Rep. 376.

(B) Of pledging Goods as a Security for Money.

(*Pledging it*) But every bailee has a temporary *qualified* property in the things of which poſſeſſion is delivered to him by the bailor, and has, therefore, a poſſeſſory action, or an appeal in his own name againſt any ſtranger, who may damage or purloin them. 21 H. 7. 14. b. 15 a. See Tr. on the *Law of Bailments*, 80, 1, 2.

(*If a man*) That is, if the bailee be *robbed* of them; for if they are taken *clandeſtinely*, (the proper ſenſe of the word *ſtolen*) he ſhall be anſwerable. 10 H. 6. 21. Br. Abr. tit. *Bailment* pl. 7.

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(*Theſe goods*) But *qu.* Whether they are not liable to be diſtrained for rent? 3 Burr. 1498.

(*There is great*) In ſuch caſe, therefore, the ſtatute of limitations will not attach. 1 Ver. 278. And if the pledger become bankrupt, his aſſignee may file a bill in equity for the redemption of the pledge; for, being a ſtranger to what is due, he cannot otherwiſe aſcertain the preciſe ſum he is to tender. *Ibid.*

Paterſon v. Taſh, 2 Str. 1178. (*b*) Danbigny v. Duval, 5 Term. Rep. 604;

A factor hath no authority to pledge the goods of his principal; and if he (*b*) do, the latter may recover the value of them from the pawnee, on tendering to the factor what is due to him, without any tender to the pawnee.

but Ld. Kenyon in this caſe thought that the principal was bound to make tender to the pawnee to the extent of the money due from the principal to the factor, though not beyond that ſum.

But if a man obtain goods from another under *fraudulent* pre-

By ſt. 1 Jac. 1. c. 21. § 5. The pawn of any goods wrongfully purloined, taken, robbed, or ſtolen from any perſon, to any broker in *London*, *Weſtminſter*, *Southwark*, or within two miles of *London*, ſhall not alter the property thereof.

tences,

tences, and pawn them, and the owner afterwards profecute the pawnor to conviction, and recover the poſſeſſion of his goods, yet the pawnee may maintain trover for them againſt the owner. Parker v. Patrick, 5 Term Rep. 175.

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(*A pawnbroker*) This act does not extend to any loan above ten pounds, or to perſons lending money upon pledge at 5*l. per cent.* without further profit.

(C) Of Bailment which veſts a ſpecial Property; and herein of lending on ſpecial Contracts.

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(*If A. borrow*) Where a bailee may be guilty of larceny. See 1 Hawk. P. C. 134, &c. Leach's Caſes, 327. 173.

(D) When the Thing bailed is deſtroyed or deteriorated, to whom is the Loſs, and to whom is the Remedy.

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(*If* A. *take*) See 1 Roll. Abr. 4. S. C. But Rolle mentions no ſuch reaſon; and according to him, Popham, C. J. advanced generally, "That if a man, to whom horſes are bailed for agiſtment, leave open the gates of his field, in conſequence of which neglect they ſtray and are ſtolen, the owner has an action againſt him."

(1. *The Firſt is*) Sir Wm. Jones thinks this diviſion of bailments a little inaccurate; that in truth the *fifth* ſort is no more than a branch of the *third*, and a *ſeventh* might with equal reaſon have been added, ſince the *fifth* is capable of another ſubdiviſion. He acknowledges, therefore, but *five* ſpecies. 1. *Depoſitum*, which is a naked bailment, without reward, of goods to be *kept* for the bailor. 2. *Mandatum*, or *commiſſion*; when the mandatory undertakes, without recompence, to do ſome act about the things bailed, or ſimply to carry them; and hence Sir Henry Finch divides bailment into two ſorts, to *keep*, and to *employ*, Law. Bk. 2. c. 18. 3. *Commodatum* or *loan for uſe*; when goods are bailed, without pay, to be uſed for a certain time by the bailee. 4. *Pignori Acceptum*; when a thing is bailed by a debtor to his creditor in *pledge*, or as a ſecurity for the debt. 5. *Locatum*, or hiring, which is always for a *reward*; and this bailment is either, 1. *locatio rei*, by which the hirer gains the temporary uſe of the *thing*; or, 2. *locatio operis faciendi*, when *work* and *labour*, or *care* and *pains*, are to be performed and beſtowed on the thing delivered; or, 3. *locatio operis mercium vehendarum*, when goods are bailed for the purpoſe of being *carried* from place to place, either to a *public* carrier, or to a *private* perſon. Law of Bailm. 35, 6.

BANKRUPT.

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(*The granting*) 2 Bl. Com. 471. "Perhaps," ſaith a writer upon this ſubject, "it can, in "no caſe, be leſs neceſſary to inveſtigate the etymology of a word, becauſe the whole ſyſtem of "the bankrupt-law is founded upon poſitive ſtatutes; and no light can poſſibly be derived to the "ſubject but what tends to elucidate them." Co. Bpt. Laws, 1.

The firſt ſtatute noticing the crime of bankruptcy, was made againſt the *Lombards*, who, after they had made obligations to their creditors, ſuddenly eſcaped out of the realm: It was therefore enacted, "That if any "merchant of the company acknowledge himſelf bound in that manner, "that then the company ſhall anſwer the debt; ſo that another merchant, "who Co. *Bankrupt Laws*, 3.

" who is not of the company, ſhall not be thereby aggrieved nor impeach-
" ed." But the firſt ſtatute made concerning *Engliſh* bankrupts was 34 *H.* 8., which has been much altered by 13 *Eliz.*, and other ſubſequent ſtatutes,

1 Burr. 474. It is to be obſerved, that all the acts concerning bankrupts make but one ſyſtem of law: they are, therefore, to be taken together, and to be conſtrued favourably for the benefit of creditors, and to ſuppreſs fraud:

2 Bl. Comm 471. For though a bankrupt was formerly conſidered merely in the light of a criminal, and therefore a ſtrict conſtruction might be expected, in conformity to the univerſal practice in deciding upon penal ſtatutes; yet, at preſent, the laws of bankruptcy are conſidered as laws calculated for the benefit of trade, and founded on principles of humanity as well as juſtice.

(L) Of Partners.

(A) What Kind of Trade, Occupation, or Profeſſion a Man muſt be of, or of what Nation, before he can be adjudged a Bankrupt, and what Acts he muſt do, permit, or ſuffer, which will make him one.

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(21 *Jac.* 1. *cap.* 19.) Privilege of parliament not to prevent the iſſuing of a commiſſion. 4 G. 3. c. 35. No ſuch bill can now be maintained.

(*By the* 14 *Car.*) The manner in which the trade to the *Eaſt Indies* was carried on at the time when this act paſſed, was, by perſons advancing ſums of money to the then incorporated company, in conſideration whereof they became partners, and the return of the cargo from the *Eaſt Indies* was diſtributed among them, either ſpecifically, or by account, in proportion to the ſum advanced. It was not a dividend on a given ſtock, but an actual participation, either on account, or in a ſpecific return of goods. Sir John Woolſtenholme, a man of large fortune, had advanced a ſum of money on the adventure in the *Eaſt India* Company's trade, and he had received his return in ſpecie, and diſpoſed of the goods; and thereupon a queſtion aroſe, Whether he was liable to a commiſſion of bankrupt? which the court of K. B. determined in the affirmative. In conſequence of that judgment, this ſtatute was paſſed, which is declaratory, and annuls the judgment, as giving an unjuſt conſtruction to the ſtatutes.

(*a*) 8 & 9 W. 3. c. 20. § 47., & 3 G. 1. c. 8. § 43. (*b*) 9 Ann. c. 21. § 42., & 8 G. 1. c. 21. § 12. (*c*) 6 G. 1. c. 18. § 10.

By 9 & 10 *W.* 3. *c.* 44. § 74. the members of the *Eaſt India Company* are exempted from being bankrupts on account of their ſtock only. No members of the *Bank* (*a*), *South Sea* (*b*), *London Aſſurance* (*c*), or *Royal Exchange*, Companies, ſhall be liable to be bankrupts on account of their ſtock in the ſaid companies.

7 *Ann. c.* 12 § 5. No merchant, or other trader within the deſcription of the ſtatutes againſt bankrupts, who ſhall put himſelf into the ſervice of any ambaſſador or publick miniſter, ſhall have any benefit of this act.

By *ſtat.* 4 *G.* 3. *c.* 33. § 1. " Any ſingle creditor, or two or more " creditors being partners, whoſe debt ſhall amount to 100*l.* or upwards; " or any two creditors whoſe debts ſhall amount to 150*l.*; or any three

" or

" or more creditors whose debts shall amount to 200*l.*; of any person " deemed a merchant, *&c.*, *having privilege* of parliament, at any time " upon affidavit being made and filed of record in any of his majesty's " courts at *Westminster*, by such creditors, that such debt is justly due; " and that every such debtor, as they verily believe, is a merchant, *&c.*, " may sue out of the same court summons, or an original bill and summons " against such merchant, *&c.*, and serve him with a copy thereof; and if " such merchant, *&c.* shall not, within two months after personal ser- " vice of such summons, pay, secure, or compound for such debt, to the " satisfaction of such creditor; or enter into a bond in such sum, and " with two such sufficient sureties, as any of the judges of that court out " of which such summons shall issue shall approve of, to pay such sum as " shall be recovered in such action, together with costs, he shall be ac- " counted and adjudged a bankrupt from the time of the service of such " summons."

By *stat.* 5 *G.* 2. *c.* 30. § 24. " If any bankrupt, after issuing any com- " mission against him, pay to the person who sued out the same, or other- " wise give or deliver to such person goods or any other satisfaction, or " security for his debt, whereby such person suing out such commission " shall privately have and receive more in the pound, in respect of his " debt, than the other creditors, such payment of money, *&c.* shall be " deemed and taken to be such an act of bankruptcy, whereby on good " proof thereof such commission shall be superseded, and it shall be lawful " for the Lord Chancellor to award to any creditor petitioning another " commission; and such person so taking such satisfaction as aforesaid, " shall forfeit and lose as well his whole debt as the whole he shall have " taken or received, and shall pay back and deliver up the same, or the " full value thereof, to such person as the said commissioners, acting under " such new commission shall appoint, in trust for and to be divided amongst " the other of the bankrupt's creditors in proportion to their respective " debts."

Every person being a trader, and capable of making binding contracts, is liable to become a bankrupt; as a nobleman, member of the House of Commons, clergyman, *&c.*

Ex parte Meymot, 1 Atk. 200. Hankey v. Jones, Coup. 745.

Infants and married women cannot be bankrupts.

Ex parte Sydebotham, 1 Atk. 146. Bull. *Ni. Pri.* 38. R. v. Cole, 1 Ld Raym. 443.

As to the latter, however, there are exceptions; for a *feme covert* in *London*, being a sole trader according to the custom, is liable to a commission of bankrupt, and her separate effects in trade may be seized and applied to the payment of her own debts contracted in such separate trade.

Ex parte Carrington, 1 Atk. 206. Lavie v. Philips, 3 Burr. 1776. 1 Bl. Rep. 570. S. C.

There is also another exception of a more doubtful nature, where a *feme covert* lives apart from her husband, acting as a *feme sole*, he not being liable to her debts. If a woman under these circumstances, though not the wife or daughter of a freeman of *London*, enters into trade, and contracts debts, it seems that she is liable to a commission of bankruptcy. The statutes contain no exception either of an infant or *feme covert*; their incapacity to be made bankrupt arises from the operation of law, which declares them incapable of making binding contracts. The criterion, therefore,

Co. *Bankrupt Laws*, 30.

therefore, of a *feme covert* being capable of coming under the bankrupt laws, appears to be her liability to be ſued to execution for the debts ſhe has contracted during coverture. A commiſſion of bankruptcy is conſidered as a ſtatute execution. If a married woman is ſo circumſtanced as to be ſubject to a common law execution, there does not appear to be any reaſon why ſhe ſhould not likewiſe be ſubject to a ſtatute execution. And upon this principle it is preſumed Lord Chancellor *Apſley* relied in the caſe of Mrs. *Fitzgerald*, in 1772, where it appeared that *Richard Fitzgerald*, huſband of *Anne Fitzgerald*, having for ſome years carried on the buſineſs of a linen-draper in *St. Giles in the Fields*, in the county of *Middleſex*, on the 14th *March* 1768, agreed upon a ſeparation, when articles were accordingly entered into for that purpoſe, and executed by and between them: by theſe articles, *Fitzgerald*, in order to make proviſion for his wife and children, and in conſideration of 600*l.* then by him taken to his own uſe out of his eſtate and effects, aſſigned to truſtees all his ſtock in trade, houſehold goods, and all ſums of money due to him, and then outſtanding on his books, together with the ſaid books, and the leaſe of his houſe, upon truſt for the ſaid *Anne*, as her own ſeparate eſtate, to be diſpoſed of as ſhe ſhould think fit, and to be by no means ſubject to the debts, control, or intermeddling of her ſaid huſband. And it was thereby further agreed, that the ſaid *Anne* ſhould have the liberty of trading without any interruption from her ſaid huſband, ſhe paying all the debts then owing by him in trade, and maintaining their children at her own expence, and ſaving him harmleſs from the ſame, and from all contracts and agreements to be thereafter entered into by her, either in the way of trade or otherwiſe. The ſeparation took place, and the huſband received the 600*l.* to his own uſe; and they ever after lived ſeparate and apart from each other, and he went to the *Eaſt-Indies*. The ſaid *Anne* was left in poſſeſſion of effects to the amount of 900*l.*, to be employed, and which were employed by her, in the ſaid trade; and, by buying and ſelling goods in that trade, ſhe got her living and maintenance for herſelf and children, continuing in her huſband's houſe, and there carrying on the buſineſs of a linen-draper, on her own account, and in her own name, as a ſole trader, near four years. In *December* 1771, a commiſſion of bankrupt was taken out againſt her, when the commiſſioners refuſed to find her a bankrupt, becauſe ſhe was a *feme covert* reſiding in the county of *Middleſex*, and not a *feme ſole* merchant trading in the city of *London*: but, upon petition to the Lord Chancellor (counſel being heard on both ſides), his lordſhip ordered the commiſſioners to proceed to find Mrs. *Fitzgerald* a bankrupt, and the meſſenger to take poſſeſſion of her effects: and, accordingly, ſhe was afterwards declared a bankrupt (*a*).

Ex parte Preſton, Green, 8.

(*a*) The authority of this caſe hath been confirmed by ſubſequent deciſions. Ringſtead v. Laneſborough. Co. *Bankrupt Laws*, 32. Barwell v. Brooks, *ibid.* 36. Corbet v Poelnitz, 1 Term Rep. 5. Co. *Bankrupt Laws*, 44. *Ex parte* Mear, 23d July 1787.

But if a *feme ſole* trader commits an act of bankruptcy, and afterwards marries, and lives with her huſband, ſhe cannot be made bankrupt. A commiſſion of bankrupt iſſued 20th *December* 1785, againſt *Frances Mear*, by the name of *Frances* the wife of *Henry Mear* of *Moſeley* in the pariſh of *Yardley*, in the county of *Warwick*, before her intermarriage known by the name of *Frances Piper* of *Birmingham*, in the county of *Warwick*, innholder. She had before her marriage kept an inn in *Birmingham*, but had declined buſineſs on 27th *December* 1784, previous to the date of the commiſſion, and on 14th *February* 1785, had intermarried with *Henry Mear*. The act of bankruptcy was proved before the commiſſioners to have been committed in *October* 1784. *Mear* and his wife petitioned to ſuperſede the commiſſion, alleging that neither the petitioning creditor's debt,

debt, the trading, nor the act of bankruptcy, could be proved, and alſo relying upon the illegality of the commiſſion, as having been iſſued againſt a married woman. The Lord Chancellor was of opinion, that the commiſſion was illegally iſſued againſt the ſaid *Frances Mear*, upon the ground of her marriage; and therefore it was ordered to be ſuperſeded, without going into the other objections.

An executor of a trader, who merely diſpoſes of the teſtator's ſtock, or buys things for the purpoſe of meliorating it, is not liable to be a bankrupt. 1 Atk. 103. Comb. 195. 1 Show. 294. Teſtator ordered the reſidue of his eſtate to be employed in carrying on his trade: This reſidue is liable for all the debts of the trade. Hankey v. Hammond, at the Rolls, 1785. In Hankey v. Twogood, Mich. 1785, Lord Thurlow expreſſed the ſame opinion; and alſo intimated, that the executor carrying on the trade with it *might be a bankrupt*, even though his name did not appear, and that he would be perſonally liable for the debts. Co. *Bankrupt Laws*, 84.

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(*A ſoapmaker*) The labour, in this caſe, is only in melioration of the commodity, and rendering it more fit for ſale. A butcher hath been holden to be a trader within the ſtatutes; and this, though the court expreſſed themſelves very ſenſible of the inconvenience of extending the bankrupt laws to perſons whoſe living is undoubtedly gotten by mechanical labour, with a mixture of buying and ſelling. Dalley v. Smith, 4 Burr. 2148.

A ſchoolmaſter who buys books to ſell to his ſcholars; or the owner of a mine who buys candles to ſell to his workmen, cannot be bankrupts. Comb. 181. 3 Mod. 327. *Ex parte* Walker v. Harvey. 22d November 1788. *Ex parte* Craddock, 21ſt Dec. 1792. Co. *Bankrupt Laws*, 74. It was formerly holden, that, if the buying and ſelling be *in proportion* to any other way the party hath of living, he may be a bankrupt; and, upon this principle, a farmer, who bought and ſold very large quantities of ſuch things as were the produce of his farm, was adjudged a bankrupt. Mayo v. Archer, 1 Str. 513. 8 Mod. 46. S. C. Buſcall v. Hogg, 3 Wilſ. 146. S. P; but ſee *infra*.

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(*A man's buying*) But, in later caſes, it hath been eſtabliſhed, that the *extent* of the trading is not material; that the true criterion is, whether the party means to ſell (with a view to profit) to any perſon who applies for the commodity in which he profeſſeth to deal. The intention of the party to trade in ſuch commodity, is a queſtion of fact to be left to a jury. As, where a farmer bought horſes not calculated for the farming buſineſs, and for the expreſs purpoſe of ſelling again, it was holden, that he made himſelf an object of the bankrupt laws; whether more or fewer inſtances of his ſo buying and ſelling, it was ſaid, was proper for the conſideration of the jury. Bartholomew v. Sherwood, 1 Term Rep. 573. See Stat. 5 G. 2. c. 30. ſ. 40.

(*A man's buying*) A perſon buys cattle at a fair, keeps them three or four days, and then drives them to another fair to ſell them, he is a drover within this ſtatute of 5 G. 2, and cannot be a bankrupt. Bull. Ni. Pri. 39.

If a man manufactures the produce of his own land, as a neceſſary or uſual mode of reaping or enjoying that produce, and bringing it advantageouſly to market; he ſhall not be conſidered as a trader, though he buy the neceſſary ingredients and materials to fit it for market; as in the caſe of a farmer buying rennet, and ſalt, to convert his milk into cheeſe; or making his apples into cyder. So in the caſe of alum works; the rude maſs of which is the rock, which is dug, burned, ſteeped, and boiled in lead, and then mixed with kelp, lees, and urine. Such alſo is the caſe of coal-mines (*a*), where raiſing the coals out of the pit is as neceſſary to the enjoyment of that ſpecies of produce, as reaping and threſhing corn is to the enjoyment of corn. But where the produce of the land is merely the raw material of a manufacture, and uſed as ſuch, and not as the mode of raiſing ſuch produce, where the ſoil is manufactured and converted into quite another thing, there in truth the party is and ought to be conſidered Newton v. Newton, Co. *Bankrupt Laws*, 76. (*a*) Port v. Turton, 2 Wilſ. 169.

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as a trader. And ſuch ſeems to be the caſe of brick-making. With reſpect however, to this ſpecies of manufacture, caſes have ariſen, wherein the queſtion, Whether it will bring a man within the bankrupt laws? hath been much agitated: and as this queſtion hath, from accident, not been finally ſettled, we ſhall ſtate the facts at large. Upon a petition for a new trial, an iſſue having been directed to try, whether the petitioner was or was not a bankrupt, it appeared from the report to have been proved, that the petitioner, who was a farmer, renting a farm of upwards of 100*l.* a-year, made bricks of earth taken off the waſte without any licence from the lord (to whom he afterwards paid a conſideration); that he uſed a kiln for the purpoſe, not built by him himſelf, and had, at various times, made from 40,000 to 70,000 bricks every year, and ſold different quantities, ſometimes only to certain perſons, and ſometimes generally to all who came for them. It was further in evidence, that the kiln was a ſmall one, not fit for making more than 7000 bricks at a time. One of the witneſſes ſwore he was employed by the bankrupt to make bricks at a certain price, and that he ſold them at an advanced value. Mr. Juſtice *Buller*, who tried the cauſe, told the jury that the queſtion was, Whether the bankrupt kept a public ſale kiln? if he did, it was a trading within the bankrupt laws; but if it was a mere private kiln for his own uſe, and that having too many, he had only ſold to a neighbour, that would not be ſuch a trading. The jury found that it was a public ſale kiln, and gave a verdict for the aſſignees; and Lord *Thurlowe*, C. refuſed to grant a new trial. "Purchaſing the earth," ſaid his lordſhip, "might, and he "thought it would be holden to be for the purpoſe of carrying on the "trade of a brick-maker. Here the earth was not indeed purchaſed, but "taken by way of treſpaſs, purged by the ſubſequent conſideration, which "would amount to obtaining a licence, and that brings it within the "bankrupt laws; that it was not to improve his own eſtate, but a purcha-"ſing of the earth by licence, ancillary to carrying on the trade of a "brick-maker."

Ex parte Harriſon, 1 Br. Ch. Rep. 173.

In the caſe of *Parker* v. *Wells*, there was a ſpecial verdict, which ſtated a demiſe from the Archbiſhop of *Canterbury*, in the year 1767, to *John Parker*, the father of the plaintiff, of an extenſive farm of 800 acres, in which there was a parcel of brick ground, for 21 years. It ſtated ſimilar demiſes to *John Parker*, the father, prior to that in 1767; and alſo a ſubſequent ſimilar one to the plaintiff in 1780: it ſtated further, that one *William Berand*, for twenty years and more, before the year 1768, rented the ſaid parcel of brick ground from the ſaid *John Parker*, the father, and made and ſold bricks there. That the ſaid *W. Berand* died in 1768, and upon his death the plaintiff took the ſaid brick ground into his own poſſeſſion, and then and there bought certain materials and neceſſary things, which were of the ſaid *W. Berand*, in his life-time, uſed in making bricks there at the valuation of 130*l.*, and then and there made bricks and tiles of the earth there, and ſold them; and that, during the time the plaintiff ſo held the ſaid land, he made bricks and tiles for ſale of the earth or clay ariſing from the brick grounds, and bought ſand and fuel, which were neceſſary ingredients for converting the earth and clay into bricks and tiles. Upon theſe facts the court of *C. P.* gave judgment for the plaintiff, holding that he was not a bankrupt, the buſineſs of brick-making being carried on by him, *merely as a mode of enjoying the profit of a real eſtate.* This judgment, however, was reverſed by the court of *K. B.* Upon a writ of error from the judgment of this laſt court, the following

Co. *Bankrupt Laws*, 61. 1 Term Rep. 34. 1 Br. Ch. Rep. 178.

following queſtions were put to the Judges, by order of the Houſe of Lords. 1ſt, Whether the finding on this verdict be ſufficient whereupon to give final judgment? 2d, If the finding be inſufficient, what award ought to be made on ſuch finding? 3d, If the finding be ſufficient, whether upon ſuch finding the plaintiff in error appears to be a trader within the true intent and meaning of the ſtatutes concerning bankrupts? The judges preſent were unanimouſly of opinion on the firſt queſtion, in the negative; and upon the ſecond, that a *venire facias de novo* ought to be awarded; whereupon the judgments both of the court of *C. P.* and of *K. B.* were reverſed; and it was adjudged, that the court of *King's Bench* do award a *venire facias de novo*. The plaintiff did not proceed on the *venire facias de novo*, but another action was brought by agreement of the parties in the court of *K. B.* *Buller*, J., previous to ſumming up the evidence, told the jury, there were three queſtions for them to determine. 1ſt, Whether *Parker* carried on the trade of making and ſelling bricks and tiles for ſale, for the purpoſe of drawing a profit therefrom? 2d, How long he carried on trade for that purpoſe, whether from the 23d of *June* 1768, when *Berand* died, to the time of his abſconding, which was on 7th *January* 1783, or from what time to what time? 3d, Whether he was a joint occupier of the farm with his father, or the father had the ſole beneficial enjoyment of the farm to his death? 1ſt, The jury found that the plaintiff did carry on the trade of making bricks and tiles for ſale, for the purpoſe of drawing a profit therefrom. 2d, That he carried on the trade for that purpoſe, from the 23d of *June* 1768, when *Berand* died, to *Michaelmas* 1778; that he ceaſed to make bricks at *Michaelmas* 1778, and he alſo ceaſed to ſell them on the ſame day. 3d, That the father had the ſole enjoyment of the farm to the time of his death. This finding was to have been drawn up as a ſpecial verdict; but, as it appeared that Mr. *Parker* had left off brick-making before the petitioning creditor's debt accrued, the defendants waved a ſpecial verdict, and a general one was entered for the plaintiff. Another commiſſion was afterwards taken out by a creditor, prior to *Parker's* quitting brick-making, which commiſſion was ſubmitted to.

Dom. Proc. 15th May 1787.

A perſon who hath dealt merely in running and ſmuggling goods, though it is an offence, and contrary to an act of parliament, is ſtill a trader within the meaning of the bankrupt acts, and liable to a commiſſion.

Ex parte Meymot, 1 Atk. 196.

Lord *Hardwicke* was inclined to think a pawn-broker within the bankrupt acts, and eſpecially within the 39th clauſe of 5 *Geo.* 2., the words of which are, "Whereas perſons dealing as bankers, brokers, and factors, are frequently intruſted with great ſums of money, and with goods and effects of very great value belonging to other perſons; it is hereby further enacted, that ſuch bankers, brokers, and factors ſhall be, and hereby are declared to be, ſubject and liable to this and other the ſtatutes made concerning bankrupts." For, he ſaid, though pawnbrokers are not expreſsly named, yet the general word *broker* is the genus, and all other kinds of brokerage the ſpecies.

Highmore v. Molloy, 1 Atk. 206.

The clauſe in 5 *Geo* 2. relating to dealers as bankers, took its riſe from that part of 21 *J.* 1., relating to ſcriveners, who were more numerous than in latter days; for bankers having taken upon them to act as ſcriveners, have made it neceſſary for the legiſlature to add bankers; and a perſon acting as a banker will be conſidered as ſuch, although he does not keep an open ſhop.

Ex parte Wilſon, 1 Atk. 218.

Drawing

Drawing and re-drawing bills of exchange may or may not be exercising trade and merchandiſe: It depends upon circumſtances; it is a queſtion of law upon the fact. Drawing and re-drawing for *large* ſums, and for a long time, though no commiſſion money be allowed, it was adjudged would make a man a bankrupt; *ſecùs* where a party drew bills upon his *own* account, at the expence of paying a quarter *per cent.* commiſſion, beſides intereſt at 5 *per cent.* for their being diſcounted, and borrowed accommodation-notes in exchange for his own to the ſame amount.

Richardſon v. Bradſhaw, 1 Atk. 128. Hankey v. Jones, Cowp. 745.

Buying and ſelling bank ſtock or other government ſecurities will not make a man a bankrupt.

Colt v. Netterville, 2 P. Wms. 308.

Lord C. J. *Holt* inclined to think that a ſhare in the ſtationer's company would not make a man a bankrupt; but Lord Keeper *Wright* held otherwiſe.

Bird v. Mayor, 2 Ld. Raym. 851.

A man who lives by buying only, or ſelling only, cannot be a bankrupt.

Com. Dig. tit. *Bankrupt.*

There can be no ſuch thing as an *equitable* bankruptcy; it muſt be a *legal* one.

Small v. Oudley, 2 P. Wms. 429.

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(*A Gentleman*) See the ſame point reluctantly ruled by Ld. Hardwicke, upon the authority of this caſe, in the matter of Aſtley, *ex parte* Smith, cited in Cowp. 402., and *ex parte* Williamſon, 1 Atk. 82. And, conformably to theſe deciſions, it is now ſettled, that if a merchant who trades to *England*, but who is a native of, and hath been conſtantly reſident in, a country not ſubject to the *Engliſh* laws concerning bankrupts, comes into this country, and commits an act of bankruptcy, he becomes an object of the bankrupt laws. Alexander v. Vaughan, Cowp. 398. Ingliſs v. Grant, 5 Term Rep. 530 S. P. But the act of bankruptcy muſt be committed here; that cannot be admitted abroad. *Ibid.*

But the bankrupt's declaration of his fears of being arreſted, or of his bad circumſtances, is not evidence of a bankruptcy, unleſs where it is concomitant with facts; ſuch as removing his goods, books, *&c.* or where the bankrupt himſelf conteſts the commiſſion.

Ambroſe v. Clendon, Ca. Temp. Hardw. 267. Cockran v. Love, at *N. P.* cor. Ld. Kenyon, 3d June 1790.

Departing the realm will not be an act of bankruptcy, unleſs done with a view of defrauding or delaying creditors: but if it appear that they are are in fact delayed by ſuch abſence, it will be the ſame as if the original departure had been fraudulent.

Ex parte Culſton, 1 Atk. 193. 139. Davis's *Bankrupt Laws*, 30.

Therefore one *Woodier*, a mercer on *Ludgate-hill*, who fled beyond ſea for the murder of his wife, whereby his creditors were prevented from recovering their debts, was holden to have committed an act of bankruptcy.

Bull. *Ni. Pri.* 39. See a confirmation of this caſe in Raikes v. Poreau, cor. Buller J. *London* Sittings after Tr. Term 1786. Co. *Bankrupt Laws*, 91.

But a trader going abroad, to avoid performing a duty, will not, therefore, be a bankrupt; as if it be to avoid an arreſt upon an *excommunicato capiendo*, or the ſervice of proceſs to enforce a decree in Chancery, unleſs it be a decree for the payment of money: but if creditors, by ſuch abſence, are delayed and defrauded, it then becomes an act of bankruptcy, according to the principle of *Woodier's* caſe, and that above referred to.

Co. *Bankrupt Laws*, 93.

Though a trader depart the realm in good circumſtances, yet if he run in debt, and defer his return in order to avoid arreſts, this is tantamount to his departing in order to defraud his creditors.

Vin. Abr. tit. *Creditor and Bankrupt*, 59.

If A.

(*If A. commits*) Colkett v. Freeman, 2 Term Rep. 59. S. P. A plain unequivocal act of bankruptcy cannot be purged or explained by ſubſequent circumſtances. *Ibid.*

Although the ſtatute of *Eliz.* mentions "the beginning to keep houſe "to defraud creditors" as an act of bankruptcy, yet the conſtruction which it hath obtained is, that there muſt be an actual denial to ſome one creditor, with intent to defraud or hinder ſuch creditor, in order to conſtitute the act; that the debtor's keeping houſe "with that intent," or giving general orders to a ſervant to deny him to creditors, without an actual denial to ſome creditor who hath a debt at that time due, will not be ſufficient. Page 251 Garret v. Moule, 5 Term Rep. 575. Hawkes v. Saunders, Tr. 24 G. 3. B. R. Co. *Bankrupt Laws*, 94 7 Vin. Abr. 6. pl. 14. A denial to a creditor coming at an unſeaſonable hour, or a denial in caſe of ſickneſs, or being engaged in company or buſineſs, is not an act of bankruptcy. Bull *N. P.* 39. 1 Atk. 202.

It hath been holden (*a*), that a denial to a perſon coming on behalf of a creditor to demand the debt will not be within the ſtatute. But it is certain, that, in practice, a denial to the clerk of a holder of a bill or note, is conſidered as ſuch evidence of keeping houſe as to make it an act of bankruptcy. (*a*) Barrow v. Foſter, cor. Ld. Camden, Norwich, S. A. 1765, Bromley v. Mundee, Bull. *N. P.* 39. Colkett v. Faleb, Co. *Bankrupt Laws*, 99.

Whether a denial in conſequence of a pre-concerted agreement between the debtor and his creditors ſhall be an act of bankruptcy, was formerly doubted; but it ſeems now to be ſettled, that if the denial be to any of the creditors privy to ſuch agreement, it is fraudulent, and not a good act of bankruptcy: *ſecùs* if to a creditor not acquainted with the agreement. Hooper v. Smith, 1 Bl. Rep. 441 Bull. *N. P.* 39 Allen v. Hartley, M. 25 G. 3. B. R. Co. *Bankrupt Laws*, 7. Cawley v. Hopkins, *London* Sittings after Mich. Term 1785. cor. Buller J. *Id.* 102.

Abſenting himſelf, may become an act of bankruptcy or not, from the intention of the party: if it be done with a view of defrauding, or even delaying his creditors, and the abſence be but for a ſingle day, it will be an act of bankruptcy; and his very abſenting himſelf is ſufficient *primâ facie* evidence of an intent to defraud or delay his creditors: but it muſt be voluntary, and not by means of an arreſt. 1 Salk. 110. 1 Burr. 484. Hall's caſe, 2 Str. 809. Green, 53.

(*If a Man permit*) 2 Sid. 69. 114. 176. S. C. 1 Lev. 13. S. C. Ld. C. B. Comyns ſaith, that if the outlawry be reverſed before the commiſſion iſſues, or for default of proclamation after the commiſſion, it ſhall not be an act of bankruptcy. Com. Dig. tit. *Bankrupt*, C. 4. But Q. of his opinion? for it reſts merely on the great authority of that writer; and if the outlawry were originally fraudulent, and intended to defraud or delay creditors, it ſeemeth that no ſubſequent event would be ſufficient to purge the fraud, and prevent the effect of the bankrupt acts.

An outlawry in *Ireland* doth not make one a bankrupt; but in the county palatine of *Durham* it doth. Com. Dig. tit. *Bankrupt*, C. 4. Co. *Bankrupt Laws*, 105.

Yielding himſelf to priſon, is to be intended a voluntary yielding for debt; and if a perſon capable of paying will notwithſtanding, from fraudulent motives, voluntarily go to priſon, it is an act of bankruptcy. Billing. 95 Good. 25.

B. was arreſted for 28*l.* and though he had money ſufficient to pay the debt, yet choſe rather to go to priſon, in order, as he declared, to force his creditors to come to a compoſition. The Lord Chancellor ſaid, this is an act of bankruptcy within 1 *Jac.* 1. though without ſuch intent, yield- *Ex parte* Burton, Vin. tit. *Cred. and Bank.* 62.

ing

ing himſelf to priſon was no act of bankruptcy, unleſs he lay there two months; otherwiſe where the party procures himſelf to be arreſted on a ſham debt, for that by the ſtatute of *Elizabeth* is immediately an act of bankruptcy.

2 Bl. Com. 478, 1 Com. Dig. 523. Clavey v. Haley, Cowp. 427. Harman v. Spottiſwood, M. 13 G. 3. B. R. Co. *Bankrupt Laws*, 122.

Willingly or fraudulently procuring his goods to be attached or ſequeſtered, is declared to be an act of bankruptcy, for it is a plain an direct endeavour to diſappoint his creditors of their ſecurity. But an attachment out of a court for default or laches is not an act of bankruptcy; nor if *A.* has a rectory impropriate, and the tithes are ſequeſted for not repairing the chancel, will he thereby become a bankrupt. The attachment here meant, and which the legiſlature had in view, is that ſort of attachment by which ſuits are commenced, as in *London* and other towns where that ſpecies of progreſs is uſed; therefore a fraudulent judgment and execution ſued there-upon, was held not to be procuring goods to be attached within he words of this act.

Martin v. Pewtreſs, 4 Burr. 2478.

Making any fraudulent grant or conveyance of his lands and tenements, goods or chattels. A fraudulent grant, to come within the meaning of this ſtatute, muſt be by deed; therefore a fraudulent ſale of goods, not by deed, is no act of bankruptcy in itſelf: but being a ſcheme concerted at the eve of a bankruptcy, to cheat innocent perſons, in order to ſecure particular creditors, it is ſuch a fraud as ſhall render the ſale void.

Worſely v. De Mattos, 1 Burr. 467. Wilſon v. Day, 2 Burr. 827. Butcher v. Eaſto. Doug 282.

A trader, before he becomes a bankrupt, may prefer one creditor to another, and may pay him his debt, or may make him a mortgage, with poſſeſſion delivered, or may aſſign part of his effects: but a preference of one creditor to the reſt, by conveying by deed all his effects to him, or ſo much of his ſtock in trade as to diſable him from being a trader, is a fraud upon the whole bankrupt law, and an act of bankruptcy.

And it makes no difference whether the aſſignment be to indemnify a ſurety, or for a preſent debt. Haſſel v. Simpſon, Hill. 24 G. 3. 1784, B. R. Co. *Bankrupt Laws*, 106.

Kettle v. Hammond, Sittings after Hil. 7 G. 3. Co. *Bankrupt Laws*, 108.

An aſſignment of all a trader's effects for the benefit of all the creditors, has been holden an act of bankruptcy, unleſs they all aſſent to the deed. But (*a*) in ſuch caſe it is not permitted to thoſe who execute the deed to ſet it up as an act of bankruptcy.

(*a*) Bamford v. Baron, cited in 1 Term Rep. 594.

Jacob v. Shepherd, 1 Burr. 478. Unwin v. Oliver, *id.* 481.

An aſſignment of part of a trader's effects may, under certain circumſtances, be good and valid; but an aſſignment of his effects, with only a colourable exception (*a*) of a ſmall part, will not prevent the deed from being fraudulent, and, of courſe, it will be an act of bankruptcy.

(*a*) Gayner's caſe, *id.* 477. Law v. Skinner, 2 Bl. Rep. 596. Compton v. Bedford, 1 Bl. Rep. 362.

Linton v. Bartlett, 3 Wilſ. 47. Devon v. Watts, Dougl. 86.

And an aſſignment by deed of only *part* of a trader's effects to a fair creditor will, if done in contemplation of a bankruptcy, be itſelf the very act.

Round v. Hope Byde, *London* Sittings after Mich. Term 1779. Co. *Bankrupt Laws*, 114.

Haſſel v. Simpſon Co. *Bankrupt Laws*, 107.

A grant or conveyance fraudulent within the ſtatute 13th *Eliz.* or 27th *Eliz.*, is an act of bankruptcy.

Being arreſted for debt ſhall, after ſuch arreſt, lie in priſon two months or more, upon that or any other arreſt or detention in priſon for debt.

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The arreſt muſt be lawful, and therefore an arreſt by an executor before probate is not within the act. 3 Lev. 58.

The ſtatute does not make the mere being arreſted an act of bankruptcy. The moſt ſubſtantial trader is liable to be arreſted; but the preſumption of inſolvency ariſes from his lying in priſon two months, without being able to get bail; nor will this preſumption be obviated by a mere formal bail put in for the purpoſe of changing from one cuſtody to another. Where bail is really put in, the bankruptcy only relates to the time of the ſurrender; but when it is only a formal bail, it will have relation to the firſt arreſt. Therefore a man arreſted in *Kent*, and brought up to *London* to be bailed, and immediately turned over to the King's Bench priſon, where he lay two months, was held a bankrupt from the firſt arreſt. In a caſe where a man was arreſted on the 2d of *May*, and on the 4th of *May* was charged in cuſtody with that and another action, and lay in priſon till the 2d *July* at the ſuit of the firſt plaintiff, when he was diſcharged out of cuſtody as to him, and continued in priſon at the ſuit of the ſecond plaintiff till the 6th of *July*; the court held there was plainly an act of bankruptcy on the 4th of *May*, whatever diſpute there might be as to its being a bankruptcy on the 2d. 1 Burr. 439. Duncomb v. Walter, 3 Lev. 57. 1 Ventr. 370. Raym. 479. Roſe v. Green, 1 Burr. 439. King v. Leith, 2 Term Rep. 141. Coppendale v. Bridgen, 2 Bur. 818.

It has in one caſe been determined, that lying in priſon two lunar months will make the party bankrupt from the time of the firſt arreſt; and though the commiſſion was taken out before the two months expired, yet he appearing to be bankrupt by relation to a time before the ſuing it out, it was held ſufficient. Hope v. Gill, Beawes Lex Mer. 489.

But where *A.* being arreſted pnts in bail, afterwards ſurrenders in diſcharge of his bail, and is above two months in priſon, he is a bankrupt only from the time of his ſurrender, not from the time of his arreſt. Bull. *N. P.* 38.

Being arreſted for 100*l. or more juſt debts, ſhall eſcape out of priſon.* The act clearly intends ſuch an eſcape as ſhews he means to run away, and thereby to defeat his creditors; it muſt be an eſcape againſt the will of the ſheriff, for a man ſhall not be made a criminal where he has not the leaſt criminal intention to diſobey any law.

Therefore, a man who was arreſted in *Kent*, and coming to town in cuſtody of the ſheriff's officer, was permitted by him to call at his attorney's houſe in the city, and from thence immediately carried to the judge's chambers in obedience to a *habeas corpus*, was held not to have eſcaped in the ſenſe of this act of parliament, but to have remained ſubſtantially in cuſtody notwithſtanding his being carried into another county. Roſe v. Green, 1 Burr. 440.

If any bankrupt, after iſſuing any commiſſion againſt him, pay to the perſon who ſued out the ſame, or otherwiſe give and deliver to ſuch perſon, goods or any other ſatisfaction and ſecurity for his debt, whereby ſuch perſon ſhall privately have and receive more in the pound in reſpect of his debt than the other creditors, ſuch payment of money ſhall be an act of bankruptcy.

In an action brought againſt the defendants (one of whom had been a co-aſſignee with the plaintiff, and removed for the purpoſe) to recover the proceeds of a variety of articles, amounting to upwards of 6000*l.*, which had been aſſigned to them by the bankrupt, after ſeveral acts of bankruptcy; *Buller*, J. ſaid, there have been three points made in this caſe; 1ſt, Whether by the leaving of her houſe, Mrs. *Tyler* intended to delay her creditors. 2dly, Whether the leaving of the kingdom without ſuch intention, but whereby in fact creditors are delayed be an act of bankruptcy. 3dly, As to the compoſition with Mr. *Thackery*. They are all Vernon v. Hankey, *London* Sittings after Trin. Term, 27 G. 3.

points of general conſequence and importance. The firſt is a queſtion of fact, and it is for you to ſay what you think was Mrs. *Tyler*'s intention when ſhe left her houſe; ſhe knew that a great number of bills were ſoon to become due, and had not made any proviſion for the payment of them; beſides, the affidavit of the defendant for the purpoſe of himſelf taking out a commiſſion is very ſtrong, and ſhews you what he thought at the time. I remember a caſe about fourteen years ago, in which Lord *Mansfield* held ſuch an affidavit concluſive evidence againſt the defendant, and upon application to the court, though it was ſaid not to be concluſive, the judges were all of opinion, that it was *primâ facie* evidence againſt ſuch perſon diſputing the bankruptcy he had ſworn to.

2dly, As to the going abroad, there cannot be any doubt that Mrs. *Tyler*'s creditors were thereby delayed; but it is ſaid, that it is not ſufficient unleſs the going was with an intention to delay them, and that the bankrupt went to *Calais* merely to avoid an impending proſecution. The law upon this ſubject is eſtabliſhed by *Woodier's* caſe, which happened in 1739, and was not ſo ſtrong a caſe as this, for he had more ground for his apprehenſion, having killed his wife. The point, indeed, has never been neatly before the court ſince that time; but that caſe has always been conſidered, and acted upon as good law. And at this time, without examining into the expedience of that deciſion, I ſhould be extremely averſe to over-rule it. For as you have often heard it obſerved from this ſeat, certainty and uniformity of deciſion are in matters of this ſort, of much more material conſequence than the eſtabliſhment of a rule one way or the other. 3dly, It appears from Mr. *Ward*'s evidence, that *Thackery* had ſued out a commiſſion which was ſealed on the 13th of *May*, and that on the 19th, in the preſence of one of the defendants, he agreed upon Mrs. *Tyler*'s paying him 200*l*, and giving ſecurity for the remainder of his debt, that the commiſſion ſhould die away. This is expreſsly made an act of bankruptcy, by the 5 *Geo.* 3. *c.* 30. § 24. The aſſignment then made to the defendants, being ſubſequent to thoſe acts of bankruptcy, there cannot be any doubt of the plaintiff's title to recover. The jury found a verdict for the plaintiff.

Cole v. Davies, 1 Ld Raym. 725. Bull. *N P* 40. Packenham v. Blan, Select Caſes in Chancery, 42.

The legiſlature having by poſitive laws declared what acts ſhall be conſidered as criterions of inſolvency or fraud whereon to ground a commiſſion, none other can be admitted by inference or analogy. Therefore, it is not an act of bankruptcy for a trader ſecretly to convey his goods out of his houſe and conceal them to prevent their being taken in execution; nor to give money for notice when a writ ſhall come into the ſheriff's office; nor for a banker to refuſe payment, if he appears, and keeps his ſhop open.

(B) Of the Commiſſion of Bankrupt; and herein of the Creditors who may obtain it, and what they are to do previous thereto.

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(*The Commiſſion*) Supported by a proper affidavit of the debt. 5 G. 2. c. 30. But ſuch affidavit need not ſtate the particulars by which the bankrupt becomes indebted. *Ex parte* Ware, 1 Atk. 153.

Goddard v. Vanderhayden, 3 Wilſ. 271. Barnaby's caſe, 1 Stra. 653.

If a creditor has his debtor in execution, he cannot petition for a commiſſion of bankruptcy; for the body of the debtor being in execution, is a ſatisfaction of the debt in point of law. Therefore, where a commiſ-

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ſion had iſſued on the petition of a creditor, who had the bankrupt in execution, it was upon that account ſuperſeded.

Nor has the petitioning creditor the ordinary election to ſue the bankrupt at law, or come under the commiſſion; for if he were to elect to proceed at law, the commiſſion muſt be ſuperſeded, which would affect thoſe creditors who had proved debts under it, and this incapacity of the petitioning creditor to ſue the bankrupt, extends to other caſes in which common creditors are not put to their election; for if a creditor has demands on the bankrupt of diſtinct natures or in different rights, he is at liberty to prove one under the commiſſion, and proceed at law for the recovery of the other. But where a petitioning creditor, having founded his petition upon a debt ariſing from two notes of the bankrupt, arreſted the bankrupt upon a third diſtinct note, Lord *Hardwicke* allowed the bankrupt's petition for his diſcharge, becauſe the petitioning creditor had determined his election by taking out the commiſſion.

Ex parte Lewes, 1 Atk. 454.

Ex parte Ward, 1 Atk. 153.

The petitioning creditor muſt have a legal demand: A debt in equity will in no circumſtances be a foundation for a commiſſion; therefore if a legal demand is not in its own nature aſſignable, the aſſignee, notwithſtanding his equitable claim, cannot be a petitioning creditor.

Forreſt. 243. 2 Ch Ca. 191. Freem. 270. *Ex parte* Hylliard, 1 Atk. 147. 2 Vez. 407. Medlicot's caſe, 2 Stra. 809. 1 P. W. 783. *Ex parte* Lee.

A debt at law, notwithſtanding the ſtatute of limitations has incurred, will ſupport a commiſſion; for the ſtatute does not extinguiſh the debt, but the remedy, and the leaſt hint will revive it.

Swayne v. Wallinger, 2 Stra. 746. *contra* Moſely, 37.

Indeed if the debtor himſelf applies on that ground to ſuperſede the commiſſion, the caſe may be different; but a debtor of the bankrupt's cannot avail himſelf of that defence to elude the payment of a juſt debt to the aſſignees.

Quantock v. England, 2 Black. Rep. 703. 5 Burr. 2628 S. C.

And accordingly Lord *Manſfield*, at *Niſi Prius*, ruled that the ſtatute of limitations does not prevent a creditor from taking out a commiſſion of bankruptcy: It extends only to the remedies by action mentioned in the ſtatute, it does not extinguiſh the debt, or take away any other remedy.

Fowler v. Brown, Sittings at *Weſtminſter* after Mich. Term 1779.

If a creditor takes a bill for his debt, which is drawn by the debtor upon a payee, who had not at that time, nor previous to the bills becoming due, any effects of the drawer in his hands, this does not extinguiſh the original debt, although the creditor neglects to give notice of its being diſhonoured.

Bickerdike v. Bollmen, 1 Term Rep. 405.

It has been determined, that a creditor by notes bought in at 10*s.* in the pound, was a creditor for the full ſum, and might take out a commiſſion.

Ex parte Lee, 1 P. W. 782.

A creditor who has a ſecurity for his debt may take out a commiſſion without delivering it up; and though it be afterwards ſold (*a*), and the debt thereby reduced under 100*l.*, the commiſſion will nevertheleſs be good.

Ex parte Penny, in Canc. Tr. 33 G. 3. ruled on the authority of (*a*) Sir George Colebrooke's caſe, cited by Sir J. Mitford.

A debt on account, though not liquidated, is a foundation for a commiſſion of bankruptcy.

Flower v. Herbert, 2 Veſ. 327.

If a tradeſman becomes ſecurity for another, it creates ſuch a debt that the creditor may take out a commiſſion: So a ſolicitor's bill for fees will

Heylor v. Hall, Palm. 325.

support a commiſſion: And notwithſtanding an order obtained that the bill ſhould be taxed by a maſter, and all proceedings at law in the mean time ſtaid; if the ſolicitor whilſt the bill is under taxation, ſues out a commiſſion of bankrupt againſt his client, it has in one caſe been determined to be no contempt nor a ſufficient cauſe to ſuperſede the commiſſion, becauſe the order of reference extends only to the bringing of actions, and the common and ordinary proceedings.

Moſely, 27.

Ex parte Goodwin, 1 Atk. 100.

The executor of a bankrupt, unleſs the commiſſion againſt his teſtator has been ſuperſeded, cannot take out a commiſſion for a debt due to the teſtator; becauſe the debt veſted in his aſſignees, and conſequently the executor is not entitled to be the petitioning creditor.

Ex parte Criſp. 1 Atk 134. Co. *Bankrupt Laws*, 20.

A debt due from a partnerſhip, is a legal debt to ſupport a ſeparate commiſſion.

Ex parte Lingood, 1 Atk. 241.

A ſum awarded by arbitrators will ſupport a commiſſion notwithſtanding a bill filed to ſet aſide the award; for the arbitration bond is a debt at law, and binds the parties, until it is ſet aſide for corruption or partiality, &c. And if a bill filed were a foundation to ſuperſede the bond, a perſon by filing a bill might at once fruſtrate the effect of the award.

Butcher v. Eaſto, Dougl. 282. Meggor v. Mills, 12 Mod. 159. 1 Ld. Raym. 287 Cotton v. Daintry, 1 Sid. 411. 1 Ventr. 29.

A creditor, before the party entered into trade, may on account of ſuch debt ſue out a commiſſion, but a creditor for a debt contracted after leaving off trade, cannot. But when a commiſſion is ſued out, thoſe creditors who have become ſuch ſince the party quitted trade, may come in and ſhare the dividend with thoſe who were creditors before or during the trading, provided they are not barred by a prior act of bankruptcy.

Ex parte Mackerneſs 1 P.W. 260. *Ex parte* James, 19th June, 1719, 1 P. W. 610. Swaine v. Demattos, 2 Stra. 1211.

A creditor by *bond payable at a future* day, having ſued out a commiſſion of bankruptcy before the time of payment, Lord Chancellor *Parker* ordered it to be ſuperſeded becauſe the money was not then due: But this, though good law at the time of the deciſion, has ſince been altered by the 5 *Geo.* 2. *c.* 30. § 22. which extends to all ſorts of bonds and ſecurities given on good conſideration for the payment of money, notwithſtanding the preamble ſpeaks only of bonds given for goods in trade.

Chilton v. Whiſſen, 3 Wilſ. 17. The ſtatute extends to goods ſold on credit. Cockran v. Love, at *N. P.* cor. Ld. Kenyon, 3d June 1790.

Toms v. Mytton, 2 Stra. 744. Ambroſe v. Clendon, 2 Stra. 1042.

If the debt of the petitioning creditor appears to have been contracted ſubſequent to a ſecret act of bankruptcy committed by the trader, no commiſſion ought to be granted upon his petition. Accordingly, where it appeared that a man was a bankrupt in *January* 1724, and the debt of the petitioning creditor was a note dated in *September* 1725, it was holden to be a void commiſſion. But if a debt originally upon a ſimple contract were extinguiſhed by the creditor's accepting a bond after a ſecret act of bankruptcy, it ſhall not operate as an extinguiſhment of the ſimple contract, ſo as to deprive the creditor of his right to petition.

This neceſſity of the petitioning creditor having a legal debt due before any act of bankruptcy, ſeems alſo to be tacitly admitted by the reaſoning of the judges in ſeveral caſes, where a queſtion has ariſen, Whether an indorſee of a note given before, but indorſed after a ſecret act of bankruptcy, is entitled to be a petitioning creditor? Such a creditor is allowed to petition, becauſe he ſtands in the place of the indorſer, and the debt is not

not created by the indorſement, but by the making of the note which was before the bankruptcy. The authority of theſe caſes, and the reaſoning on them, has been acknowledged and confirmed by the court of *King's Bench*, in *Bingley* v. *Maddiſon*, in that caſe a note was given by the bankrupt in *January*, and it became due in *June*. The act of bankruptcy was in *October* following, and the indorſement in *November*. The indorſee of the note was petitioning creditor, and ſued out the commiſſion.

Ex parte Thomas, 1 Atk. 73. 2 Wilſ. 135. Bingley v. Maddiſon, B. R. Mich. Term 1783, Co. *Bankrupt Laws*, 24.

It was contended, that at the time of the bankruptcy the petitioning creditor had no debt, and therefore the commiſſion could not be ſupported.

The court obſerved, that this was a caſe in which the law of *England* allowed the aſſignment of a choſe in action. The debt payable to *B.* is aſſigned to *D.* The conſequence is, that the aſſignment relates to the original debt, and the aſſignee ſtands in his place. That the indorſee always came in under the commiſſion, becauſe the indorſement relates to the original debt. That it ſtood thus upon principle, and the caſes are clear, explicit, and poſitive, and of the higheſt nature. The caſe in the *Common Pleas* (*a*) is a ſolemn opinion of the whole court. They therefore held the commiſſion valid.

(*a*) 2 Wilſ. 135. But ſee De Golls v. Ward. Ca. Temp. Talb 243.

Notwithſtanding the above *ſtat.* 5. *G.* 2. has provided a remedy againſt maliciouſly ſuing out commiſſions of bankrupt, yet it is holden not to take away the common law remedy by an action for damages, but that the party may proceed at law to obtain ſuch redreſs for the injury he has ſuſtained, as a jury think he is entitled to. Where a party elects to abide by the remedy afforded by the ſtatute, he muſt petition the lord chancellor to have the bond aſſigned to him. It is however in the breaſt of the court where the bankruptcy is a doubtful caſe, and the commiſſion ſuperſeded, either to direct an inquiry before a maſter of the damages ſuſtained by the bankrupt, or a *quantum damnificatus* upon an iſſue at law; and after the damages are ſettled, the court may, for the better recovery thereof, order the bond to be aſſigned. But where the caſe is attended with any flagrant circumſtances, the bond will be immediately aſſigned without further inquiry.

Brown v. Chapman, 3 Burr. 1418. Bonham's caſe, 8 Rep. 121.

Ex parte Gayter, 1 Atk. 144.

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(*Alſo by* § 25.) This direction, that the commiſſioners ſhall ſettle the bill, does not prevent the chancellor, upon petition, from referring it to a maſter in chancery to tax it, if, upon the hearing, there ſhould appear to be reaſonable objections againſt the allowances made by the commiſſioners. *Ex parte* Vincent, 24th March 1786. *Ex parte* Clarke and Coghlan, 29th May 1789; 22d March 1790; 26th November 1791. Co. *Bankrupt Laws*. 10.

Where a creditor of a bankrupt to the amount of 112*l.* previous to the bankruptcy, but after notice of an act of bankruptcy having been committed, received 50*l.*, it was holden, that he was not thereby precluded from taking out a commiſſion; for this payment could not be retained, and conſequently the original debt remained in force.

Mann v. Shepherd, 6 Term Rep. 79.

A creditor cannot preſent a petition to prove a debt until he has gone before the commiſſioners, and his petition ought to ſtate what paſſed before the commiſſioners.

Ex parte Wright, 2 Vez. jun. 41.

A defendant at law having lain two months in priſon was made a bankrupt, and diſcharged under a *ſuperſedeas*, the plaintiff not having proceeded for two terms: the plaintiff then proved his debt under the commiſſion, but before a dividend took the bankrupt in execution in a freſh action. Lord Chancellour diſmiſſed a petition of the bankrupt to releaſe him, ſaying, that he could not bar the creditor of his legal remedy.

Ex parte Callow, 3 Vez. jun. 1.

A. became

Hodgſon v. Bell, 7 Term Rep. 97.

A. became bound as a ſurety with *B.* to *C.* on the 10th of *Auguſt* 1778, conditioned for payment in ſix months. On the 1ſt of *March* 1780, he became bound with *B.* to *D.* conditioned for payment in ſix months. On the 4th of *March* 1780, *B.* became bound to *A.* conditioned for payment of the two former bonds, and alſo to indemnify *A.* againſt thoſe bonds. The money ſecured by the ſecond bond not being paid on the day when it became due, it was holden, that the laſt bond was thereby forfeited, though *A.* was not called upon to pay the money in the ſecond bond until afterwards, and that he might prove it under a commiſſion of bankrupt that iſſued againſt *B.* after the forfeiture and before payment.

Smith v. Broomhead, 7 Term Rep. 300.

If a commiſſion be taken out fraudulently or maliciouſly, the Lord Chancellour may, under the ſtat. 5 *Geo.* 2. *c.* 30. either order a ſpecifick ſum to be paid by the petitioning creditor to the bankrupt, by way of damages, or aſſign the bond to the latter to enable him to recover the whole penalty of it. And the aſſignment of the bond is concluſive evidence of the fraud or malice, ſo that it is not neceſſary to ſtate in the declaration that the commiſſion was fraudulently or maliciouſly ſued out.

(C) Of the Commiſſioners, their Duty; and herein of the Power they may exerciſe over the Bankrupt, and others, in diſcovering his Eſtate.

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Ex parte Simpſon, 1 Atk. 72. *Ex parte* Groome, *id.* 119. De Golls v. Ward, Ca. Temp. Talb. 243.

IF ſufficient evidence is given to ſatisfy the commiſſioners (for they are not bound to believe all that is ſworn,) that the party is a bankrupt, they declare him a bankrupt *generally*, to prevent diſputes about the time when he became ſuch.

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(*And by the* 1 *Jac.*) This act continues in force, notwithſtanding the ſubſequent ſtatutes. 2 Bur. 1224. The commiſſioners have no authority under this act to commit a perſon ſuſpected to detain effects of the bankrupt for not attending to be examined, upon their firſt ſummons. Dyer v. Miſſing, 2 Bl. Rep. 1035.

(*By the* 21 *Jac.*) But the wife cannot be examined touching his bankruptcy. *Ex parte* James, 1 P. Wms. 610.

(*By the* 1 *Jac.* 1 *cap.* 15.) And where goods had been ſent by the bankrupt on board a ſhip to be conveyed to his correſpondents abroad, it was holden, that the commiſſioners could not ſeize and take them away, without paying the freight. Molloy, 253. Where the party refuſes obedience to the commiſſioners' warrant, it ſeems, that the chancellor will attach him as for a contempt. *Ex parte* Titner, 1 Atk. 136. *Vide* Molloy, 253. *contr.*

The commiſſioners, if they have reaſon to apprehend that the bankrupt is making away with,

By 5 G. 2. *c.* 30. § 14., "Upon certificate made under the hands and "ſeals of the commiſſioners, that ſuch commiſſion is iſſued, and ſuch "perſon proved before them to become bankrupt, it ſhall and may be lawful, to and for all or any of the juſtices of his majeſty's court of King's "Bench, or Common Pleas, or barons of the court of Exchequer, and "to and for all and every the juſtices of the peace within that part of the "kingdom of *Great Britain* called *England*, the dominion of *Wales*, and "town of *Berwick upon Tweed:* and they are hereby empowered and "required, upon application to them for that purpoſe made, to grant their "warrant under their hands and ſeals, for the taking and apprehending "ſuch perſon, and him to commit to the common gaol of the county "where

" where he ſhall be ſo apprehended and taken, there to remain, until he be " removed by order of the ſaid commiſſioners, or the major part of them, " by warrant under their hands and ſeals. And the gaoler or keeper, to " whoſe cuſtody ſuch perſon ſhall be committed, is hereby required to " take and receive ſuch perſon into his cuſtody; and forthwith to give " notice to one or more of the ſaid commiſſioners in the ſaid commiſſion " named, of ſuch perſon being in his cuſtody, to the intent the ſaid " commiſſioners may ſend their warrant to ſuch gaoler or keeper, (which " they are hereby empowered and required forthwith to ſend,) for the " delivering ſuch bankrupt to the perſon or perſons named in ſuch war- " rant, who ſhall be thereby authoriſed to convey and bring ſuch perſon " to the ſaid commiſſioners, in order to ſuch examination and diſcovering " as aforeſaid. And the ſaid commiſſioners are hereby likewiſe autho- " riſed and empowered by ſuch their warrant, or any other warrant, to " take and ſeize any of the goods, wares, merchandizes and effects of " ſuch bankrupt, (the neceſſary wearing apparel of ſuch bankrupt, or of " his wife or children, only excepted) and any of his books, papers, or " writings which ſhall be then in the cuſtody or poſſeſſion of ſuch bank- " rupt, or of any other perſon, in any priſon or priſons whatſoever; any " cuſtom or uſage to the contrary in anywiſe notwithſtanding "

and conceal. ing his effects, or preparing to depart the kingdom to avoid ſurrendering, may ſummon him to appear before them to examine him immediately; and, upon his refuſal to attend to the ſummons, may certify to a judge under this clauſe. *Ex parte* Lingood, 1 Atk. 240.

§ 11. " Provided, That if any ſuch perſon or perſons ſo apprehend- " ed and taken ſhall, within the time or times allowed by this act for that " purpoſe, ſubmit to be examined, and in all things conform, as if he, " ſhe, or they had ſurrendered, as by this act ſuch bankrupt or bankrupts is " or are required; that then ſuch perſon ſo ſubmitting or conforming ſhall " have and receive the benefit of this act, to all intents, as if he, ſhe, or " they had voluntarily come in and ſurrendered himſelf, herſelf, or them- " ſelves; any thing, *&c.*"

(*By the ſame ſtat.* § 16.) The power of the commiſſioners to examine the bankrupt is not limited and confined within the time allowed him to ſubmit to be examined; they may compel him to make further anſwer after that time. 2 Bur. 1123, 1124. If a bankrupt, in his anſwers to his examination, will ſwear fully and roundly, the commiſſioners cannot commit him, altho' they may diſbelieve it; for it is one thing, whether the anſwer be true; and another, whether it be ſufficient. *Ex parte* Pedley, Tr. 25 G. 3. B. R. Co. *Bankrupt Laws*, 536. As to the ſufficiency of the anſwers, ſee Miller's caſe, 3 Wilſ. 420.; and 2 Bl. Rep. 882. Langhorn's caſe, 2 Bl. Rep. 919. Rex v Perrot, 2 Burr. 1122

The commiſſioners may examine the bankrupt to all matters that are requiſite to a full diſcloſure of his eſtate and effects, and the manner he has diſpoſed of them, notwithſtanding ſuch examination ſhould ſubject him to penalties, as in the caſe of ſmuggling or gambling, for that is no reaſon why the commiſſion ſhould not proceed; and if the bankrupt has any objection to the queſtion, he muſt demur to the interrogatories, and the Lord *Chancellor* will judge of the queſtion upon a petition; or if the bankrupt refuſe to anſwer any queſtion, and the commiſſioners commit him, and the delinquent bring an *habeas corpus*, the queſtion muſt be ſet forth particularly in the return to the *habeas corpus*, that the judges may judge whether it was a lawful queſtion or not.

Ex parte Meymot, 1 Atk. 200. *Ex parte* Burr. 1793, Co. *Bankrupt Laws*, 526.

As the commiſſioners in the commitment of the bankrupt and others have but a ſpecial authority, they muſt be careful not to exceed it; for an action will lie againſt them, in caſe of an illegal commitment.

1 Salk. 348. Miller v. Seare, 2 Black 1144. 2 Str. 880.

The commitment, therefore, muſt purſue the words of the act of parliament, and in this the ſuperior courts have been very ſtrict in their conſtruction. A commitment of a bankrupt by commiſſioners to priſon, there to remain *till he conformed to their authority*, was holden ill, becauſe the ſtatute empowers them to commit in that caſe, till he ſubmit himſelf to be

Bracy's caſe, 1 Salk. 348.

by

by them examined. And the court ſaid, the word *conform*, inſtead of the word *ſubmit*, was well enough, becauſe it was of the ſame ſenſe; but as the commiſſioners had other authorities beſides that of examining, and it did not appear but it might require a ſubmiſſion to them in other reſpects, and for that, all powers given in reſtraint of liberty muſt be ſtrictly purſued, the commitment was bad.

Holling-ſhed's caſe, 1 Salk. 351. 2 Ld. Raym. 851. S. C.

So where a bankrupt was committed for refuſing to be examined, and the concluſion of the warrant was, *or otherwiſe diſcharged by due courſe of law*, it was holden bad.

Rex v. Nathan, 2 Stra. 880.

Again, a warrant reciting that the bankrupt had been examined before the commiſſioners, upon his oath, upon which examination he had notoriouſly prevaricated, and therefore that they had committed him without bail or mainprize, until he ſhould make a full and true diſcloſure of his eſtate and effects, *or be otherwiſe delivered, by due courſe of law*, was holden ill; becauſe the commitment did not purſue the words of the ſtatute.

Miller's caſe, 2 Bl. 882. 1144.

And, upon the ſame principle, a commitment till the bankrupt ſhall *full anſwer make to all ſuch queſtions as ſhall be put to him as aforeſaid*, was conſidered as clearly bad.

5 Mod. 309.

It has been holden, that a perſon examined before commiſſioners of bankrupt is not bound to anſwer any thing which tends to accuſe himſelf; he is not to anſwer any thing criminal.

Comb. 391.

Sed quære? and *vide ex parte* Bland, 1 Atk. 205.

The lord chancellor has power to limit the commiſſioners of bankrupts, to make particular inquiries.

Ex parte Parſons, 1 Atk. 204.

Thus the lord chancellor, upon a petition, limited the examination of a mother to her ſon's trading, but would not reſtrain the commiſſioners from aſking any queſtion that might be relevant thereto.

Bracy's caſe, 1 Ld. Raym. 153.

The depoſitions taken before commiſſioners of bankrupts are not of a public nature, but taken by commiſſioners to defend themſelves; therefore the court will not order a copy of them.

The court has refuſed perſons ſummoned before the commiſſioners, a copy of the interrogatories, or their former depoſitions. *Ex parte* Bland, 1 Atk. 205. Bowden v. Dellow. *Id.* 289.

Ex parte Dick, 2 Bl. 1142.

A queſtion was raiſed, whether a bankrupt, under examination, was protected from arreſts at the time, and *eundo et redeundo?* The fact was, that the bankrupt was arreſted upon an extent. Lord *Hardwicke* held, that the king was not bound by the bankrupt acts; therefore that it was merely a queſtion at common law: And certainly, at common law, the commiſſioners have no authority; and that their authority is not judicial, but miniſterial.

Ex parte Stow, 2 Bl. 1142. And ſee acc. *ex parte* Kerney, 1 Atk. 55. But ſee Kinder v. Williams, 4 Term Rep. 376. *contr.*

In a ſubſequent caſe, Lord *Henley* ſaid, that the commiſſioners are a court of juſtice, ſufficient for the purpoſe of having their witneſſes protected, at leaſt by the court of Chancery, if not by themſelves; elſe witneſſes would be in a ſtrange dilemma. If they do not appear, they are liable to be committed by the court for their contempt; if they do. they are liable to arreſts, which would be abſurd, and therefore impoſſible.

Ex parte Nowlan, 6 Term Rep. 118.

If upon the examination of a bankrupt, touching the diſpoſition of his property, he ſwears to an account of it, which appears to be incredible, the commiſſioners may commit him to priſon.

(D) Of

(D) Of the Aſſignees; and herein of the Manner and Time of chooſing them, and Nature of their Truſt.

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(*By 5 Geo. 2. cap.* 30. § 26.) But if any obvious objection appears to the debt, it is the conſtant practice to ſuffer the creditor only to claim till he makes out his demand to the ſatisfaction of the commiſſioners. *Id.* 71. Therefore one creditor, if his debt be ſufficiently large, may chooſe himſelf aſſignee.

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(*And whereas it may*) It is ground for removing aſſignees, that ſome of the creditors lived at a diſtance, and had not an opportunity of being preſent at their election; a want of ſubſtance or integrity is the true ground on which to make ſuch an application. *Ex parte* Gregnier, 1 Atk. 91. If the aſſignee becomes bankrupt, he may be removed. *Ex parte* Newton, 1 Atk. 97. Or if the commiſſioners act improperly at the time of chooſing him. Vin. Abr. tit. *Creditor and Bankrupt*, (O), pl. 3. When an aſſignee is removed, he muſt join with the old aſſignee, and the commiſſioners in making an aſſignment to the new aſſignee. *Ibid.* And where an aſſignee is removed on account of his own bankruptcy, Lord Hardwicke was of opinion, that he and his aſſignees muſt join with the commiſſioners in executing an aſſignment to the new aſſignee. 1 Atk. 97.

§ 32. "Before the creditors ſhall proceed to the choice of aſſignees of "any bankrupt's eſtates, the major part in value of the ſaid bankrupt's "creditors then preſent ſhall, if they think fit, direct in what manner, "how, and with whom, and where the monies ariſing by, and to be re-"ceived from time to time, out of the bankrupt's eſtate, ſhall be paid in "and remain until the ſame ſhall be divided amongſt all the creditors as "by this act is directed; to which rule and direction, every ſuch aſſignee "and aſſignees aforeſaid to be choſen ſhall conform, as often as 100*l.* "ſhall be got in and received from ſuch bankrupt's eſtate, and ſhall be "and are hereby indemnified for what they ſhall do, in purſuance of ſuch "direction of the ſaid creditors."

Aſſignees are in the nature of truſtees; and where they employ an agent to receive or pay money, who abuſes their confidence, they muſt, like other truſtees, anſwer over to the *ceſtuy que truſts*. But (*a*) when they employ an agent, either from neceſſity, or conformably to the common uſage of mankind, they have been holden not liable, provided they have uſed due precaution in the choice of the perſon employed.

In re Earl of Litchfield, 1 Atk. 88.

(*a*) *Ex parte* Belchier, Ambl. 218.

From their being conſidered as mere truſtees, it follows, that each is ſeparately anſwerable only for what he receives; and the negligence of one ſhall not hurt any of the others, provided they be not at all privy to any private and perſonal agreement entered into by their co-aſſignee.

1 Atk. 89.

(*a*) But Ld. Hardwicke recommends the inſertion of the words "*jointly and ſeverally*" in the aſſignment, for the ſecurity of each aſſignee. 1 Atk. 90.

Another conſequence is, that payment of a debt to one aſſignee will not be good.

Can v. Read, 3 Atk. 695.

If an aſſignee becomes inſolvent, and has applied any of the money received by him in that capacity to his own uſe, the commiſſioners are to be conſidered as ſpecialty creditors, becauſe the commiſſioners executed a counterpart of the aſſignment to them; and the agreement, being under hand and ſeal, makes it in the nature of a ſpecialty debt, and therefore they may come upon his real eſtate.

Primroſe v. Bromley, 1 Atk. 89.

It is the duty of the aſſignees to ſell all the bankrupt's property as ſoon as it can be done with advantage; and, if they neglect to diſpoſe of it, the chancellor, upon petition of a creditor, will order a ſale, notwithſtanding the

Ex parte Goreing, 12th June 1790, Co.

Bankrupt Laws, 325. the aſſignees ſhould be deſirous of keeping the eſtate, as conceiving it to be more beneficial for the creditors than a ſale.

Brown v. Jones, 1 Atk. 188. The creditors and aſſignees ſtand in the place of the bankrupt, and are ſubject to the ſome equity, and bound by all acts fairly done by him; for although the court will favour creditors as much as they can, it muſt be where they have a ſuperior right to other perſons.

Tyrrell v. Hope, 2 Atk. 562. If a ſettlement is made before marriage, though without a portion, it will be good againſt the aſſignees; for marriage itſelf is a conſideration, and it is equally good if made after marriage, provided it be upon payment of money as a portion, or a new additional ſum of money, or even an agreement to pay money, if the money be afterwards paid purſuant to the agreement.

Row v. Dawſon, 1 Vez. 331. Pope v. Onſlow, 2 Vern. 286. Co. *Bankrupt Laws*, 326. So if a perſon give a bond for a ſum of money as a marriage portion, and the marriage take effect, it is a good conſideration for the bond, and the aſſignees cannot be relieved againſt it.

Ex parte Cottrell, Cowp. 742. Tyrrell v. Hope, 2 Atk. 558. Where the bankrupt himſelf, from the circumſtances of the caſe, would be conſidered as truſtee for another, his aſſignees will be looked upon in the ſame light.

Ex parte Byas, 1 Atk. 124.

Ex parte Coyegame, Co. *Bankrupt Laws*, 330. If the wife of a bankrupt prior to her marriage was entitled to a truſt eſtate, the aſſignees of the huſband are not entitled to the property without making a ſettlement on the wife.

1 Atk. 192. S. C. Grey v. Kentiſh, 1 Atk. 280. Worrall v. Marlar, Buſhnan v. Pell, 1 Cox's P. Wms. 458.

Milner v. Colmer, 2 P. W. 639. Adams v. Pierce, 3 P. W. 11 Willats v. Cay, But if the huſband, or his general aſſignees, (who ſtand exactly in the ſame ſituation,) can get poſſeſſion of the wife's property without the aid of equity, it ſeems doubtful, whether the court will interfere to aſſiſt the wife.

2 Atk. 67. Jewſon v. Moulſon, 2 Atk. 420.

Ruſſell v. Ruſſell, 1 Brown, Ch. Rep. 269. Where a mortgage is made on a leaſe pledged by a bankrupt, equity will ſupply a defect in the conveyance againſt the aſſignees.

Taylor v. Wheeler, 2 Vern. 564.

Buckley v. Taylor, 2 Term Rep. 600. If there is a cuſtom in the country that half-a-year's rent ſhould become due on the day the tenant enters upon the premiſes, the aſſignees are bound by it, notwithſtanding the tenant had committed an act of bankruptcy before he took the premiſes, and made the agreement to pay half-a-year's rent in advance.

Drake v. The Mayor of *Exeter*, 1 Ch. Ca. 71. If a leſſor covenants with his leſſee and his aſſigns to renew his leaſe, and the leſſee becomes a bankrupt, equity will not compel the leſſor to renew in favour of the aſſignees.

Aſhbrooke v. Manley, Comb. 70. The ſtatute of limitations will run againſt the aſſignees from the time of the original promiſe to the bankrupt.

Grey v. Bendiſh, Caſes in Equity, 171. So where in an action brought againſt the defendant by an aſſignee, he pleaded the ſtatute of limitations; the court reſolved that the ſtatutes of bankrupts transfer the right to the aſſignee, but it is no more than the old right which the bankrupt had before he had committed any act of bankruptcy, and therefore the aſſignee muſt take it in the ſame plight and condition

dition as the bankrupt himſelf had it; and that the ſtatute of limitations was a bar. 3 P. W. 144.

Where a creditor before bankruptcy agrees to take leſs than his debt, ſo that it be paid preciſely at the day, and the debtor fails of payment, he cannot be relieved; and if the debtor becomes bankrupt, the aſſignees will not be entitled to bind the creditor by his compoſition, but he has a right to prove his whole debt. *Ex parte* Bennet, 2 Atk. 528.

It is the duty of the aſſignees to make a dividend ae early as poſſible after the time given by the ſtatute, for creditors to come in and prove their debts: And if they neglect making a dividend, and keep the money in their own hands, they will be liable to intereſt for it. *Ex parte* Lane, 1 Atk, 90. Treves v. Townſhend. In Canc. Nov. 17, 1783. Co. *Bankrupt Laws*, 344.

Where the aſſignees are not entitled to the poſſeſſion of a bankrupt's wife's property without the aid of a court of equity, they muſt make a proviſion for her out of it, whether ſuch property be real or perſonal. And if the whole fund be attainable in equity only, the wife's equity extends to the whole, nor will a ſettlement before marriage of part of it to her ſeparate uſe bar her of it. Burdon v. Dean, 2 Vez. jun. 607. Oſwell v. Probert, *Id.* 680.

(E) Of the Creditors, who are ſuch; and herein of proving their Debts.

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(*By* 21 *Jac. cap.* 5.) When a creditor comes to prove his debt, he is obliged to ſwear, whether he has a ſecurity or not; and if he has, and inſiſts upon proving, he muſt deliver it up for the benefit of his creditors; 1 Atk. 105.; unleſs it be a joint ſecurity from the bankrupt and another perſon; in which caſe he may come in for his whole debt under the commiſſion, without being compelled to deliver up the joint-ſecurity, as he is entitled to recover what he can from the co-ſecurity, and take his dividend upon the whole of his demand upon the bankrupt's eſtate, provided he does not receive more than 20*s.* in the pound on the whole. *Ex parte* Bennet, 2 Atk. 528. When, therefore, a creditor has a mortgage, or other pledge, which he apprehends is not equal to the payment of his debt, he muſt apply to the Chancellor to have the pledge ſold, and that he may be admitted a creditor for the reſidue; and the commiſſioners may direct the ſale to be before them, or by publick auction. *Ex parte* Coming, 20th April 1790. Co. *Bankrupt Laws*, 149. Bonds, bills of exchange, and other perſonal ſecurities, pledged or depoſited with a creditor, may be directed to be ſold before the commiſſioners in the ſame manner as an eſtate. *Ex parte* Hillier, 19th July 1788. *Ibid.* If a debtor, by way of collateral ſecurity, deliver a bill of exchange or promiſſory note to his creditor, without his name appearing on the paper, it muſt be diſpoſed of as a pledge, and the produce applied to reduce the debt, the reſidue only of the demand being proveable under the commiſſion. *Ex parte* Smith, 19th Dec. 1784. *Ibid.* Where, indeed, a perſon takes a bill without the name of the party from whom he receives it, it may be a pledge, or a purchaſe, according to the agreement of the parties. If it is taken as a pledge, it muſt be ſold; but if as a purchaſe, it liquidates the debt to the full amount of the bill. *Ex parte* Whitter, 6th Feb. 1790. *Ex parte* Roberts, 21ſt June 1789. *Ex parte* Smith, 18th Nov. 1789. *Id.* 150. Bank of *England* v. Newman, 1 Ld. Raym. 442. Where a creditor has two demands, one proveable under the commiſſion, the other not; he may apply his ſecurity, in the firſt place, to reduce that demand which is not proveable. *Ex parte* Howard, 14th June, 1790. *Ex parte* Arkley, 26th Nov. 1791. Co. *Bankrupt Laws*, 150. 153.

Corporations uſually appoint a clerk or treaſurer, who is the perſon to prove debts due to them; he muſt, however, produce his appointment under ſeal to the commiſſioners. Co. *Bankrupt Laws*, 155.

If the bankrupt's eſtate is in arrear for taxes, the collector ſeems the proper perſon to prove the debts, and he ought to produce his appointment, that the commiſſioners may judge of the legality of it: But if the collector himſelf ſhould become bankrupt, having received the taxes from the inhabitants, *Ex parte* Child, 1 Atk. 111. If there are two collect-

ors, who divide the money received bitants, but not paid the money over, one of the inhabitants may prove for himself and the reſt.

between them, and one of them becomes bankrupt, the other ſhall prove, on behalf of the parish, the whole ſum remaining in their hands not paid over. *Ex parte* Moggeridge and Clarke, 4th Feb. 1790. Co. *Bankrupt Laws*, 156.

Ex parte Groom, 1 Atk. 119. *Ex parte* Williamſon, 1 Atk. 83. *Ex parte* Capot, 1 Atk. 220.

The privilege of creditors to come in and prove their debts, and bankrupts to be diſcharged therefrom, is ſaid to be co-extenſive and commenſurate. However, the court will not abſolutely ſtop a creditor from bringing an action, but put him to his election; and ſhould he elect to proceed at law, he will ſtill be allowed to prove his debt, for the purpoſe of aſſenting to or diſſenting from the certificate, which permiſſion is abſolutely requiſite to make his remedy at law of any avail; for ſhould the bankrupt procure his certificate, he will be thereby diſcharged from that action, as well as from all debts contracted before the act of bankruptcy.

Ex parte Williamſon, 1 Atk. 83. Some doubts have been entertained of this; but ſee *ex parte* Botteril, 1 Atk. 109., where the commiſſioners refuſed.

Where a creditor has proceeded at law, before he applies to prove his debt under the commiſſion, he ought not to be permitted to prove without relinquiſhing his proceedings at law, unleſs by order from the Great Seal, for the purpoſe of ſignifying his aſſent to, or diſſent from, the certificate.

Ex parte Dorvilliers, 1 Atk. 221. *Ex parte* Lindſay, 1 Atk. 220. *Ex parte* Capot, 1 Atk. 219.

But the circumſtance of a creditor proving his debts previouſly to proceeding at law againſt the bankrupt, does not amount to a concluſive election to take under the commiſſion, for a creditor has been ſuffered to make his election of proceeding at law, againſt the *bankrupt himſelf*, after having proved his debt, and received two dividends, upon condition of refunding what he had received. But the caſe, perhaps, might be different, if the creditor had in view the charging *a third perſon*, as the ſecurity, or the bail of the bankrupt.

Aylett v. Harford, 2 Bl. Rep. 1317.

Therefore, where a creditor had proved his debt, and *ſigned an agreument to permit the bankrupt to keep his houſe ſtill open for trade, and to make him an annual allowance*; and the bankrupt afterwards deſerted his houſe and abſconded; upon which the creditor proceeded to fix the bail, and ſerved execution upon them: The court ſaid, there were ſome inſtances, in which the court of Chancery permits a creditor to do certain acts, ſuch as proving his debt, and voting for aſſignees, without binding him to come in under the commiſſion, and renounce his legal remedy. But the creditor here has gone much farther, *he has made his election*, has acquieſced under the commiſſion, and ſhall not, on a ſubſequent unforeſeen event, at the diſtance of a twelvemonth, deſert the commiſſion, and come upon the bail by ſurprize.

Ex parte Ward, 1 Atk. 153. *Ex parte* Dorvilliers, 1 Atk. 221.

The being choſen *aſſignee*, will not prevent the creditor from ſuing the bankrupt at law if he has not proved his debt, for in that caſe, he can only be conſidered as a creditor at large; and even if he has proved his debt, and choſen himſelf aſſignee, he *may ſtill elect to proceed at law*, and be diſcharged as a creditor under the commiſſion.

Ex parte Hinklin, 2d Feb. 1775. *Ex parte* Warder, 22d Dec. 1790.

If a creditor, *at the time the commiſſion iſſues*, has the bankrupt in execution, he may prove his debt under the commiſſion, and elect to diſcharge the bankrupt. But if, *after* the commiſſion has iſſued, a creditor proceeds at law againſt the bankrupt, and takes his body in execution, it is a concluſive election, and he will not be entitled to prove ſo as to receive

ceive a dividend, although he ſhould afterwards diſcharge the bankrupt out of cuſtody. *Ex parte* Caton, 21ſt Dec. 1790.

Ex parte Rattray, 10th Auguſt 1791. *Ex parte* Biſſon, 23d March 1792. Creditor having taken bankrupt in execution, ſubſequent to the commiſſion, afterwards releaſed him, and was permitted to prove: Debt expunged. So *ex parte* Hewitt, 21ſt Jan. 1789. Co. *Bankrupt Laws*, 160, 1, 2, 3.

If a creditor is proceeding at law, the bankrupt is entitled by petition to put the creditor to his election, either to abide by the commiſſion and wave the proceedings at law, or relinquiſh all benefit under it; but whether the creditor can be compelled to elect *before* a dividend, ſeems to be ſomewhat unſettled: though the modern determinations, ſupported by ſome of an earlier date, have moſtly put him to his election before a dividend, provided the application was not made before he had a reaſonable time of examining into the bankrupt's affairs. *Ex parte* Hopkinſon, 3d June 1790. 1 Vez. jun. 159. *Vide* Co. *Bankrupt Laws*, 163, 4, 5.

If a creditor has demands upon the bankrupt of diſtinct natures, or in different rights, he is at liberty to prove one under the commiſſion, and proceed at law for the recovery of the other. Therefore, where a bankrupt had borrowed 100*l.* upon bond of a near relation, who had arreſted him upon the bond and charged him in execution; and had another demand for a year's rent, which he offered to prove under the commiſſion, but would not wave his execution upon the bond debt; and the commiſſioners, therefore, refuſed to admit him to prove: Lord *Hardwicke* ſaid, that though it was a hard caſe upon the bankrupt, yet, as the debts were entirely diſtinct, he ſhould be allowed to prove. *Ex parte* Crinſoz, 1 Bro. 270. *Ex parte* Botteril, 1 Atk. 109.

So, on a petition *ex parte Matthews*, where it appeared that Mr. *Gary* had proved a debt under the commiſſion in right of his wife, amounting to 5000*l.*, being her fortune under a marriage ſettlement, and alſo brought an action at law in his own right for a debt due to him for goods ſold and delivered; the Lord Chancellor obſerved, the court would never ſuffer a creditor to ſplit a demand, and prove part under the commiſſion, and proſecute at the ſame time a bankrupt for the remainder at law. But that in this caſe there are two remedies and different rights; and he even thought he might have done it, if the debts had been both in his own right. Suppoſe, one debt had been due to Mr. *Gary* by bond, and another upon an account current, and he had brought a bill here for the account, and an action at law upon the bond; theſe are two diſtinct things, and therefore the court will let him go on, both in law and equity. If indeed, he was to bring a bill in equity for an account current, and an action at law for a particular *item* in that account, the court would, in that caſe, oblige the plaintiff to make an election. *Ex parte* Matthews, 3 Atk. 817.

If an executor becomes bankrupt, as he acts in *auter droit*, his bankruptcy does not take away the legal right of executorſhip, nor does the commiſſioners' aſſignment affect the teſtator's aſſets, except as to ſuch beneficial intereſt, as the bankrupt may himſelf be entitled to. But though a bankrupt executor may ſtrictly be the proper hand to receive the aſſets, yet if his aſſignees have received any of the property, a court of equity will for the benefit of creditors and legatees appoint a receiver, with whom the aſſignees ſhall account. And the court will do ſo upon petition. *Ex parte* Ellis, 1 Atk. 101. *Ex parte* Llewellyn, in the matter of William Moſeley, a bankrupt, Aug. 10, 1784.

As bankruptcy does not affect the right of an executor, in ſtrictneſs, he is himſelf the proper perſon to be admitted to prove againſt his own eſtate; which is not incongruous, as he does it in *auter droit*, and the danger *Ex parte* Lecke, 2 Br. Ch. Rep. 596. *Ex parte*

Brooke, 1ſt June 1793, like order. If the property be conſiderable, Lord Thurlow ſaid, he would not proceed without bill. 2 P. Wms. 547.

danger of embezzlement may be prevented by ordering the dividend to be paid into court: and this was done in a caſe where the petitioner was a creditor of the bankrupt's teſtator to the amount of 286*l.*: part of the effects of the deceaſed, to the amount of 432*l.*, were in the bankrupt's hands; and, on petition to be permitted to prove this demand againſt the bankrupt's eſtate, Lord *Thurlow* ordered that the bankrupt, as executor, ſhould be admitted a creditor under the commiſſion iſſued againſt him for the ſum of 432*l.* 7*s.* 1½*d.*, in the petition mentioned, and that the aſſignees ſhould pay the dividends into the bank, in the name, and with the privity of the accountant-general, in truſt in the matter of *A. B.* the bankrupt, ſubject to further order.

Ex parte Artis, 2 Vez. 490. *Ex parte* Le Compte, 1 Atk. 251. Perkins v. Kempland, 2 Bl. Rep. 1106.

A creditor by an annuity, where the annuity is *merely perſonal*, is entitled to come in under the commiſſion, provided the penalty of the bond be forfeited (*a*) *prior* to the bankruptcy. In order to prevent, on the one hand, the injuſtice of admitting him to prove only the arrears accrued due before the bankruptcy, and, on the other, the great inconvenience that would enſue if the annuity ſhould be received from time to time as an accruing debt on the eſtate, a value is ſet upon the annuity, and he is admitted a creditor for the ſum at which it is valued.

(*a*) If a forfeiture has been incurred, no act of the annuitant ſhall amount to a waver of it, for it is for the benefit of both parties that it ſhould be ſo. Wyllir v. Wilkes, Dougl. 523.

Fletcher v. Bathurſt, Vin. Abr. tit. *Creditor and Bankrupt* (I), pl. 4. 4 Burr. 2446.

If the annuity is ſecured by a deed of covenant, and a bond is likewiſe given as an additional ſecurity, which is forfeited for non-payment before the bankruptcy the creditor, in that caſe, is not obliged to prove under the commiſſion, but may proceed at law for the breach of covenant, notwithſtanding the bankrupt has obtained his certificate.

Cottrel v. Hooke, Dougl. 93.

Ex parte Sandby, 1 Atk. 149. Barwell v. Ward, 1 Atk. 261.

An apprentice can come in as a creditor only for the ſum remaining due, after deducting for the time he has lived with the bankrupt. It is uſual, indeed, for the commiſſioners to recommend it to the creditors to allow him a groſs ſum out of the eſtate, for the purpoſe of binding him to another maſter; but this, though equitable and juſt, is not what he is entitled to *de jure*, nor, of courſe, what the court can order.

Ex parte Macklin, 2 Vez. 675.

A petition was preferred on the part of a daughter, to be let in as a creditor on the eſtate of her father, a bankrupt, for the money he had received from the managers of the theatre on her account, offering an allowance thereout for living with, and being maintained by him, during her acting on the ſtage. It was alleged on her part, that the court is ſo far from giving the father all the earnings of the child, that it will not ſuffer the father to be eaſed of the maintenance of a child who has a fortune; but will let the whole intereſt accumulate, and the father maintain the child, unleſs unable to do ſo.

Lord Chancellor ſaid, he was under ſome difficulty for the ſake of the precedent; for it is true that this queſtion is the ſame as it would have been between the daughter and the father, if he had not been a bankrupt, and could anſwer to an action for himſelf; Whether after all this tranſaction the daughter could in an action have recovered againſt the father all this money, as money had and received to her uſe? He ſaid, it might be dangerous in *London* to lay it down as a general rule, that if a father having ſeveral children, who earn money which he receives, becomes bankrupt, every child can come in and claim his debt for that money ſo had

had and received while they lived together, and were part of his family. A father frequently ſends out his ſon to work as journeyman, and his earnings are taken to be the father's. Here, ſaid his lordſhip, the father, mother, and daughter were all actors, and lived together; the father received the whole. It is extraordinary to ſay, that after a length of time this ſhall be all called back, becauſe of an act of bankruptcy. He referred it therefore to the commiſſioners to inquire, how much the father received to the child's uſe, unleſs as to ſo much as was a covenant with the daughter herſelf. But, to avoid the expence of an account, it was agreed that the petitioner ſhould be admitted as a creditor for a particular ſum; but no allowance to be made for maintenance.

A landlord having a legal right to diſtrain goods while they remain on the premiſes, the iſſuing of a commiſſion of bankrupt againſt the tenant, and the meſſenger's poſſeſſion of the goods of the tenant, will not hinder him from diſtraining for the whole rent in arrear; for it is not ſuch a *cuſtodia legis* as an execution; and even there the law allows the landlord a year's rent. And though, by the aſſignment by the commiſſioners of the bankrupt's eſtate and effects, the property of the goods is changed, yet the aſſignees take them ſubject to every thing which they are ſubject to in the hands of the bankrupt; and while upon the premiſes they remain liable to be diſtrained. 1 Atk. 102, 103, 104.

But if the landlord neglects to diſtrain, and ſuffers the goods to be ſold by the aſſignees, he can only come in with the reſt of the creditors *pro ratâ*. 1 Atk. 102.

A commiſſion iſſued againſt *A.* who was a tenant of *B.*, and owed him twelve year's rent. *B.*, the landlord, came in and proved his debt under the commiſſion, and the aſſignees ſold the whole goods to *Grove* the petitioner, who lived in the tenant's houſe. The landlord three years after proving his debt, diſtrained upon thoſe goods as being ſtill upon the premiſes. *Ex parte* Grove, 1 Atk. 103.

Lord *Hardwicke*, upon the ſecond hearing of the petition, determined, that the vendee of the goods under the aſſignees was entitled to the goods; and ordered, that the proceedings of the landlord ſhould be reſtrained, and confined him to his remedy under the commiſſion. See *Ex parte* Devine, and Mary his wife, 13th Jan. 1776.

Co. *Bankrupt Laws*, 221. Bradyll v. Ball, 1 Br. Ch. Rep. 427. S. P.

It is ſtated in 1 *Atk.* 103., that a mortgagee of a bankrupt's eſtate, although he pays the arrears of rent that is due to the bankrupt's landlord, ſhall not be preferred to the creditors under the commiſſion, unleſs he applies to the court for an order that he may ſtand in the place of the landlord; but, from the caſes above referred to, it rather ſeems that no ſuch order could be obtained, becauſe, unleſs the landlord *actually* diſtrains, he has himſelf no lien upon the goods. Co. *Bankrupt Laws*, 225.

On a diſtreſs for rent, goods were ſold, and 77*l.* 3*s.* remained in the conſtable's hands, who became a bankrupt. The tenant dies, and his executor prays to be paid this money by the aſſignees, in preference to the other creditors. *Ex parte* Dobion, 7 Vin. Abr. 74.

It was argued, that this comes to the hands of the conſtable by due courſe of law; and the caſe of *Wright* v. *Dixon* was cited, where goods were taken in execution by *Wilcox*, bailiff of *Weſtminſter*, who died; and the judgment and execution being afterwards ſet aſide, the court ruled, that the widow and executrix of *Wilcox* ſhould refund the money, though ſhe alleged ſhe had not aſſets to pay ſpecialties.

But

But the Lord Chancellor ſaid, that caſe was againſt an executrix; and, though the law makes a difference between one creditor and another, yet in caſe of bankruptcy all creditors are upon an equal footing. If any thing *remained in ſpecie*, it might be different; but here the money is embezzled by the conſtable. He therefore ordered the petitioner to come in as a creditor with the reſt.

Ex parte Bennet, 2 Atk. 528.

Commiſſioners, after a man becomes a bankrupt, compute intereſt upon debts no lower than the date of the commiſſion, becauſe it is a dead fund; and in ſuch a ſhipwreck, if there is a ſalvage of part to each perſon, it is as much as can be expected. But there is no direction in the act for that purpoſe, and it has been uſed only as the beſt method of ſettling the proportion among the creditors, that they may have a rate-like ſatisfaction; nor does the certificate operate as a diſcharge of the fund before veſted in the aſſignees, thereby to deprive the creditors of ſubſequent intereſt, but extends only to any remedy to be taken againſt the perſon of the bankrupt, or his future effects.

Bromley v. Goodere, 1 Atk. 79.

Ex parte Rooke, 2 Atk. 244.

Ex parte Wardell, 29th March 1787, cited and confirmed.

If an eſtate mortgaged is not adequate to the payment of principal and intereſt, the intereſt is only to be calculated to the date of the commiſſion.

Ex parte Hewey, 10th Nov. 1792. Co. *Bankrupt Laws*, 227.

7 Vin. Abr. 110.

But, if it is ſufficient for that purpoſe, the aſſignees cannot redeem without paying intereſt to the time of redemption.

1 Atk. 75.

A ſpecialty creditor cannot have intereſt beyond the penalty contained in his ſecurity, but a creditor by note carrying intereſt may receive the full amount: However, if the bearing of intereſt is not ſpecified in the note, it will not of itſelf entitle the holder to claim any; but he may prove the whole ſum ſpecified in the note, notwithſtanding he deducted the diſcount at the time of receiving it.

Ex parte Matlar, 1 Atk. 151.

Bromley v. Child, 1 Atk. 259.

There is a difference between debts that carry intereſt and a ſpecial depoſit of goods and ſtock; for in the former, the intereſt ſhall be continued down to the date of the commiſſion, but in the latter it is otherwiſe, for the intereſt ſtops from the time of the depoſit, and a calculation ſhall be made of the value of the whole entire thing depoſited, both principal and intereſt, be it ſtock or goods, according to the market price at the time of the depoſit.

Where a joint commiſſion is taken out, and the uſual order obtained, for keeping diſtinct accounts of the ſeparate eſtates of each partner, the creditors of the ſeparate eſtates are not entitled to intereſt upon their debts after the payment of twenty ſhillings in the pound, unleſs the joint creditors have alſo received twenty ſhillings in the pound; but the overplus of the ſeparate eſtate muſt be applied to increaſe the joint fund.

Ex parte Boardman, 2d Auguſt 1786.

Thus, upon a petition by ſeparate creditors to be allowed intereſt on their debts carrying intereſt, before the ſurplus of the ſeparate eſtate ſhould be carried over to the joint account, it appeared that a joint commiſſion had been taken out againſt two bankrupts, and an order obtained for keeping diſtinct accounts, and that there was a ſurplus of the ſeparate eſtate of one of them, after paying his ſeparate creditors twenty ſhillings in the pound; but the Lord Chancellor was of opinion, that ſuch ſeparate creditors were not entitled to intereſt, unleſs the joint eſtate had alſo paid twenty ſhillings in the pound, and therefore diſmiſſed the petition.

Aylett v. Harford, 2 Bl. Rep.

On actions, whether of debt, *aſſumpſit*, or for a *tort*, the judgment, when ſigned, relates to the verdict; and the coſts *de incremento*, when taxed, are annexed

annexed to those assessed by the jury, and become consolidated with them by a fair and equitable relation of law, and therefore they may be proved as a debt, if the verdict is prior to the bankruptcy. 1317. *Ex parte* Talbot, 4 Burr. 2445. Langford v. Ellis, Easter Term, 1785, B. R. Co. *Bankrupt Laws*, 232. *Ex parte* Simpson, 3 Br. Ch. Rep. 46. Lewis v. Piercy, 1 H. Bl. Rep. 29.

A bond, though it is not assignable at law, may be proved by the assignee under the commission; but the assignor must join in the deposition that he hath not received the debt, or any part thereof, or any security or satisfaction for the same. Co. *Bankrupt Laws*, 182.

If a person gives an absolute bond to another who became surety for him, or who accepted bills of exchange drawn upon him by the obligor, not having effects in his own hand to answer them, it is a good consideration for the bond, and he is entitled to prove it as a debt under the commission, although he has not himself paid the money at the time. Toussaint v. Martinnant, 2 Term Rep. 100.

If a bond, given by a trader to indemnify another who has become surety for him, be forfeited before bankruptcy, the surety may prove payments made by him, subsequent as well as prior to the bankruptcy. *Ex parte* Cockshot, in Can. 23d March 1792.

The holder of a bill of exchange is entitled to prove his debt under a commission against the drawer, acceptor, and indorser, and to receive a dividend from each upon his whole debt, provided he does not in the whole receive more than twenty shillings in the pound. But there is a distinction in this case, where the creditor applies to prove his debt after having received a part, and where he applies to prove previously to having received any payment or composition; for if the creditor at the time of proving has received any part of the bill, he can only prove for so much as remains; but if, after having proved for the whole, he receives a part of the bill from any of the persons liable to pay it, he is entitled to a dividend upon the whole, provided it does not exceed twenty shillings in the pound upon such part as remains due. Co. *Bankrupt Laws*, 187. Cooper v. Pepys, 1 Atk. 107. *Ex parte* Wildman, 1 Atk. 109. and 2 Vez. 113. *contra*. *Ex parte* Lefebre, 2 P. Wms. 407.

In bills of exchange and promissory notes there is a double contract, the first between the principal debtor and creditor, and also an implied contract, that the principal debtor will indemnify the surety; so that if the creditor the indorsee comes upon the surety the indorser, the indorser or his assignees may come in against the original or principal debtor. But this, as before observed, must depend upon the time when the surety paid the debt; however, if the holder of the bill prove it under the commission against the person who ultimately ought to pay it, before the surety is called upon, the surety seems to have an equitable right to stand in the place of the holder, and receive the dividends upon his debt. *Ex parte* Walton, 1 Atk. 123. *Ex parte* Ryswicke, 2 P. Wms. 89. *Ex parte* Marshal, 1 Atk. 129.

If a person discounts several bills for another who afterwards becomes a bankrupt, and the holder proves the aggregate amount of the bills, excepting them as a security; and any of the bills are afterwards paid in full; the amount of the bills paid must be deducted from the proof, and the future dividends be paid upon the residue of the debt only. In the same manner, where bills of exchange have been given as a security for a general balance, or for a debt exceeding their amount, and upon a bankruptcy the creditor has proved the whole amount of his debt, excepting such bills; if any of them are duly honoured, or by any means fully satisfied, they must be taken as a payment *pro tanto*, and the future dividends made on the residue of his debt. Co. *Bankrupt Laws*, 195. *Ex parte* Smith, *in re* Lewis and Potter, 10th Nov. and 21st Dec. 1789.

One *Lee*, a bankrupt, was indebted to *Welch* and Company, bankers and partners, in 159*l.* 15*s.* 2*d.* for money by them advanced to him, and interest thereon, for securing which he indorsed *Ex parte* Wallace, 24th Dec. 1788.

indorſed to them two promiſſory notes and a bill of exchange. This debt they proved under the commiſſion. After the proof *Welch* and Co. were fully paid one of the notes, amounting to 58*l.* 12*s.*, by the drawer, and they delivered up the note to him; by which means the debt from the bankrupt was reduced to 101*l.* 3*s.* 2*d.* *Welch* and Co. inſiſted upon receiving their dividends upon the whole 159*l.* 15*s.* 2*d.* proved by them, notwithſtanding the payment of the ſaid note; upon which the aſſignees preſented a petition to expunge or deduct the ſum of 58*l.* 12*s.*, the amount of the note, from their debt, which, after hearing counſel, was ordered: and it was directed that *Welch* and Co. ſhould be paid dividends only on the ſum of 101*l.* 3*s.* 2*d.*, reſidue of the ſaid ſum of 159*l.* 15*s.* 2*d.*, ratably, and in equal proportions, with the reſt of the creditors of the bankrupt.

Co. *Bankrupt Laws*, 196, 7, 8. *Ex parte* King, 10th Nov. 1786. *Ex parte* Croſsley, 3 Br. Ch. Rep. 237.

If a bill of exchange or promiſſory note is drawn by way of accommodation, yet the party holding it for a valuable conſideration is entitled to prove to the whole extent of the bill or note, and receive the dividends, provided they do not amount to more than twenty ſhillings in the pound, on the conſideration which he gave.

Touſſaint v. Martinnant, *ſupra*. *Ex parte* Maydwell, 16th April 1785, in Can. *Ex parte* Beaufoy, 22d Jan. 1787. *Ex parte* Lord Clanricarde, 27th July 1787. Co. *Bankrupt Laws*, 199, 200, 1, 2, 3.

The liability to pay money is a good conſideration for a bill of exchange, and will entitle the party to prove it, although the payment is to be made in future, or depends upon contingency.—And this does not at all militate againſt the rule that contingent debts are not proveable; becauſe the claim under the commiſſion is upon an inſtrument creating an abſolute debt at law, for which the ſubjecting one-ſelf as a ſurety, or the delivering of counter-notes is a good conſideration.

If the indorſer of a bill is compelled to pay it on account of the failure of the acceptor, he may prove upon the bill under the commiſſion againſt the acceptor, although he did not take it up till after the commiſſion iſſued.

Ex parte Brymer, 30th May 1788.

The houſe of *Scott* and *Pearſon* having had frequent occaſions to get their bills diſcounted by perſons at *Briſtol*, and continuing to require a negotiation of paper, they applied to *Wilkins*, the bankrupt, and to one *Forſyth*, to aſſiſt them by lending their names to bills, which were to be diſcounted by *Samuel Span* of *Briſtol*, for the uſe of *Scott* and *Pearſon*, whoſe names were not to appear thereon. Accordingly (amongſt others) three bills were drawn by *Forſyth* upon *Wilkins*, dated 28th of *May* 1787, for 800*l.* each, payable three months after date. Two to the order of *Samuel Span*, and the third to the order of the drawer; which laſt was endorſed in blank by the drawer. They were all accepted by *Wilkins* about the time of their being drawn. The three bills were put into the poſſeſſion of *Scott* and *Pearſon*, and were by them ſent down to *Span* at *Briſtol*, who endorſed them, and procured them to be diſcounted by other perſons, and remitted the value to *Scott* and *Pearſon*, in *Briſtol* bank bills. Before the bills became due, both *Scott* and *Wilkins* became bankrupts; and afterwards *Span*, as the endorſer, was obliged to take them up.

Under theſe circumſtances *Span* was admitted to prove the bills under *Wilkins*'s commiſſion. And this petition was preferred to have the proof of the debt expunged.

The

The Lord Chancellor conſidered it as a very clear point, that a bill of exchange negotiated after the bankruptcy of the acceptor, might be proved under his commiſſion, although the party was not poſſeſſed of it at the time of the bankruptcy, for the debt accrued by the acceptance; and that, as to the conſideration, there was a clear conſideration paid in this caſe, though not to *Wilkins*; and that *Span* became the holder of theſe bills in a fair manner; his Lordſhip therefore diſmiſſed the petition.

A new petition was preferred, praying that the former petition might be reheard and the debt expunged.

The Lord Chancellor, after hearing counſel, expreſſed himſelf to be very clearly of the ſame opinion.

See *ex parte* Thomas, 1 Atk. 73. Bingley v. Maddiſon, Co. *Bankrupt Laws*, 24. 18th July 1788. See Brooks v. Rogers, 1 H. Bl. Rep. 640. Howis v. Wiggins, 4 Term Rep. 714.

Where the acceptor of a bill of exchange becomes bankrupt, the holder may prove the amount of the bill under his commiſſion, and alſo maintain an action againſt the other parties: but if the acceptor of a bill, or maker of a note, become inſolvent, or offer to compound their debts, the holder of a bill or note, according to ſuch compoſition, thereby diſcharges the poſterior parties, unleſs they have previouſly aſſented to his executing the compoſition-deed.

Ex parte Smith, 3 Br. Ch. Rep. 1. *Ex parte* Smith and others, 21ſt Dec. 1789. Co. *Bankrupt Laws*, 214.

The coſts and charges of proteſting bills *before* an act of bankruptcy may be proved: but ſuch coſts accrued by proteſting bills *after* an act of bankruptcy cannot.

Anon. 1 Atk. 140. *Ex parte* Moore, 2 Br. Ch. Rep. 597. See Francis v. Rucker, Ambl. 672.

The 7 *G.* 1. *c.* 31. reciting "Whereas merchants, and other traders "in goods, have been very often obliged, and more eſpecially of late "years, to ſell and diſpoſe of their goods and merchandizes to ſuch per- "ſons as have occaſion for the ſame, upon truſt or credit, and to take "bills, bonds, promiſſory notes, or other perſons' ſecurities for their "monies, payable at the end of three, four, or ſix months, or other "future days of payment; and the buyers of ſuch goods becoming bank- "rupts, and commiſſions of bankruptcy being taken out againſt them be- "fore the money upon ſuch bonds, notes, or other ſecurities became "payable; it hath been a queſtion, Whether ſuch perſons giving ſuch "credit on ſuch ſecurities ſhould be let in to prove their debts, or be "admitted to have any dividend or other benefit by the commiſſion, be- "fore ſuch time as ſuch ſecurities became payable? which hath been a "great diſcouragement to trade, and great prejudice to credit within this "realm:" Therefore enacts, "That every perſon who ſhall give credit "on ſuch ſecurities as aforeſaid, to any perſon who ſhall become bankrupt "upon a good and valuable conſideration *bonâ fide* for any ſum of money "or other matter or thing whatſoever, which ſhall not be due or payable "at or before the time of ſuch perſon's becoming bankrupts, ſhall be ad- "mitted to prove his bills, bonds, notes, or other ſecurities, promiſe or "agreement for the ſame, in like manner as if they were made payable "preſently, and not at a future day; and ſhall be entitled unto, and ſhall "have and receive a proportionable part, ſhare, and dividend of ſuch "bankrupt's eſtate, in proportion to the other creditors of ſuch bankrupts, "deducting only thereout a rebate of intereſt, and diſcounting ſuch ſecu- "rities payable at future times, after the rate of five pounds *per centum* "*per annum*, for what he ſhall ſo receive, to be computed from the actual "payment thereof to the time ſuch debt, duty, or ſum of money ſhould "or

2 Ld. Raym. 1549. 2 P. Wms. 395. 2 Str. 867. Notwithſtanding the preamble makes mention only of "ſecurities for the ſale of goods and merchandize," yet it is holden to extend to all ſorts of bonds for the payment of money; and that the words "ſuch ſecurity," do not mean ſecurity for ſuch a ſort of debt, but ſecurity by bonds, bills, notes, &c. Pattiſon v. Bankes, Cowp. 540. Brooks v. Lloyd,

1 Term Rep. 17. 3 Wilſ. 17.

" or would have become due and payable in and by ſuch ſecurities as aforeſaid."

By 19 G. 2. c. 32. § 2. Demands on policies of inſurance, *bottomree* and *reſpondentia* bonds

" And every perſon who ſhall become bankrupt ſhall be diſcharged of and from all and every ſuch bond, note, or other ſecurity as aforeſaid, and ſhall have the benefit of the ſeveral ſtatutes now in force againſt bankrupts, in like manner to all intents and purpoſes as if ſuch ſum of money had been due and payable before the time of his becoming bankrupt."

may be claimed before the loſs happens, and proved when it does happen: and theſe debts ſhall in like manner be diſcharged by the certificate. And it hath been holden, that inſurance upon lives are within this ſtatute, though not mentioned in the preamble. Cox v. Liotard, Dougl. 166.

Macarty v. Barrow, 2 Str. 949. 3 Will. 16.

A bill drawn before the bankruptcy, though not proteſted till after, is a debt that may be proved under the commiſſion, for the debt accrues immediately upon the drawing.

Ex parte E. I. Company, 2 P. Wms. 395.

A. having contracted with the *Eaſt-India* Company at one of their ſales for the purchaſe of a parcel of goods, to be paid for at a future day, before that day became a bankrupt. Ld. *King* held this caſe not within the above ſtatute, becauſe the goods were not delivered, nor was the contract ſigned by the party.

Tully v. Sparks, 2 Ld. Raym. 1546.

Contingent debts are ſaid not be included in the ſtatute 7 G. 1.; becauſe, it being uncertain whether they will ever become due or not, it is impoſſible to make ſuch abatement of 5*l. per cent.* as the act directs. And this doctrine is now conſtantly followed, and admitted. Lord Chancellor *King*, indeed, declared, that though a debt be contingent, when the obligor becomes a bankrupt, yet if the contingency happens before the diſtribution made, ſuch contingent creditor may come in for his debt; or if the contingency happen before a ſecond dividend, the creditor may come in for his proportion thereof. But this has been ſince over-ruled, and the contrary poſition eſtabliſhed, for Lord *Hardwicke* ſaid, that Lord *King*'s was barely an *obiter* opinion, and that Lord *Talbot* afterwards doubted of Lord *King*'s aſſertion, and that he himſelf had differed from him entirely on a former occaſion, and that he ſtill adhered to his opinion.

Ex parte Caſwell, 2 P. Wms. 497.

Ex parte Groome, 1 Atk. 118.

One having only a cauſe of action, cannot come in and prove it as a debt; becauſe the damages that may be given are conſidered merely as contingent.

3 Wilſ. 270.

Therefore if a leſſee ploughs up meadow ground, for which he is bound to pay the leſſor a certain ſum of money, as a penalty, that penalty cannot be proved as a debt under the commiſſion: nor, if a man be bound in an obligation, in a certain ſum to perform covenants, and the obligor, before he becomes a bankrupt, breaks thoſe covenants, can the obligee prove this as debt under the commiſſion.

Ex parte Todd, 3 Wilſ. 270.

So where in an ejectment, a verdict was given for the plaintiff with nominal damages, but, before the judgment could be entered, the defendant became a bankrupt, and in the term following the plaintiff ſigned judgment, and had coſts *de incremento* then taxed and allowed to him: Lord *Henley* held theſe coſts did not become a debt till the judgment, and were connected therewith, and that the plaintiff could not be permitted to prove the ſame as a debt under the commiſſion.

Walter v. Sherlock, 3 Wilſ. 272.

And where, in a caſe of aſſault and battery before bankruptcy, during the bankruptcy the plaintiff had a verdict with damages, but had not judgment

judgment till after the certificate; the court were of opinion the plaintiff could not come in under the commiſſion, that it was not a proveable debt, or a debt due at the time of the bankruptcy.

And upon the ſame principle, where one *Sneaps* was committed for a contempt in non-payment of coſts, which were taxed ſubſequent to his bankruptcy, but the order for the taxation was made before it; upon a motion for his diſcharge, upon the ground of the debt being diſcharged by his certificate, it became a queſtion, Whether this was to be conſidered as a debt ariſing *anterior* or *poſterior* to the bankruptcy? It was argued, that all proceedings under an order of court were to have relation in point of time to that order; and conſequently that, as the order was made before the bankruptcy, the debt was to be conſidered as having originated in that order, and ought to be diſcharged by the certificate. *Ex parte* Sneaps, March 4, 1782.

The Lord Chancellor obſerved, it is generally true, that, where ſeveral diſtinct acts are neceſſary for the completion of any buſineſs, the completion refers to the inchoation. But the queſtion is, Whether the making an order can be conſidered as ſuch inchoation? And he ſaid, he thought it clearly could not. That it might as well be ſaid, the damages aſſeſſed in treſpaſs are to have reference to the treſpaſs, which they certainly have not, for they have their origin in the judgment. He took it to be clear, that in all inſtances in the court of Chancery, the *taxation* conſtitutes the demand; and as the taxation was ſubſequent to the bankruptcy, the debt is therefore ſo, and conſequently he could not diſcharge the bankrupt.

Where an annuity is ſecured by a deed of covenant, the growing payments are contingent; and therefore an action may be brought, notwithſtanding the bankruptcy and certificate of the covenantor. Cottrell v. Hooke, Dougl. 93.

As to covenant to pay rent. See Ludford v. Barber, 1 Term Rep. 86.; and Hornby v. Houlditch, there cited.

If a perſon lends a trader ſtock in the publick funds, to be replaced as ſtock; without naming any particular time at which it is to be inveſted; if the trader becomes bankrupt before he has been required to re-place the ſtock, it is a contingent debt, and cannot be proved. Atterſon v. Vernon, 3 Term Rep. 539., and 4 Term Rep. 570.

Ex parte Bartlett, 19th May 1792, S. P. Co. *Bankrupt Laws*, 245.

In collateral undertakings, if the party engaging to ſecure the debt of another, himſelf becomes bankrupt before that debt is payable to the principal, the creditor cannot prove under his commiſſion. Alſop v. Price, Dougl. 155. *Ex parte* Adney, Cowp. 460.

Where a man becomes bail for another, it is conſidered as a contingent debt. And if the bail commit an act of bankruptcy before the judgment, it cannot be proved under the commiſſion. Hockley v. Merry, 2 Stra. 1043.

Accordingly, where the defendant, the 9th of *May* 1734, was bail on a writ of error, and, on the 25th of *October* 1734, committed an act of bankruptcy, and after a commiſſion obtained his certificate; on the 12th of *November* 1735, the judgment was affirmed; and, in an action of debt upon the recognizance, he pleaded his diſcharge, and that the cauſe of action aroſe before his bankruptcy; Lord *Hardwicke*, Chief Juſtice, on the trial, held that the defendant was not diſcharged, according to the caſe of *Tully* v. *Sparkes*, for this was but a contingent debt, for which the plaintiff could not come in under the commiſſion.

Where

Taylor v. Mills, Cowp. 525. Crookſhank v. Thompſon, 2 Stra. 1160. 3 Wilſ. 16. Chilton v. Whiffen, 3 Wilſ. 13.

Where a man undertakes to pay a ſum of money for another, his undertaking alone will not create a debt that he can prove under a commiſſion; and if an act of bankruptcy intervenes between the undertaking and the actual payment, it can never be proved, and the creditor can only reſort to the bankrupt perſonally. But if the party engaging to pay the debt of another is taken in execution for that debt, his impriſonment is conſidered as a payment and ſatisfaction of the debt, ſufficient to give him a right to prove under the commiſſion.

Young v. Hockley, 2 Bl. Rep. 840. Heſkuyſon v. Woodbridge, Doug. 166. Taylor v Mills, Cowp. 525. Kettier v. Raynes in Canc. June 12, 1784. Co. *Bankrupt Laws*, 258. Paul. v. Jones, 1 Term Rep. 599.

Goddard v. Vanderheyden, 3 Wilſ. 262.

This principle alſo extends to the caſe where one man is bail for another, it having been determined that he cannot prove as a creditor under a commiſſion againſt the principal, till he has paid the debt for which he became anſwerable; and that if the act of bankruptcy committed by the principal is prior to the bail's having paid the debt, he cannot prove it under the commiſſion.

Ex parte Atkinſon, Baker, and Darling, *in re* Brigham, 28th July 1792. Co. *Bankrupt Laws*, 264.

But the hardſhip of not admitting a ſurety to prove a debt which he pays ſubſequent to the commiſſion, is in ſome meaſure relieved when the original creditor has made his proof before he calls upon the ſurety for payment; becauſe the ſurety is holden to have an equitable right to ſtand in the place of the original creditor, and receive dividends upon his proof.

Ex parte Hill, Co. *Bankrupt Laws*, 290.

Where the contingency, upon which money is made payable to a wife, is *the bankruptcy or inſolvency of the huſband*, ſuch debt cannot be proved under the commiſſion.

But the wife's own fortune may be ſettled on the huſband until he fails, and then to her ſeparate uſe. Lockyer v. Savage, 2 Str. 947.

(*a*) *Ex parte* Caſwell, 2 P. Wms. 497. *Ex parte* Jefferies, Vin. Abr. tit. *Creditor and Bankrupt*, pl. 7. *Ex parte* King, Dav. 254. *Ex parte* Smith, *ex parte* Brown, Co. *Bankrupt Laws*, 267. 271.

Though it be eſtabliſhed (*a*) agreeably to the general rule, that a wife ſhall not come in as a creditor on a mere contingent proviſion, yet if the aſſignees go into equity to enforce the performance of a truſt, as they require equity, they ſhall be obliged to do equity, and ſecure the ſettlement to her. One *Blanchard*, a cabinet-maker, married the ſiſter of *Calliford*, who had 500*l.* portion ſecured by land. *Blanchard*, on his marriage, gave a bond to leave his intended wife, if ſhe ſurvived him, 500*l.* or a third of his eſtate, at her election. *Blanchard* became a bankrupt. A bill was brought by the aſſignees to have the 500*l.* raiſed by a ſale, and decreed accordingly; but with this, that the wife ſhould come in as a creditor upon the 500*l.* bond, and what ſhould be paid in reſpect thereof ſhould be put out at intereſt, and received by the creditors, during the life of the huſband; and if the wife ſurvived, then the money ſhould be paid to her.

Holland v. Calliford, 2 Vern. 662.

2 Vern. 94.

A debt contracted ſubſequent to the bankruptcy, though the creditor have no notice of it, cannot be proved.

Ex parte Skip, 2 Vez. 489. A debt on goods ſold, to be ſent to

A debt made void by the ſtatute ought not to be permitted to be proved, as a debt on an uſurious contract; and though the rule of the court of Chancery is, upon a bill to be relieved againſt demands of uſurious intereſt, not to make void the whole debt, but to make the party pay what is really

really due; in a commiſſion of bankruptcy the aſſignees have a right to inſiſt that the whole is void, as an uſurious contract. And unleſs the aſſignees and creditors ſubmit to pay what is really due, the Lord Chancellor has not power to order it, and applications of this nature have been frequently refuſed.

India, contrary to the ſtatute, cannot be proved. *Ex parte* Moggridge, 22d Dec. 1791. The petitioner admitted to prove, it appearing on a trial at law, that he did not know the deſtination of the ſhip. Co. *Bankrupt Laws*, 232.

A. gave a note of hand without conſideration, payable to *B.* two months from the date, for 100*l.*, *B.* indorſed it over to *C.*, allowing a diſcount of a guinea and a half, being at the rate of 9*l. per cent.* When the note became due, *C.* took a joint bond from the drawer and indorſer for the 100*l.*, though he paid only 98*l.* 8*s.* 6*d.* The commiſſioners had admitted him as a creditor under a commiſſion againſt the drawer; but, finding out this fact afterwards, they ordered his dividend to be ſtopped. The Lord Chancellor, upon his petition, would not direct him to be admitted to his dividend, but ordered an iſſue at law to try whether the bond was uſurious.

Ex parte Thompſon, 1 Atk. 125.

But whatever were the event of the iſſue directed by the court in this caſe, it ſhould ſeem, if the contract was originally uſurious, the note is void, and cannot be proved even in the hands of an innocent indorſee; for, upon an action brought *on it*, the defendant's plea of uſury would be a complete bar.

Lowe v. Waller, Doug. 716. 3 Wilſ 271. Co. *Bankrupt Laws*, 319.

In caſe of debts uncertain in point of liquidation, as between two merchants in balancing accounts, the matter reſts upon a claim, to aſcertain the ſum that was due at the time of the bankruptcy. So where a creditor cannot aſcertain his debt with certainty ſufficient to enable him to ſwear to it, or is not able in other reſpects ſatisfactorily to ſubſtantiate it; or where the agent of a creditor cannot produce his authority, and in many other caſes where there appears a probable foundation of a demand, though not ſufficiently made out, it is uſual for the commiſſioners to ſuffer *a claim to be entered*; but that will not entitle the party to a dividend, which he cannot receive without completely proving his debt. If a claim is not ſubſtantiated in reaſonable time, the commiſſioners may ſtrike it out, and they generally do ſo before a dividend is declared, unleſs ſufficient reaſon is offered to them for prolonging the time; but the creditor is notwithſtanding afterwards at liberty to prove his debt and receive his ſhare upon any future dividends. However, in ſuch caſes where there has not been groſs laches, the Lord Chancellor will make an order that ſuch creditor ſhall be paid his proportion of the dividend out of the money in the hands of the aſſignees, upon condition that it does not break in upon any former dividend.

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(*By the* 1 *Jac.* 1.) But they may come in after four months, if diſtribution be not made. Hutt. 37. Hob. 287; or if only a partial diſtribution. 2 Ch. Cat. 154.

A Creditor three years and a half after having received a dividend, refunded the dividend, brought an action againſt the bankrupt, and held him to bail. The bankrupt thereupon petitioned that the proceedings might be ſtayed: but the court diſmiſſed his petition, the action being after the bankruptcy, and the bail therefore not being ſurpriſed: they ſaid, that the length of time made againſt the bankrupt, for he ought to have procured his certificate: that the caſe, therefore, muſt be determined on the

Ex parte Wright, 2 Vez. jun. 9.

the general rule, that a creditor refunding a dividend may proceed at law. A motion being made for coſts upon this diſmiſſal, Lord Commiſſioner *Eyre* ſaid, he never knew an inſtance of coſts being given on an application to put a party to his election.

(F) Of the Bankrupt's Eſtate and Effects, to which the Commiſſioners or Aſſignees are entitled, when it ſhall be ſaid to be veſted in them; and herein of fraudulent Diſpoſitions by the Bankrupt, and the Actions the Aſſignees may bring for the Recovery thereof.

(*By* 13 *Eliz.*) Copyholds, though mentioned expreſsly only in this act, have yet been determined to be within the purview of all the acts. Cro. Car. 550.

As to *future* real eſtates, there muſt be a new bargain and ſale. *Ex parte* Proudfoot, 1 Atk. 253.

Paine v. Teap, 1 Salk. 109.

By § 14., "No purchaſer for good and valuable conſideration ſhall "be impeached by virtue of this or any other act heretofore made againſt "bankrupts, unleſs the commiſſion be ſued forth againſt the bankrupt "within five years after he ſhall become ſo."

Lofft. 71.

A bankrupt having an eſtate, in right of his wife, ſettled to himſelf for life, with other intervening uſes, remainder to himſelf in fee, with power to change the uſes; it was holden, that the remainder in fee veſted in the aſſignees, and his power of revocation was gone.

Newland v. —— 1 P. W. 92. Hitchcox v. Sedgwick, 2 Vern. 156. *Sed quære* if no commiſſion had been ſued, but a ſecret act of bankruptcy committed? Collet v. De Golls, Ca. Temp. Talb. 69.

The commiſſioners may aſſign lands in fee when the bankrupt owes a debt by ſtatute, if the ſtatute is not ſued and executed before the bankruptcy. And the aſſignment ſhall prevail againſt a ſecond mortgagee who purchaſes the prior mortgage, if the ſecond mortgage was made after a commiſſion ſued out, although the mortgagee had no notice of the commiſſion.

Billing. 111. Good. 89. 1 Com. Dig. 530.

If there be two joint-tenants, and the one becomes bankrupt and dies, it is ſaid, the bankrupt's part ſhall be ſold, and that there ſhall be no ſurvivorſhip; becauſe the bankrupt's moiety is bound by the ſtatutes; and alſo the bankrupt had power to ſell the ſame in his life-time, and might depart with it. And, by the 1 *Jac. c.* 15., the commiſſioners, after the bankrupt's death, may proceed in execution, in and upon the commiſſion for and concerning the offender's lands, tenements, *&c.*, in ſuch ſort as if the offender had been living; which they cannot do if the ſurvivorſhip is allowed to take place.

Beck v. Welſh, 1 Wilſ. 276.

If a mortgage is made by a bankrupt tenant in tail, without ſuffering a recovery, the aſſignees ſhall take advantage of this defect, and hold the land after the death of the bankrupt clear of the mortgage.

Edwards v. Applebee, 2 Br. Ch. Rep. 652.

But if the deed contains a covenant for further aſſurance, the mortgagee will be entitled to retain his ſecurity againſt the creditors under the commiſſion.

Pye v. Danbuz, 3 Br. Ch. Rep. 595.

The

The lord is to be compounded with for the admiſſion, by the expreſs proviſion of the ſtatute; but if the commiſſioners ſell a copyhold, and the vendee tenders to the lord a competent fine, which the lord refuſes, and will not admit the vendee, he may enter. Stone, 127

Where the commiſſioners ſell the copyhold lands, the bargain and ſale binds the copyholder, and bars his eſtate and he is no copyholder after the bargain and ſale is enrolled; for the bargainee, by the ſtatute, is only barred to take the profits until admittance, which is for the lord's benefit in reſpect of the fine due to him; and, when the bargainee is admitted by the lord, the eſtate ſhall veſt in him, and have reference to the bargain and ſale, and ſhall deveſt the claim of any intermediate eſtate. As if the bankrupt dies between the bargain and ſale and the admittance of the bargainee, his wife (where the cuſtom of the manor is, that the wife of a copyholder dying *tenant*, ſhall be endowed) ſhall not be endowed. And if the commiſſioners aſſign the bankrupt's copyhold eſtates to the general aſſignees, they are to be conſidered as vendees; for if not, the aſſignee might continue in poſſeſſion for years before he made a ſale; and yet, by an expreſs proviſion in the act, he is reſtrained from receiving the profits till he has compounded with the lord; and therefore the aſſignee muſt, upon his admittance, pay a fine to the lord, and upon ſale of the eſtate, another fine muſt be paid: However this inconvenience may be avoided by excepting copyholds out of the deed of aſſignment of the bankrupt's eſtate, for the commiſſioners may convey to a purchaſer in the firſt inſtance; and, by leaving out the copyhold eſtate of a bankrupt in a temporary aſſignment, the creditors will run no riſk with regard to the crown, for an extent will not affect it. Parker v. Bieeke, Cro. Car. 568. Drury v. Man, 1 Atk. 96.

In caſe of a patron becoming a bankrupt, the commiſſioners may ſell the advowſon of the living; but if the church be void at the time of the ſale, the vendee ſhall not preſent to the void turn, but the bankrupt himſelf, becauſe the void turn of a church is not valuable. 1 Burn's *Eccl. Law*, 4 ed. p. 125.

The commiſſioners may ſell offices of inheritance, and for terms of years; but an office concerning the execution of juſtice (and therefore within 5 & 6 *Edw.* 6. *c.* 16.) cannot be ſold. 1 Atk. 213. *Ex parte* Lyons, Ambl. 89.

Place of Jew-broker not ſaleable.

On the other hand, a place that does not concern the execution of juſtice, but only the police, may be ſold. *Ex parte* Butler, 1 Atk. 210.

215. Ambl. 73. S. C. 3 Term Rep. 681. The pay of an officer is not aſſignable. 4 Term Rep. 248. 1 H. Bl. Rep. 627. Co. *Bankrupt Laws*, 355.

The commiſſioners may aſſign a poſſibility of a right belonging to the bankrupt, but it muſt be ſuch as (*a*) can be aſſigned or releaſed, and diſcloſed upon the laſt examination. Higden v. Williamſon, 3 P. Wms. 132. 2 Atk. 420. (*a*) Moth v. Frome, Ambl. 394.

A. being about to renew a leaſe of an eſtate, at the expence of a fine of 160*l.*, borrowed of *B.* 80*l.* (of which *B.* himſelf borrowed 50*l.*), and gave a promiſſory note to repay the money, unleſs ſhe ſhould bequeath the eſtate to ſome or one of his children; ſhe afterwards deviſed the eſtate to *B.*'s daughter; but, before the deceaſe of *A.*, *B.* had become a bankrupt. His aſſignees claimed the 80*l.* or half of the eſtate, as being purchaſed by the bankrupt for the advancement of a child under 1 *Jac.* 1. *c.* 15.; and, upon a hearing at the rolls, obtained a decree, which, upon an appeal to the Chancellor was affirmed. Fryer v. Brown, 1 Br. Ch. Rep. 160.

Walker v. Burrows, 1 Atk. 93.

In a caſe before the court of Chancery it appeared, that the plaintiffs were aſſignees under a commiſſion of bankruptcy againſt the father of the defendant, who in 1739, conveyed all his ſhop, goods, &c. by bill of ſale to the defendant his ſon, and in 1740 became bankrupt. In the year 1718, he, *after marriage*, conveyed to truſtees his real eſtate in conſideration of five ſhillings, and other valuable conſiderations, in truſt for himſelf for life, to his wife for life, then to his eldeſt ſon if he ſurvived his father and mother, and ſo to the next ſon, &c.

Lord *Hardwicke* ſaid, as to to the firſt part of the caſe, there was not a foundation to ſet aſide the aſſignment of the houſehold goods as fraudulent, becauſe it was made many months before the bankruptcy, and the conſideration of the aſſignment was proved, and alſo followed by the poſſeſſion of the ſon. And as to the ſecond, the truſtees under the deed muſt convey to the aſſignees under the commiſſion; for it falls directly within the clauſe 1 *J.* 1. *c.* 15. § 5.

Miles v. Williams, 1 P.W.249. Boſvil v. Brander, 1 P.W.460.

The commiſſioners may aſſign a debt or *choſe* in action due to the wife of a bankrupt, and ſo it is of a mortgage made to her *dum ſola*, for the right to the debt is plainly veſted in the aſſignees, though the legal eſtate of the inheritance of the lands in mortgage continue in the wife.

Saddington v. Kinſman. 1 Bro. Ch. Rep. 44.

Bennet v. Davies, 2P. W. 316.

J. S. made his will, and deviſed his eſtate to his daughter for her ſeparate uſe, excluſive of her huſband ſhould not be tenant by the curteſy, nor have theſe lands for his life, in caſe he ſurvived his wife, but that they ſhould upon his wife's death, go to her heirs. Soon after the teſtator died, and the huſband became a bankrupt. The commiſſioners aſſigned the lands deviſed, upon which the wife brought her bill againſt the aſſignees, in order to compel them to aſſign over the eſtate to her ſeparate uſe. The maſter of the rolls held it to be clear, that it was a truſt in the huſband, and that there was no difference where the truſt was created by the act of the party, and where by the act of law. And decreed a conveyance for the ſeparate uſe of the wife.

Gayer v. Wilkinſon, cited in 1 Br. Ch.Rep.50.

If the wife is entitled to a legacy which the huſband has not reduced into poſſeſſion during his life, it ſeems, it will not paſs by the commiſſioners' aſſignment.

Seers v. Hind, 1 Vez. jun. 294. 2 Eq. Caſ. Abr. 100.

The commiſſioners may aſſign a leaſe granted by the bankrupt, notwithſtanding there be a proviſo in it that the leſſee, his executors, or adminiſtrators, ſhall not aſſign without the leſſor's conſent in writing.

Philpot v. Hoare, Ambl. 480.

Gerrard v. Aylmer, Palm. 505.

They may aſſign an obligation taken in another's name to the bankrupt's uſe.

Com. Dig. tit. *Bankrupt*, (D.16.) Toulſon v. Grout, 2 Vern. 432. Tudway v. Bourne, 2 Burr. 718.

They may ſell an heriot, relief, &c. due to the bankrupt, and a legacy given to the bankrupt before his bankruptcy. So where the certificate has been ſigned by the creditors and commiſſioners, a legacy left to the bankrupt before the certificate allowed by the chancellor may be aſſigned. Many years may intervene between the ſigning and the allowance of the certificate, and large effects may, in the mean time, come to the bankrupt. And it is not like the relation of a bargain and ſale, or the ſurrender of a copyhold.

Neale v. Cottingham, in

The commiſſioners here may ſell the bankrupt's good in *Ireland*, and the courts in *Ireland* will take notice of our laws ſo as to prevent a credi-

tor,

tor, attaching property after the commiſſion, from gaining a preference over the aſſignees of the bankrupt. Canc. in *Ireland*, 16th Nov. 1764.

1 H. Bl. Rep. 132. As to the operation of the bankrupt laws abroad, ſee the caſe of Cleve v. Mills, at the Cockpit, 27th July 1764; and the judgment of the court in the caſes of Sill v. Worſwick, and Hunter v. Potts, *infra*.

So where the laws of *Holland* have, in like manner as a commiſſion of bankrupt here, taken the adminiſtration of the property, and veſted it in perſons who are called curators of deſolate eſtates, the court of Chancery hold, that they have, immediately upon their appointment, a title to recover the debts due to the inſolvent in this country, in preference to the particular creditor ſeeking to attach thoſe debts. The principle upon which theſe deciſions proceed is, that perſonal property is governed by that law which governs the perſon of the owner. Solomons v. Roſs, 1 H. Bl. 131. Jollet v. Deponthien, 1 H. Bl. 132.

If after an act of bankruptcy, but before the aſſignment, a creditor, reſident in this country at the time of the bankruptcy, and knowing of it, attach money of the bankrupt abroad, he is compellable to refund it to the aſſignees. But a debtor of the bankrupt before the bankruptcy, whoſe debt is afterwards *bonâ fide*, and by regular proceſs, attached by a creditor reſident abroad at the time of the bankruptcy, is not liable to pay it over again to the aſſignees. Sill v. Worſwick, 1 H. Bl. 694. Hunter v. Potts 4 Term Rep. 182. In the caſe of Sill v. Worſwick the proceſs abroad was founded on an act done in *England*, and under the aid of the law of *England*; a circumſtance on which that caſe immediately turned. The caſe of Hunter v. Potts was without that circumſtance; and it was propoſed to argue it on a writ of error before the twelve judges; but no ſuch argument hath taken place.

In mortgages of land or chattels real, the non-delivery of poſſeſſion does not amount to that ſpecies of fraud intended to be checked by the ſtatute, the title deeds, and not the poſſeſſion, being the evidence of ſuch ſpecies of property. Creditors, therefore, cannot be deceived and deluded by the poſſeſſion of property of that nature. But, where goods are pawned or mortgaged, it is very different; for poſſeſſion and a power of diſpoſal of ſuch property are the only evidences of ownerſhip to which the creditor can look: an aſſignment therefore of ſuch property, unaccompanied by poſſeſſion, is fraudulent and void. Stephens v. Sole, 1 Vez. 352. Bourne v. Dodſon, 1 Atk. 154. Ryal v. Rowles, 1 Atk. 165. 1 Vez. 348. Bamford v. Baron, 2 Term Rep. 594. Edwards v. Haben, 2 Term Rep. 587.

But, if the property cannot be delivered at the time of the contract, it will be ſufficient if the mortgagee has the documents and muniments delivered to him, in order to reduce it into poſſeſſion. A mortgage, therefore, of a ſhip, or goods at ſea, if the mortgagee has taken all methods in his power to get poſſeſſion, ſuch as the bill of ſale, bills of lading, *&c.* will be valid, for otherwiſe no ſecurity could be made of ſuch things at ſea. But if the creditor were to ſuffer the ſhip to come back and go upon another voyage, the caſe would be very different. For the delivery of the grand bill of ſale will not be ſufficient, if there is an opportunity of taking actual poſſeſſion. Brown v. Heathcote, 1 Atk. 160. *Ex parte* Mathews, 2 Vez. 272. Hall v. Gurney, Hil 24 G. 3. B. R. Co. *Bankrupt Law* 401. Atkinſon v. Maling, 2 Term Rep. 462. By the 26 G. 3. c. 60. § 17. the bill of ſale muſt recite the certificate of the regiſtry of the ſhip, notwithſtanding it be intended only as a ſecurity for money lent, elſe it is void: and being void, the vendee, though he take poſſeſſion of the ſhip immediately upon her return, cannot retain it againſt the aſſignees of the vendor. Rolleſton v. Hibbert, 3 Term Rep. 406.

If a ſhip is in a foreign port, where the mortgagee might take poſſeſſion of her, and this be known to him, yet he is not obliged to take poſſeſſion until her arrival in *Great Britain*. *Ex parte* Batſon, 8th Aug. 1791. Co. *Bankrupt Laws*, 406.

Where

Gilleſpy v. Coutts, Ambl. 652.

Where a ſhare of a ſhip is mortgaged or pledged, the delivering of the bill of ſale of that ſhare is ſufficient, for the mortgagee cannot in ſuch caſe take actual poſſeſſion of the ſhip.

Ex parte Standgroom, 2d Auguſt 1790. Co. *Bankrupt Laws*, 410. 1 Vez. jun. 163.

Falkener v. Caſe, Co. *Bankrupt Laws*, 412.

Choſes in action are holden within the ſtatute, for although they are only aſſignable in equity, equity will follow the law in ſuch caſe.

1 Br. Ch. Rep. 125. S. C. 2 Term Rep. 491. S. C. Rowe v. Dawſon, 1 Vez. 331.

Ryall v. Rowles, 1 Vez. 372. 1 Atk. 171. 177.

If a bond is aſſigned, the bond muſt be delivered and notice muſt be given to the debtor; but in aſſignment of book-debts notice alone is ſufficient, becauſe there can be no delivery, and ſuch acts are equal to a delivery of goods, which are capable of being delivered.

A choſe in action may be aſſigned without deed. Howell v. M'Ivers, 4 Term Rep. 690.

Cowp. 233.

The enacting part of 21 *Jac.* 1. *c.* 19. *ſ.* 11. is not reſtrained by the preamble, but it extends to other perſons' goods, as well as thoſe which were originally the bankrupt's property.

Mace v. Cadell, Cowp. 232.

One *Mace* kept a public houſe, had a licence, and ſaid ſhe was married to *Penrice*. It was proved ſhe went to the Exciſe-office, had his name entered in the books, with a note in the margin, "married." *Penrice* had the licence, and continued in poſſeſſion of the houſe and goods from that time till he abſconded and went to *Pimlico*, which was an act of bankruptcy. *Mace*, the plaintiff, firſt claimed the goods in queſtion under a bill of ſale from *Penrice*, but afterwards as her own original property, and denied that *Penrice* and ſhe were married. Upon a queſtion, Whether this was within the ſtatute? the court held that it was.

Bryſon v. Wylie, Hil. 24 G. 3. B. R

In another caſe, *Bryſon* being poſſeſſed of a dyer's plant, ſold it to *Simpſon* for 165*l.* 16*s.* 6*d.*; and *Simpſon* gave *Briſon* two promiſſory notes dated the 19th day of *January* 1780, one for the ſum of 82*l.* 13*s.* 6*d.*, payable on the 6th *January* 1781, and the other for the ſum of 82*l.* 13*s.*, payable on the 6th *January* 1782. When the firſt note became due, *Simpſon* could not take it up, and *Bryſon* offered to take back the plant, and return the notes, and agreed that he would let him the plant at the rent of 5*l.* a-year, upon the valuation amounting to 8*l.* 5*s.* 6*d.* *per ann.*, for the term of three years. To this propoſal *Simpſon* very readily agreed, and a deed was accordingly executed; by which it was agreed, that *Bryſon* ſhould let the plant to *Simpſon*, and that if he ſhould make default in any of the quarterly payments, or in the performance of any of the covenants, then the term granted ſhould ceaſe, and *Simpſon* ſhould deliver up the plant, &c. and it ſhould be lawful for *Bryſon* to take immediate poſſeſſion of the ſame. There was a memorandum at the foot of the deed, that *Simpſon* had put *Bryſon* in full poſſeſſion of the plant, by delivering to him one winch in the name of the whole. On the 5th of *July* 1783, a commiſſion of bankruptcy iſſued againſt *Simpſon*, and the meſſenger took poſſeſſion of the plant.

The bare leaving goods in poſſeſſion of the bankrupt, without power to diſpoſe, will not be within the ſtatute. Weſt v. Skip, 1 Vez. 243. *Ex parte* Flyn, 1 Atk. 185. The ſort of poſſeſſion, diſpoſition, &c. are in general facts for the determination of a jury. Walker v. Burnell, Dougl. 303. Copeman v. Gallant, 1 P. Wms. 314. Collins v. Forbes, 3 Term Rep. 316.

The queſtion was, Whether this was within the *ſt.* 21 *Jac.* 1.? The court held clearly that it was.

Where

Where a trader makes a ſettlement of perſonal property upon his marriage, for the ſeparate uſe of his wife, and to be by her employed in a trade, his living with the wife, if he do not intermeddle in the buſineſs, will not be a poſſeſſion of the property within the ſtatute of 21 *Jac.* 1, for he hath not the *order and diſpoſition with the conſent of the real owner.* Haſelinton v. Gill, 3 TermRep. 620. n. Jarman v. Woolloton, *ibid.*

The delivery of property to a creditor in contemplation of immediate bankruptcy is conſidered as fraudulent, notwithſtanding the delivery is conſidered as fraudulent, notwithſtanding the delivery is made in ſatisfaction of a *bonâ fide* debt, for it diſappoints the equality which the bankrupt laws aim at. Hinton's caſe, Frem. 270. Rutt v. Cooper, Cowp. 629.

Alderſon v. Temple, 4 Burr. 2235. 1 Bl. Rep. 441. Harman v. Fiſher, Cowp. 117.

But if a trader, under an apprehenſion of legal proceſs, delivers property to his creditor, or gives him a power to receive it, ſuch act is valid, notwithſtanding the bankrupt knows himſelf to be inſolvent. Thompſon v. Freeman, 1 TermRep. 155.

So if a debtor, upon being preſſed by his creditor, who knows him to be inſolvent, gives an order upon a perſon, having his property, to pay out of the proceeds, it hath been determined not to affect the payment. Yeats v. Grove, 1 Vez. jun. 280.

The crown is not bound by the acts relating to bankrupts, not being named in them; therefore an extent ſerved upon the property of the bankrupt will bind from the *teſte* of the writ, and till actual aſſignment by the commiſſioners; but the king is bound by an actual aſſignment, becauſe the property is then abſolutely transferred to a third perſon. Co. *Bankrupt Laws*, 446. Audley v. Halſey, Sir W Jones, Rep. 202.

Rex v. Pixley, Bunb. 202. Rex v. Bewdley, in the Exch. July 1784. 2 Show. 480. Lechmere v. Thoroughgood, 3 Mod. 236. Comb. 123. Rorke v. Dayrell, 4 Term Rep. 408.

One became indebted to the crown, and a commiſſion of bankruptcy was ſued out againſt him, and an aſſignment made of his effects; and an extent iſſued from the crown, teſted the day of the date of the aſſignment, and the crown was preferred. Park. Rep. 126. 2 Show. 40.

The land-tax money in the hands of collectors is a debt to the king, but the warrant of the commiſſioners of the land-tax is not equal to an extent ſo as to bind the goods from the date, but until aſſignment the property is in the bankrupt, and the land-tax commiſſioners' warrrant executed before the aſſignment will create a lien upon ſuch a ſeizure, therefore all the aſſignees' right is to redeem the goods which are in the hands of the commiſſioners of the land tax for that purpoſe. Braſſey v. Dawſon, 2 Stra. 978.

A candle-maker, in arrear for the ſingle duties, becoming bankrupt, and convicted for non-payment after the aſſignment of his effects, the double duties are a lien upon the candles, utenſils, and materials in the hands of his aſſignees, and they may be diſtrained. Stacy v. Hulſe, Dougl. 395.

Attorney-General v. Senior, Rex v. Fowler, Dougl. 400.

The aſſignment will not paſs goods which the bankrupt hath poſſeſſion of as factor, though he act upon a *del credere* commiſſion. Garret v. Cullum, Bull. *Ni Pri.* 42. 5th. ed.

Godfrey v. Furzo, 1 P. Wms. 185. *Ex parte* Dumas, 2 Vez. 586. 1 Atk. 232. Scrimſhire v. Alderton, 2 Str. 1182. Eſcott v. Milward, Sittings after Mich. 1783. Co. *Bankrupt Laws*, 456, 7.

Nor, upon the ſame principle, will it paſs bills or goods ſent to a trader to be applied to a particular purpoſe. *Ex parte* Dumas, 2 Vez. 586.

1 Atk. 232. *Ex parte* Emery, 2 Vez. 674. Godfrey v. Furzo, 3 P. Wms. 185. D'Aquila v Lambert, Ambl. 399. *Ex parte* Clare, and *ex parte* King, cited in Snee v. Preſcott, 1 Atk. 250. Zink v. Waller, 2 Bl. Rep. 1154. Tooke v. Hollingworth, 5 Term Rep. 215.

Howard v. Jemmett, 3 Burr. 1369.

Neither will it paſs goods which the bankrupt may be poſſeſſed of as executor or adminiſtator.

Ex parte Ellis, 1 Atk. 101. *Ex parte* Marſh, 1 Atk. 158. But if a trader is made executor and reſiduary legatee, and, before his bankruptcy, collects in enough of the teſtator's effects to pay debts and particular legacies, and the remainder of the aſſets is uncollected; though the aſſignees *in law* would not be entitled to get it in, becauſe the bankrupt has it in *auter droit* as executor, yet the *aſſignees under the commiſſion*, notwithſtanding the legal intereſt is not veſted in them, may, by the aid of the court of Chancery, get in the aſſets in the name of the executor. Per Ld. Hardwicke, in *ex parte* Butler, 1 Atk. 213. Ambl. 74. S. C. As courts of law now take notice of a truſt, the *aſſignee in law* would be entitled. Winch v. Keeley, 1 Term Rep. 619.

Winch v. Keeley, 1 Term Rep. 619.

Nor a debt which he hath previouſly aſſigned to another perſon; for in ſuch caſe he is a mere truſtee, and the debts which are aſſignable by the ſtatute are thoſe which are for *the benefit* of the bankrupt.

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(*If A. being beyond*) *Vide* Snee v. Preſcot, 2 Atk. 245. and *ex parte* Walker and Woodbridge, after Trin. Term 1755. Co. *Bankrupt Laws*, 480. This right of the conſignor to ſtop *in tranſitu* in caſe of bankruptcy, when the queſtion is merely between conſignor and conſignee, is now eſtabliſhed at law. Biſkett v. Jenkins, cited in Cowp. 296. Solomons v. Niſſen, 2 Term Rep. 674. Lickbarrow v. Maſon, 2 Term Rep 63. But whether ſuch right exiſt, as between the conſignor and the aſſignee of the conſignee, under an indorſement of the bill of lading for a valuable conſideration, is a point as yet unſettled. The court of K. B. have negatived any ſuch right. Lickbarrow v. Maſon, 2 Term Rep. 63.; their judgment was reverſed in the Exchequer chamber, 1 H. Bl. 357.; but the Houſe of Lords, not thinking the evidence on the record (for the queſtion was brought forward on a demurrer to evidence) ſufficient to maintain the plaintiff's action, awarded a *venire facias de novo*. Dom. Proc. 14th June 1793. But, if they once get into the hands of either, the right is gone. Ellis v. Hunt, 3 Term Rep. 464.

Atkin v. Barwick, 1 Str. 165. 10 Mod. 432. S. C. 4 Burr. 2239.

Goods that have been delivered on a precedent conſideration cannot be aſſigned, though the acceptance be after the bankruptcy.

Cowp. 125. As to what perſons are entitled to ſuch lien, ſee Ambl. 252. Cowp. 251. 1 Burr. 493. 2 Burr. 931. Pr. Ch. 580. 4 Burr. 2214. 1 Bl. Rep. 654. 4 Term Rep. 123. 1 Atk. 235. 2 Cox's P. Wms. 367. Dougl. 97. *Ex parte* Andrews, Co. *Bankrupt Laws*, 515.

The aſſignment doth not deveſt an equitable lien. By an equitable lien, however, we are not to underſtand a right attaching upon the property in whatſoever hands it may be; for there can be no lien diſtinct from poſſeſſion.

Moyſes v. Little, 2 Vern. 194. *Sed quære.* Vandenanker v. Deſbrough. 2 Vern. 96.

The defendant on the marriage of his ſon ſettled lands on himſelf for life, remainder to his ſon for life, *&c.*; and covenanted during his own life to pay his ſon 15*l. per annum*; the ſon became a bankrupt; the plaintiff as aſſignee brought a bill againſt the father, to have the benefit of the agreement, and to compel payment of the 15*l. per annum*. *Per Cur.* An aſſignee, under a ſtatute of bankruptcy, is not entitled to have the performance of an agreement made with the bankrupt; and it was ſo adjudged in the caſe of *Drake* v. The Mayor of *Exeter*, where the court held, that if a leſſor covenants with his leſſee and his aſſigns to renew his leaſe, and the leſſee becomes a bankrupt, and the commiſſioners aſſign this covenant, the aſſignee cannot have any relief againſt the leſſor.

Drake v. The Mayor of *Exeter* 1 Ch. Ca. 71.

Chippendale v. Tomlinſon, Trin. 25 G. 3. B. R.

Chippendale brought an action of *aſſumpſit* for work and labour as an attorney. The defendant pleaded, that the plaintiff was a bankrupt, and averred, that the commiſſion was ſtill in force. The plaintiff replied, that the work and labour was done after the commiſſioners' aſſignment, and for the neceſſary ſupport and maintenance of himſelf and his family. Rejoinder, that the plaintiff had not obtained his certificate; and thereupon a demurrer. Lord *Manſfield* ſaid, the only queſtion is, Whether the aſſig-

nee

ees of a bankrupt are entitled to the profits ariſing from his perſonal la-
our? The aſſignees cannot let out the bankrupt; they cannot contract for
is labour. And Mr. Juſtice *Buller* obſerved, that when Lord *Hardwicke* 1 Atk. 253.
id, that "all the bankrupt's future perſonal eſtate is affected by the aſ-
ſignment," he evidently meant, that if the aſſignees claim it, the bank- See *acc.* Aſhley v. Kell, 2 Stra. 1207.
pt muſt deliver it up; and ſo far the aſſignment affects it: but no other P. 262.
erſon can have the ſame plea.

(*The Aſſignees have*) 2 Str. 978. But he is bound by an actual aſſignment. 2 Show. 481.

Where a trader commits an act of bankruptcy by lying in priſon for two Barwell v. Ward, 1 Atk. 260.
onths, it relates to the firſt day of his ſurrender, ſo as to over-reach all King v. Leith, 2 Term Rep. 141.
termediate tranſactions.

As this relation to the act of bankruptcy occaſionally induceth very great Where the act of bankruptcy was committed by the bankrupt's lying in gaol two months, and in the interval, before it was completed, the
rdſhip upon parties, it meeteth with but little encouragement from the
urts. The legiſlature too hath interpoſed, and provided that it ſhall not
tend (*a*) to the prejudice of any debtor of the bankrupt, who pays his
bt to the bankrupt truly and *bonâ fide* before he ſhall underſtand or know
at he is become a bankrupt; or to purchaſers (*b*) for valuable conſidera-
n, unleſs the commiſſion ſhall be ſued out within five years after the act
bankruptcy; or to payments (*c*) for goods or bills of exchange *bonâ*
de made by the bankrupt in the courſe of trade, without the creditor's
owing that he is become bankrupt, or in inſolvent circumſtances.

riff paid money which he had levied under an execution againſt the bankrupt to the plaintiff the action, the court would not aſſiſt the aſſignees upon motion. Clarke v. Ryal, 1 Bl. Rep. 2. (*a*) 1 J. 1. c. 15. § 14. (*b*) 21 J. 1. c. 19. § 14. (*c*) 19 G. 2. c. 32. § 1. There is no ference between an actual payment of money in ſatisfaction of a debt, and indorſing bills of change; provided there be no notice, and the money be received on them before the commiſ- n of bankruptcy iſſues. Hawkins v. Penfold, 2 Vez. 550. Payment by the acceptor of a bill, er time given him by the holder, on condition of allowing intereſt, is not a payment in the urſe of trade, and of courſe, not protected againſt a ſecret act of bankruptcy: Vernon v. Hall, Term Rep. 648. A banker is affected by notice equally with other perſons; and if, in ſuch e, he pays the draft of a trader keeping caſh with him, he is liable to pay it over again to the ignees. Vernon v. Hankey, 2 Term Rep. 113. 3 Br. Ch. Rep. 313. But the aſſignees hav- recovered the money from the banker, cannot compel the creditor, to whom the bankrupt d it, to refund. Vernon v. Hanſon, 2 Term Rep. 287. If a perſon borrows money, and re- s it after a ſecret act of bankruptcy, this, though not a payment in the courſe of trade, will be allowed; for the loan being repaid, it will be conſidered as never borrowed. *Ex parte* ngalton, 3 Br. Ch. Rep. 47.

The relation operates only on voluntary payments with notice; and if Foſter v. Allenſon, 2 Term Rep. 479.
e debtor pays the debt in conſequence of a judgment at law, the aſſignees
not recover the money a ſecond time.

It will not avoid a fair act ſubſtantially complete, though defective in Lempriere v. Paſley, 2 Term Rep. 485.
ne formal circumſtance. If therefore a trader aſſigns goods at ſea, and
the ſame time undertakes to indorſe and deliver the bill of lading as The like law as to an indorſe-
n as he receives it, the indorſement will be good, though an act of
kruptcy be committed before it is made.

nt of a bill of exchange in purſuance of a prior agreement. Smith v. Pickering, Eſpin. *Ni*, 30.

(*a fraudis faciat*) Therefore not within 21 J. 1. c. 19. ‖ 9.

It ſeemeth to have been formerly (*b*) very much doubted, whether the (*b*) See Baily v. Dunning, 1 Lev. 173. 1 Sid. 271. S. C.
ignees could maintain any action againſt an officer who had the goods of
ankrupt in execution after an act of bankruptcy, and before the iſſuing
of

1 Keb. 930. S. C. (c) Cooper v. Chitty, 1 Burr. 20. of the commiſſion; but it is (c) now ſettled, that the aſſignees may in ſuch caſe bring trover againſt him, though the relation (d) ſhall not operate ſo as to make him a treſpaſſer.

1 Bl. Rep. 65. S. C. (d) Nor will he be a treſpaſſer, though he ſell after notice from the proviſional aſſignee. Smith v. Miles, 1 Term Rep. 475.

Akerry v. Williams, 1 Vern. 27. Collet v De Golls, Ca Temp. Talb 65. Wilker v. Bodington, 2 Vern. 599.

A purchaſer for a valuable conſideration, without notice of an act of bankruptcy, ſhall not be obliged in equity to diſcover any thing that may tend to deprive him of a legal title; but every advantage ſhall be left him to defend himſelf. Indeed where a commiſſion is actually taken out, the caſe is very different, becauſe that is a public act, which all are bound to notice; but an act of bankruptcy may be ſo ſecret as to be impoſſible to be known.

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(*In Aſſumpſit*) Lawſon v. Lamb, 1 Lutw. 274. S. P. 2 Ld. Raym. 1548. S. P. The aſſignee muſt lay the promiſe to be made to the bankrupt, if the contract be prior to the bankruptcy. 6 Mod. 131. Stra. 697. *Secùs*, if ſubſequent; and therefore, in ſuch caſe, they need not name themſelves aſſignees. Evans v. Mann, Cowp. 569. If the ſame perſons are aſſignees of *A.* and *B.*, who were partners, but there is no joint commiſſion; they cannot, in one action, ſue for debts due to *A.* and *B.* jointly, and alſo for debts due to each, individually. Hancock v. Hayward, 3 Term Rep. 433. Streatfield v. Halliday, *id.* 779.

Hutchin v. Campbell, 2 Bl. Rep. 830. 3 Wilſ. 309.

The aſſignees may bring either *trover* or *aſſumpſit* for money received ſubſequent to the bankruptcy; but they cannot bring both; and having brought one, and proceeded to judgment in that, it will bar the other. They were formerly not allowed to maintain *aſſumpſit* in ſuch caſe. 1 Ver. 329. 3 Lev. 19

Miles v. Williams, 1 P.W. 249. 1 Atk. 193.

It is in one caſe ſaid, that if a bond was made to *A.* in truſt for *B.*, who becomes a bankrupt, the aſſignees may bring the action in their own name, though *B.* muſt have brought it in the name of his truſtee; but this opinion has been denied to be law by Lord *Hardwicke*, who thought clear by the manner of wording the clauſe, relating to the commiſſioners' power of aſſignment of a bankrupt's effects, 1 *Jac.* 1., that aſſignees can only have the like remedy to recover a debt as the bankrupt himſelf might have had, the words "as the party himſelf might have had," in the concluſion of that clauſe, appearing to him to be meant of the bankrupt.

Sturdy v. Arnaud, 3 Term Rep. 592.

The aſſignees cannot maintain an action to recover the payment of an annuity, which the bankrupt, prior to an act of bankruptcy, had agreed ſhould be applied to ſatisfy a debt due from the bankrupt to the grantor of the annuity.

(*By* 5 *Geo.* 2. *cap.* 30.) Creditors cannot give a general power to aſſignees to proſecute ſuits their own diſcretion; but there muſt be a meeting of creditors upon notice in the *Gazette*, to conſ of each particular ſuit. Atk. Rep. 92. pl. 39. And a ſolicitor, who carries on ſuits for an aſſig without the conſent of the creditors aſſembled purſuant to this act, is not entitled to be paid of the bankrupt's eſtate, but is left to a perſonal remedy againſt the aſſignee employing him. *parte* Whitchurch, 1 Atk. 210. Actions at law may be brought without firſt calling any meet of creditors. Huſſey v. Fidell, 3 Salk. 59.

Bull. *N. P.* 37.

In actions brought by aſſignees, it is neceſſary to prove the bankrupt a trader within the ſtatute, the act of bankruptcy, that the commiſſion was gularly granted, the aſſignment to the plaintiff, and property in the bankr

Abbot v. Plumbe, Dougl. 216. But, as againſt a perſon who is party to a deed, his examination

It is an eſtabliſhed rule, that aſſignees muſt prove the petitioning ditor's debt, by the ſame evidence which muſt have been produced i action againſt the bankrupt; and as it is neceſſary, in order to recove a bond, to call the ſubſcribing witneſs, unleſs ſome reaſon can be for his abſence, ſo the petitioning creditor's debt, if it ariſes on muſt be proved in like manner.

before the commiſſioners, wherein he admits the execution of it, ſuperſed neceſſity of calling the ſubſcribing witneſs. Bowles v. Langworthy, 5 Term Rep. 366.

The depoſitions of the act of bankruptcy, when recorded according to 5 *Geo.* 2. *c.* 30. § 41., are evidence in an action at law to prove the preciſe time when the act of bankruptcy was committed, if ſpecified therein. Janſon v. Wilſon, Dougl. 257.

A bankrupt cannot be a witneſs to prove his own act of bankruptcy; but, if the defendant calls him, he waves all objections to the competency of his evidence, and the bankrupt may be croſs-examined by the plaintiffs to that fact. Field v. Curtis, 2 Strange, 829. Aſſignees of

Gill v. Woodmaſs, ruled by Lee, C. J., Mich. Sittings, 1752. Bull. *N. P.* 38.

The bankrupt cannot be evidence to ſwear property in himſelf, or a debt due to his eſtate, without having obtained his certificate, and given a releaſe of his ſhare in the ſurplus and the dividends, for elſe he is plainly intereſted; but he may prove property in, or a debt due to, another. Bull. *N. P.* 43 Cowp. 71.

Upon the ſame principle an uncertificated bankrupt cannot be witneſs to prove uſury in a creditor, who had proved that debt under the commiſſion. Maſters v. Drayton, 2 Term Rep. 496.

It is a ſettled rule, that a bankrupt may be a witneſs to diminiſh the fund, though he has not obtained his certificate; becauſe, in ſo doing, he ſpeaks manifeſtly againſt himſelf; for he may not only defeat his title to the benefit which the law allows him, if the fund is of a certain amount, but he hazards the diſpleaſure of all his other creditors. Walker v. Walker, cited Cowp. 70. Butler v. Cooke, Cowp. 70.

If a bankrupt has had his certificate, and received his allowance, his evidence will be admiſſible, for he is not bound to refund. Ruſſel v. Ruſſel, 1 Br. Ch. Rep. 269.

It muſt be obſerved, however, that though a bankrupt has obtained his certificate, yet he is not a competent witneſs to prove the petitioning creditor's debt, or any other fact neceſſary to ſupport the commiſſion. Chapman v. Gardner, 2 H. Bl. 279. Croſs v. Fox and Flower v. Herbert, *ib. id.*

It is ſaid in the caſe of *Drake* v. Mayor of *Exeter*, (*ſupra.*, vol. i. p. 413. 438. cited alſo in 2 *Vern.* 97.) that a covenant for the renewal of a leaſe, of which a profit may be made, does not paſs by the aſſignment. But the authority of that caſe has been ſince doubted, for a covenant to renew a leaſe runs with the land. 2 H. Bl. 462, 3. Smith v. Coffin, *ibid.*

The *right* to bring a *real* action paſſeth to the aſſignees by the uſual words of the deed of aſſignment. Smith v. Coffin, *Ibid.*

The aſſignees are entitled to recover from the winner money loſt at play by the bankrupt before his bankruptcy in an action of debt upon the ſtat. 9 *Ann. c.* 14. for the money is part of the bankrupt's eſtate; the ſtatute gives an action to the party grieved, and therefore veſts an intereſt in him. Brandon v. Pate, 2 Bl. 308. Brandon v. Sands, 2 Vez. jun. 514.

A commiſſion of bankrupt veſts all rights and all poſſibilities of the bankrupt in the aſſignees; in which reſpect it differs from an execution, which paſſes only what the ſheriff ſeizes. Hence, two commiſſions of bankrupt for the ſame purpoſe cannot ſubſiſt together: for the ſecond will be ſuperſeded, unleſs there be ſome ſpecial circumſtances, as, conſent, fraud, or laches in the creditors under the firſt. Indeed, if the aſſignees under the ſecond will pay the creditors under the firſt twenty ſhillings in the pound, and all the coſts, in that caſe the firſt will be inſtantly ſuperſeded. *Ex parte* Brown, 2 Vez. jun. 67.

Anſtin v. Whitehead, 4 Term Rep. 436.

Where a ſoap-maker, who had incurred a forfeiture for concealing ſoap contrary to the ſtat. of 1 *Geo.* 2. *ſt.* 2. *c.* 36. became a bankrupt, and a proviſional aſſignment of his eſtate was made, after which the ſoap was condemned, and the bankrupt convicted, whereupon a warrant iſſued to levy the penalty on his goods generally, it was holden, that the warrant was bad, and could not juſtify a ſeizure of the ſoap in the hands of the aſſignees.

Barnes v. Freeland, 6 Term Rep. 80.

Where a ſale of goods has been completed by actual delivery to the buyer, who afterwards becomes inſolvent before they are paid for; he cannot reſcind the contract, and return the goods with the conſent of the ſeller, ſo as to give the ſeller a preference to his other creditors.

Smith v. Payne, *Id.* 152.

Where a creditor, knowing his debtor to be in diſtreſſed circumſtances, and unable to pay his debt, applied to him in the firſt inſtance, about two months before his bankruptcy, for a ſecurity, and took part of his ſtock in trade for that purpoſe; it was holden, that this was not an undue preference, though the creditor did not threaten to ſue the debtor in caſe of refuſal.

Ex parte Scudamore. 3 Vez. jun. 85.

Where an inſolvent debtor, not two months before his bankruptcy, at the very time when an execution was in his houſe, upon being applied to by a creditor, who was wholly ignorant of his ſituation, gave him by way of ſecurity for his debt a letter of attorney to receive debts, Lord Chancellour inclined to think the tranſaction fair, but permitted the aſſignees to bring an action.

Bradley v. Clark, 5 Term Rep. 197.

If after a ſecret act of bankruptcy, the bankrupt pay money to a carrier for the carriage of goods, the aſſignees may recover it back in an action of *aſſumpſit*.

Pinkerton v. Marſhall, 2 H.Bl.334.

So, where a defendant againſt whom a verdict had been recovered afterwards committed a ſecret act of bankruptcy, and the plaintiff in the action not knowing of the bankruptcy, inſtead of entering up judgment and ſuing out execution, took a bill drawn by the defendant on a third perſon at a diſtant period for the amount of the ſum recovered, which bill was afterwards paid; it was holden, that this payment was not protected by the 19 *G.* 2. *c.* 32. and that the plaintiff was liable to refund to the aſſignees the money he had ſo received.

Philips v. Hunter, 2 H.Bl.402.

A., *B.*, and *C.*, being partners in trade in *England*, *A.* and *B.* reſide in *England*, and *C.* goes to a foreign country for the purpoſe of managing the concerns of the houſe in that country. *D.* is alſo reſident in *England*, where a debt is contracted by *D.* to *A.*, *B.*, and *C.* *D.* becomes inſolvent, and *C.* knowing that *D.* has ſtopped payment, and that a commiſſion of bankrupt has in fact iſſued againſt him, attaches in the name of himſelf and partners a debt due to *D.* in the foreign country by legal proceſs, and obtains payment of it under the judgment of a court of juſtice of that country. It was holden, that the aſſignees of *D.* had a right to recover the money ſo received by *C.* in an action againſt *A.*, *B.*, and *C.* for money had and received to the uſe of the aſſignees.

Minton v. Moore, 7 Term Rep. 67.

A. having contracted with a canal company to build locks and bridges on the canal as their engineer, purchaſed timber and other materials for that purpoſe, which he laid on the company's premiſes on the banks of the canal; and on the company's advancing money to him, they took a bill of ſale of theſe goods, and a ſymbolical delivery of them by a halfpenny; they afterwards took out execution upon a judgment confeſſed by *A.*, and the ſheriff ſeized theſe goods, and *A.* became a bankrupt. It was holden, that

that *A.* had not ſuch a poſſeſſion of the goods as would enable his aſſignees to take them within the 11 *Ja.* 1. *c.* 19. § 11. for the beſt delivery was given which the nature of the goods would admit of, they being before on the company's premiſes. It was holden alſo, that the bill of ſale was no act of bankruptcy in *A.*

Where *A.*, a trader and an officer in the *Eaſt India* Company's ſervice, aſſigned his privilege (being a right to ſhip goods from the *Eaſt Indies* to *England*) to *B.* for a valuable conſideration, and in order to evade the bye laws of the *Eaſt India* Company, which prohibit ſuch aſſignment, the goods were ſhipped, entered, warehouſed, and ſold by the company in *A.*'s name, and the proceeds carried to his account, but *A.* became a bankrupt before he received thoſe proceeds from the company; it was holden, that the aſſignees were entitled to recover the amount in an action for money had and received againſt the *Eaſt India* Company, this being ſuch a poſſeſſion of "goods and chattels" as falls within the 21 *Jac.* 1. *c.* 19. § 11. Gordon v. East India Company, 7 Term Rep. 228.

The commiſſioners of the Victualling-office having occaſion to erect a ſtage at *W.* for the purpoſe of rolling their barrels on board the ſhipping, publiſhed an advertiſement for carpenters to deliver in propoſals for doing the work. *Forbes* and his partners were diſpoſed to undertake the buſineſs, and to deliver in their propoſal, but inaſmuch as they were general merchants, and not carpenters, and as there might have been difficulties in making the contract in their own name, *Kent*, who was a carpenter, agreed with *Forbes* and Company to make the contract in his name; and he was to have one fourth of the clear profits, and a guinea *per* week for his ſuperintendence, and *Forbes* and Co. were to ſupply the timber, and to have the reſidue of the profits. The contract was accordingly made between the commiſſioners and *Kent*, and *Forbes* was one of *Kent*'s ſureties, which would not have been allowed (as *Forbes* himſelf knew,) according to the uſual mode of government contracts, had he been known to have any concern in the contract, which *Kent* declared he had not. The timber was bought by *Forbes* and Company, and ſhipped by them in their own name to be ſent to the yard at *W.*, where it was delivered as for *Kent*'s uſe, and received by the king's officers as ſuch; and they ſwore they ſhould not have received it on account of any other perſon; but that they ſhould not have permitted even *Kent* to diſpoſe of it in any other manner than for the work contracted for, except ſuch parts of it as were found unfit for the intended purpoſe, becauſe they conſidered it as delivered for the purpoſe of the contract. *Kent* had informed the agent victualler that *Forbes* was the real contractor, but that was a ſecret between thoſe perſons. Before the work was finiſhed *Kent* became a bankrupt, and *Forbes* thereupon getting poſſeſſion of the timber; the aſſignees brought an action of trover to recover it, on a ſuppoſition that the bankrupt's creditors were entitled to it under the ſtat. of 21 *Ja.* 1. *c.* 19. But the court held, that though the bankrupt had the *poſſeſſion* of the property, and the *apparent diſpoſition* of it, yet, as there was no fraud in the caſe, either actual or conſtructive, and as the *real property* was in *Forbes*, the ſtatute did not operate upon it: that there never was any ſale of the timber to *Kent*, nor any *general delivery ſo as to give him the abſolute diſpoſition of it*; for it appeared that the ſtore-keepers in the yard would not have permitted even *Kent* to have ſold it to any other perſon, unleſs any part of it had been unfit to be uſed in performing the contract, as they conſidered it was delivered only for the purpoſe of the contract. Therefore there Collins v. Forbes, 3 Term Rep. 316.

Upon this caſe being cited in Gordon v. East India Company, Lawrence, J. ſaid "I was "by no "means ſa- "tisfied "with the "deciſion:

" it ſtruck me, that when the timber was delivered to the officers of government in Kent's name, and for his uſe, he had the poſ-
" ſeſſion, and order, and diſpoſition of it: but the court proceeded on this ground, that the bank-
" rupt had only the poſſeſſion of the goods for a ſpecial purpoſe, and had not the order and diſ-
" poſition of them." 7 Term Rep. 237.

there was no danger that *Kent*'s creditors would be induced to truſt him on the credit of that property, or as ſuppoſing it liable to their debts.

Tooke v. Hollingworth, 5 Term Rep. 215. 2 H.Bl.501.

An agreement was entered into between *A.* and *B.* that *B.* ſhould purchaſe of *A.* all the light gold coin which he could ſend at a ſtated price, and that *A.* ſhould from time to time draw upon *B.* for the money due upon ſuch ſale; and that *B.* ſhould alſo from time to time accept other bills drawn by *A.* for his convenience, to cover which *A.* ſhould remit value to *B.* After they had acted under this agreement for ſome time, *B.* became bankrupt, being under acceptances to a great amount; and *A.* (not knowing of the bankruptcy) ſent a parcel of light gold and bills, to enable *B.* to diſcharge the acceptances, which parcel was taken by *B.*'s aſſignees. *A.* himſelf afterwards diſcharged the acceptances. As the gold and bills ſent after the bankruptcy were ſent for the particular purpoſe of paying the acceptances, and that purpoſe was not anſwered; the property in them, it was holden, remained in *A.* and he might recover from the aſſignees the amount of them.

Nixon v. Jenkins, 2 H.Bl.135.

If the aſſignees bring an action of trover for the recovery of goods colluſively ſold on the eve of a bankruptcy, they muſt prove a demand and refuſal; for in ſuch caſe, at the time of making the ſale, the parties are competent to contract; the taking of the goods is not unlawful, though the tranſaction is liable to be impeached by the aſſignees.

Clarke v. Capron, 2 Vez. jun. 666.

If after by judgment by default in an action for a dividend, the aſſignees file a bill for a diſcovery, and to have the proof of the debt expunged, a demurrer to the bill will be allowed, the regular courſe in ſuch caſe being by petition.

(G) Of ſetting off, ſubmitting to Arbitration, and compounding Debts due to the Bankrupt.

Ryall v. Larkin, 1 Wilſ. 155.

IT hath been holden in one caſe, that the ſtatutes of ſet-off could not be pleaded by a debtor to a bankrupt in an action brought againſt him by the aſſignees; for as between them there could not be mutual debts, becauſe, as the debtor could have no action againſt the aſſignees, there could not be mutual remedies. But this deciſion hath been impeached in a later caſe, and it is now ſettled, that a defendant may ſet off a debt due to him from the bankrupt; for the aſſignees are to be conſidered as the bankrupt.

Ridout v. Brough, Cowp. 135 Lock v. Bennet, 2 Atk. 49.

Ex parte Groome, 1 Atk. 119.

Contingent debts, not due at the time of the bankruptcy, cannot be ſet-off.

Hancock v. Entwiſle, 3 Term, Rep. 435.

Marſh v. Chambers, 2 Str. 1234. 1 P.W.326.

A note indorſed to a debtor of the bankrupt after the bankruptcy cannot be ſet off.

Billon v. Hyde, 1 Atk. 126.

Where there is a plain mutual credit, one party ſhall ſet off againſt the other, and the ſtatute is not to be conſtrued of dealings in trade only, o

in caſe of mutual running accounts, but in all caſes of mutual credit the balance only ſhall be paid. Therefore where *Samuel Jones* borrowed 1500*l.* of *Coggs* on mortgage, and *Coggs* owed about 1400*l.* to *Jones* upon notes, *Jones* was allowed to ſet off his demand upon the notes againſt the mortgage. 1 Atk. 237. 1 Vez. 375. Laneſborough v. Jones, 2 P. W. 325.

But if *A.* and *B.* are joint traders, and *J. S.* is indebted to *A.* and *B.* on their joint account 100*l.*, and *A.* owes ſaid *B.* 100*l.* on two ſeparate accounts; *J. S.* cannot deduct ſo much as *A.*'s proportion of the 100*l.* comes to out of the joint debt; becauſe the co-partnerſhip debts of *A.* and *B.* are to be firſt paid before any ſeparate debts; but if there be a ſurplus beyond what will pay the partnerſhip debts, then, out of *A.*'s ſhare of the ſurplus, *J. S.* may deduct the ſeparate debt of *A.* *Vide ex parte* Edwards, 1 Atk. 100., where Ld. Hardwicke doubted, Whether a perſon, a creditor under a ſeparate commiſſion againſt *A.*, and debtor under a joint commiſſion againſt *A.* and *B.*, can ſet off the debt he owes the latter, by his demand againſt the former.

Where *A.* was a creditor of the bankrupt for 100*l.* and 10*l.*, and a debtor to him on bond for 340*l.* payable on the 4th of *March* 1756, with lawful intereſt, and applied that he might ſet off his demand of 100*l.* againſt the principal and intereſt due on the bond, and not be obliged to prove his debt under the commiſſion, and take a dividend upon it only; the Lord Chancellor ſaid, though this is not in ſtrictneſs a mutual debt, yet it is a mutual credit; for the bankrupt gives credit to the party in conſideration of the bond, though payable at a future day, and he gives the bankrupt credit for the debt upon ſimple contract, and therefore it is a caſe within the equity of the 5 *G.* 2. *Ex parte* Preſcot, 1 Atk. 231. For, though the debt be paid *after* the bankruptcy, yet, if it be in conſequence of a liability *before*, it may be ſet off, Smith v. Hodſon, 4 Term Rep. 211, French v. Fenn, there cited. Martin v. Court, 2 Term Rep. 640. Dobſon v. Lockhart, 5 Term Rep. 133.

A broker having a *del credere* commiſſion may, under this ſtatute, give in evidence, upon the general iſſue, a loſs upon a policy happening before the bankruptcy in an action by the aſſignees of the underwriter, for premiums upon various policies underwritten by him. Grove v. Dubois, 1 Term Rep. 112. Bize v. Dickſon, *id.* 285. S. P.

But where there is no *del credere* commiſſion, the broker is not entitled to ſet off loſſes on goods which he inſured for other perſons, the debts being properly due to them, and not to the broker. Wilſon v. Watſon, Eſpin. *Ni. Pr.* 274.

A broker is entitled to deduct money due from the bankrupt to him, for premiums, out of what he collects on the policy, where it is put into his hands to receive the money from the underwriters. Whitehead v. Vaughan, Tr. 25 G. 3. B. R., and Parker v. Carter, in C. P. Tr 28 G. 3. Co. *Bankrupt Laws*, 647. 649.

A demand againſt a bankrupt cannot be ſet off in an action by his aſſignees for *trover* and converſion, ſubſequent to the bankruptcy, of effects belonging to the bankrupt eſtate. Wilkins v. Carmichael, Dougl. 97.

A company incorporated by charter, or act of parliament, cannot prevent the aſſignees of a bankrupt from ſelling any ſtock he is entitled to on account of a demand they may have againſt the bankrupt, for the rule relating to mutual credit does not apply to this caſe. But, if there is an expreſs bye-law to ſubject the ſtock of each member to ſatisfy the debts they may owe to the company, they are at liberty to hold it, and to account only for the balance. Gibſon v. *Hudſon's-Bay* Company, 1 Str. 645. 1 Eq. Ca. Abr. 9.

Debts due in different rights cannot be ſet off. Biſhop v. Church, 3 Atk. 691.

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(*By the said Statute*) Creditors cannot give a general power to aſſignees to ſubmit matters to arbitration, at their own diſcretion; but there muſt be a meeting of creditors upon notice in *Gazette*, to conſider each particular caſe. 1 Atk. 91. pl. 39.

Dickſon v. Evans, 6 Term Rep. 57.

In an action by the aſſignees the defendant cannot ſet off caſh notes, iſſued by the bankrupt, payable to *bearer*, bearing date before the bankruptcy, unleſs he ſhew that ſuch notes came to his hands before the bankruptcy: but, if they be made payable to *the defendant himſelf*, that will be reaſonable evidence of their having come to his hands at the time they bear date.

Ex parte Quinten, 3 Vez. jun. 248.

Where there was a ſeparate commiſſion of bankrupt againſt one partner, and the other partner paid all the joint debts; a debtor to the partnerſhip, who was alſo a ſeparate creditor of the bankrupt, was allowed to ſet off againſt the bankrupt's ſhare of the joint debt, and to prove the reſidue under the commiſſion, the ſolvent partner conſenting to receive his ſhare.

(H) Of the Diſtribution to be made of the Bankrupt's Eſtate.

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(*By* 5 *G.* 2. *c.* 30. § 33.) The Chancellor will not interfere till the four months have elapſed. Cooper v. Pepys, 1 Atk. 111. And it ſeemeth doubtful whether he will interfere until application hath been made to the commiſſioners. See *ex parte* Whitchurch, *id.* 91. Co. *Bankrupt Laws*, 588. Aſſignee cannot ſtop creditor's dividend on account of his own private debt due from ſuch creditor. 1 Atk. 90. But *qu.* of this? and ſee *ex parte* Nockold, 29th June 1734. Co. *Bankrupt Laws*, 590. Upon affidavit of creditor that he has not read the *Gazette*, he will be admitted ſo as not to diſturb former dividends; and commiſſioners cannot proceed to make a ſecond till he is brought up equal to the creditors under the firſt, provided he hath obtained an order for that purpoſe. 1 Atk. 209.

Ex parte Smith, 3 Br. Ch. Rep. 46.

If a creditor has obtained an unfair poſſeſſion of the bankrupt's property, his ſhare of the dividend may be retained, until he gives up the property of which he hath ſo poſſeſſed himſelf.

(I) How the Bankrupt is to demean himſelf; and herein of the Crime in not appearing, and diſcovering his Eſtate, and the Privilege he is to enjoy during his Attendance.

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(*By* 5 *Geo.* 2. *cap.* 30. § 1.) On a petition to Lord Hardwicke, that the clerk of the commiſſion might be ordered to attend at the *Old Bailey*, with the proceedings upon a proſecution againſt the bankrupt for felony in not ſurrendering; his Lordſhip ſaid, that a court of equity will not lend its aid to ſuch a proſecution; but that the petitioner muſt go on in ſuch manner as the law preſcribes to prove him a bankrupt and a felon, within the meaning of the act of parliament. 1 Atk. 221. Lord Macclesfield, his Lordſhip added, in ſeveral inſtances, ſuperſeded the commiſſion in order to prevent ſuch a proſecution, where a bankrupt did not ſurrender himſelf in due time; and there did not appear any intention in him to defraud his creditors. *Id.* 222.

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(*By* § 2.) They have alſo power to examine him, as to a farther diſcloſure of his eſtate and effects, after he has paſſed, what is uſually called, his laſt examination. 2 Burr. 1124.

(*By* § 3.) If by a *mere innocent* default of the bankrupt, he has neglected to ſurrender himſelf on the day appointed, the chancellor may, upon petition, make an order, that the commiſſioners appoint a new day for taking the examination. *Ex parte* Graham, 2 Br. Ch. Rep. 48. *Ex parte* Bos-

Bould, *id.* 49. *Ex parte* Smith, Co. *Bankrupt Laws*, 521. *Ex parte* Rogers, Ambl. 307. *Ex parte* Grey, 1 Vez. jun. 195. *Ex parte* White, 2 Br. Ch. Rep. 47. But ſuch order will not avoid the effect of the ſtatute; it is only declaratory of the opinion of the court, that the bankrupt had no intention of keeping out of the way fraudulently. It therefore recites the ſpecial circumſtances of the caſe. See the above authorities.

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(*By* § 4.) It ſeemeth doubtful, whether the bankrupt can be compelled to a performance of his duty after the forty-two days, or the enlarged time fixed for his ſurrender, are elapſed. *Ex parte* Turner, 1 Atk. 148.

(*By* § 5.) This is a particular privilege to enable the bankrupt to ſurrender; and, until actual ſurrender, confined to the act of his going *with that view*; not a *general* privilege during the whole time which the act allows him to ſurrender in. Nevertheleſs, if a bankrupt be abroad, and upon his return with an intention to ſurrender, be arreſted on his landing, before he can conveniently make his ſurrender, the privilege ſhall extend to him; but it muſt appear that he was actually going to ſurrender. Kenyon v. Solomon, Cowp. 156. Co. *Bankrupt Laws*, 142. A bankrupt may be taken, and ſurrendered by his bail within the time of privilege; for this act is no protection but againſt the ſuits of creditors. *Ex parte* Gibbons, 1 Atk. 238.

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(*By* § 36.) The bankrupt has no right to maintenance out of his effects during his examination. Thomſon v. Councel, 1 Term Rep. 157.

If after two petitions diſmiſſed a bankrupt preſents a third for the ſame purpoſe, it will be diſmiſſed with coſts; and if not able to pay them, he muſt be committed. But it is not competent, it ſeems, to the court to make an order to reſtrain him from preſenting any more petitions. *Ex parte* Shaw, 2 Vez. jun. 40.

(K) Of the Overplus of the Bankrupt's Eſtate, and the Allowances to be made him; and herein of his Diſcharge and Certificate.

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(*By* 13 *Eliz. cap.* 7.) See *acc.* 1 J. 1. c. 15. § 15. If the bankrupt's eſtate is more than ſufficient to pay 20*s.* in the pound, he is entitled to the ſurplus; but all creditors by bonds, contracts, or notes carrying intereſt, are entitled to receive intereſt out of the eſtate for the principal ſum owing at the time of the commiſſion, before any ſurplus ſhall be conveyed to the bankrupt or his repreſentative. *Ex parte* Rooke, 1 Atk. 244. Bromly v. Goodere, *id.* 80. *Ex parte* Hyde, Dec. 1783. *Ex parte* Morris, 3 Br. Ch. Rep. 79. *Ex parte* Hankey, *id.* 504. *Ex parte* Champion, *id.* 438. But *qu.* of this right of the creditor to intereſt?

(*By* 5 *Geo.* 2. *cap.* 30. § 7.) 1 Jac. 1. c. 15. A clauſe to the ſame effect. Bankrupts are not entitled to allowance under this act, till a *final* dividend is made, and they have had their certificate. 1 Atk. 208. The allowance is a veſted intereſt, and tranſmiſſible to the bankrupt's repreſentative. *Ex parte* Trap, *id. ibid.* *Ex parte* Calcot, *id.* 209. 3 Atk. 814. S. C. The ſame perſon is not entitled to a double allowance; one, in reſpect of a joint, and the other, in reſpect of a ſeparate eſtate. *Ex parte* Bate, Co. *Bankrupt Laws*, 592. Nor does the ſtatute give a diſtinct allowance of 300*l.* to each partner, when joint creditors are paid 15*s.* in the pound. *Ibid.* If there is any appearance of fraud on the part of the bankrupt, the court will not interfere in this ſummary way. Vincent v. Brady, 2 H. Bl. 1. Sowley v. Jones, 2 Bl. Rep. 725. The defendant may plead thus generally, without ſtating that he hath conformed according to the bankrupt acts. Willan v. Geordini, Tr. 1782, B. R. The caſe of Paris v. Salkeld, 2 Wilſ. 139. *contr.* denied to be law. He muſt be careful to ſtate, that the cauſe of action accrued before the bankruptcy. Charlton v. King, 4 Term Rep. 156. As this plea concludes to the country, the plaintiff may give the ſpecial matter, on which the action is brought, in evidence, to ſhew that he is not barred by the certificate; for it opens the whole merits of the queſtion in evidence on both ſides. Alſop v. Price, Dougl. 160. This point, however, hath been queſtioned by high authority; and it hath been thought, that the plaintiff ſhould ſet out in his declaration, the matter of which he wiſhes to avail himſelf.

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(*Provided that no*) Upon this clauſe of the ſtatute, it hath been ſaid, that a *mandamus* will not lie to compel the allowance of the certificate; for it is diſcretionary; firſt, in the commiſſioners, and afterwards, in the chancellor, to grant or refuſe it, according to the behaviour of the bankrupt.

rupt. 1 Atk. 82. The chancellor, having then the power of granting or refuſing the certificate, can, of courſe, poſtpone it. And this he will do if creditors live at a diſtance, in order to give them an opportunity of coming in, and proving their debts. *Ex parte* Williamſon, 1 Atk. 82. 2 Vez. 249. *Ex parte* Sauſmerez, 1 Atk. 84. Or if the commiſſioners ſeem to have been over-haſty in ſigning it. *Id. ibid.* But he will not ſtay it, in order to give a creditor an opportunity of proving his debt, who does not account for his delay in not applying earlier. *Ex parte* Adams, 2 Br. Ch. Rep. 48.; nor upon the application of creditors whoſe demands are not liquidated; but depend on an account to be taken, eſpecially if they do not ſwear to a balance in their favour. *Ex parte* Johnſon, 1 Atk. 81. For, unleſs a perſon proves a debt, or ſhews a reaſonable ground for a claim, he is not competent to aſſent to, or diſſent from, the certificate. 1 Atk. 83. A certificate, allowed in the bankrupt's life-time, may be confirmed after his death; for it deriveth its operative force from the conſent of the creditors, and, when confirmed, hath relation to the time when ſuch conſent was given. 1 Atk. 77. But the relation doth not operate ſo as to defeat an execution, or to veſt in the bankrupt effects coming to him between the ſigning and allowing of the certificate. Callen v. Meyrick, 1 Term Rep. 361. Tudway v. Bourn, 2 Burr. 716. An executor may ſign the certificate; but a perſon who hath a debt in his own right, and another debt as executor, cannot ſign in each diſtinct right; for, to this purpoſe, both are conſidered as his own particular debt. *Ex parte* Sauſmerez, 1 Atk. 85. If the property of the principal creditor, upon his death, devolves upon the bankrupt, the bankrupt himſelf may ſign the certificate; for, otherwiſe, his perſon could never be releaſed, as no one elſe is or can be qualified to ſign it for him. Green, 260.

By ſtatute 24 *G.* 2. *c.* 57. § 9. it is enacted, "That where any perſon "ſhall fraudulently ſwear or depoſe, or, being of the people called Quakers, affirm, before the major part of the commiſſioners named in any "commiſſion of bankruptcy, or by affidavit or affirmation exhibited to "them, that a ſum of money is due and owing to him or her from any "bankrupt or bankrupts, which ſhall in fact not be really and truly ſo due "and owing; and ſhall, in reſpect of ſuch fictitious or pretended debt, "ſign his or her conſent to the certificate for ſuch bankrupt's diſcharge "from his debts; in every ſuch caſe, unleſs ſuch bankrupt ſhall, before "ſuch time as the major part of the ſaid commiſſioners ſhall have ſigned "ſuch certificate, by writing by him to be ſigned and delivered to one or "more of the ſaid commiſſioners, or to one or more of the aſſignees of "his eſtate and effects under ſuch commiſſion, diſcloſe the ſaid fraud, and "object to the reality of ſuch debt, ſuch certificate ſhall be null and void "to all intents and purpoſes; and ſuch bankrupt ſhall not in that caſe be "entitled to be diſcharged from his debts, or to have or receive any of "the benefits or allowances given or allowed to bankrupts by the act of "5 *G.* 2. *c.* 30."

And by § 10., "Where any creditor or creditors of any bankrupt "reſide in foreign parts, the letter of attorney of ſuch creditor, atteſted "by a notary publick in the uſual form, ſhall be a ſufficient evidence of "the power and authority by which any perſon thereby authoriſed ſhall "ſign any bankrupt's certificate."

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(*By* 5 *Geo.* 2. *c.* 30. § 11.) See Sumner v. Brady, 1 H. Bl. 647. Robſon v. Calze, Dougl. 228. Jones v. Berkley, *id.* 695. As it is illegal for a creditor to take, ſo it is for him to retain money given him for ſigning the certificate. Smith v. Bromley, Dougl. 696. Cockſhot v. Bennet, 2 Term Rep. 766. An agreement to pay a ſum of money to the aſſignees, if they will ſign the certificate, is within the letter and reaſon of this clauſe. Dougl. 695.

(*Provided that*) Lord Hardwicke ſaid, that this clauſe muſt be conſtrued ſtrictly, and not extended further than the children of the bankrupt. 1 Atk. 86. Inſuring in the lottery is not gaming within this clauſe. Lewis v. Piercy, 1 H. Bl. 29. Nor is it any ground for oppoſing the certificate, that the bankrupt kept a lottery-office, or obtained goods under falſe pretences. *Ex parte* Richardſon, 21ſt Dec. 1791. Co. *Bankrupt Laws*, 555. A creditor under 20*l.* though excluded from aſſenting to or diſſenting from the certificate, yet, like a creditor who elects to proceed at law, hath a right to petition againſt the allowance of it; and for the ſame reaſon, becauſe he is affected by the conſequences of the allowance. *Ex parte* Allen, Vin. Abr. tit. *Creditor and Bankrupt*, (S. a) pl. 18.

A

As to the effect of the certificate, it diſcharges the bankrupt from all debts, both joint and ſeparate, that might have been proved under the commiſſion; therefore, it diſcharges a bankrupt from a debt accruing before the act of bankruptcy, though judgment is not obtained till after the certificate allowed. Horſey's caſe, 3 P. W. 23. Twiſs v. Maſſey, 1 Atk. 67. Wickes v. Strahan, 2 Str. 1157.

As where a bankrupt had given a bail-bond to the ſheriff which was forfeited before the bankruptcy for non-appearance, and an action was brought upon this bail-bond, but judgment not obtained till after the certificate allowed; the court held there was a breach, and that the penalty was forfeited, and therefore the debt was due, though execution could not be taken out for more than the damages. *Ex parte* Simpſon, 1 Atk. 138. *Ex parte* Goodwyn, 2 Vern. 696. Blackhall v. Combs, 2 P. W. 70. Boutcflower v. Coats, Cowp. 25. 2 Str. 1042. Ca. Temp. Hardw. 267.

Again, *Jones* had employed *Bird*, who was an attorney, to recover a debt. *Bird* undertook the buſineſs and recovered the money, but, as *Jones* alleged, had not paid over to him the fair balance, and in 1788, he applied to the court of King's Bench, of which court *Bird* was an attorney, for the uſual rule of reference to the maſter, on an undertaking to pay what ſhould appear due. *Bird* ſhewed cauſe, but the rule was made abſolute, after which, and before any proceedings upon it, *Bird* became bankrupt, and in 1788 obtained his certificate. A rule was now obtained to revive the former rules, but, on ſhewing cauſe, the court diſcharged that rule, ſaying the certificate was a clear bar to the demand. They alſo ſaid, that after ſuch lapſe of time, the court would not proceed to give relief in a ſummary way. The party might proceed as he ſhould be adviſed. Bird v. Jones, Mich. 29. G. 3. B. R. Co. *Bankrupt Laws*, 566.

So if a perſon enters into a bond with a trader as a ſurety for him, and, for his own indemnity, takes a counter-bond payable the day before the firſt; though the trader become bankrupt before either of the bonds be payable, the party may yet prove his bond under the commiſſion. Martin v. Court, 2 TermRep. 640.

A., wanting money, prevails with *B.* to lend him his name, by indorſing his note to be diſcounted at the bank; and gives him, as a ſecurity, a debenture, making it negotiable. *B.* pledges the debenture with another perſon, for money advanced to him. *A.* pays the note at the bank, and ſoon afterwards *B.* becomes a bankrupt, and then *A.* redeems the debenture by paying the money, for which it remained a pledge. This is a debt proveable by *A.* under *B.*'s commiſſion, and diſcharged by the certificate. Johnſon v. Spiller, Dougl. 167.

If an executor becomes bankrupt, a veſted legacy, though liable to be deveſted, may be proved under the commiſſion, and is, of courſe, diſcharged by the certificate. Walcot v. Hall, 2 Br. Ch. Rep. 305.

The certificate is a bar to an action brought againſt the huſband for a debt due from the wife, *dum ſola*, becauſe by the marriage it becomes a debt due from the huſband. Miles v. Williams, 1 P. W. 249.

In an action of *debt* for rent, the certificate will be a bar, becauſe the aſſignment of the leaſe by the commiſſioners is conſidered as an aſſignment by the aſſent of the leſſor, all perſons being ſuppoſed to conſent to an act of parliament, by the authority of which the commiſſioners aſſign the bankrupt's property; and therefore as the bankrupt is no longer in the enjoyment of the thing demiſed, *debt* does not lie for the rent. Cantrel v. Graham, Barnes, 69. So in *debt* on the *reddendum* of a leaſe, Wadham, v. Marlow, M. 25 G. 3. B. R. Mills v. Auriol, 1 H. Bl. 433. *Secus* of *covenant* for non-payment of rent. *Ibid.*

Baker's caſe, 2 Str. 1152.

If a man be attached for non-payment of money in obedience to an award, and afterwards become bankrupt, the certificate entitles him to his diſcharge; for as the act diſcharges the duty, it would be hard to detain the perſon.

Ballantine v. Golding, Mich. 24 G. 3. B. R. The bankrupt laws are now adopted in *Ireland*.

On a motion to enter an *exoneretur* on the bail-piece, it appeared, that the defendant had been a bankrupt, and obtained a certificate under the great ſeal of *Ireland*. The original demand aroſe upon a bill of exchange drawn in *Ireland*, and payable by the defendant who reſided there. Lord *Mansfield* ſaid, it is a general principle, that where there is a diſcharge by the law of one country, it will be a diſcharge in another. That he remembered a caſe in Chancery of a *ceſſio bonorum* in *Holland*, which is held a diſcharge in that country, and it had the ſame effect here. The rule was enlarged, and was afterwards made abſolute by conſent, the counſel giving it up upon the authority of *Burrows* v. *Jemino*.

Ex parte Burton, 1 Atk. 255. 2 Stra. 733. Palmby v. Maſters, Barnes, 368. Graham v. Benton, 2 Str. 1196. 1 Wilſ. 41.

A certificate obtained pending an action, but too late to be pleaded, diſcharges the bankrupt from the original debt and ſubſequent coſts. But it hath been determined, that, if after the certificate the bankrupt's goods are taken in execution, the court will not proceed in a ſummary way (*a*), but put the party to his *audita querela*.

Blandford v. Foote, Cowp. 138. Lewis v. Piercy, 1 H. Bl. 29. (*a*) Calcraft v. Swan, Barnes, 204; and *qu.* Whether the courts would now put the party to that expence?

Cowp. 25. Stra. 868. 1043. 1160. 1 Atk. 119. 129. 3 Wilſ. 13. 262. Rex v. Egginton, 1 Term Rep. 369, and *ſupra*. (E).

A certificate does not diſcharge a bankrupt from a contingent debt which has not been reduced to a certainty, becauſe it cannot be proved under the commiſſion, and in queſtions, Whether a debt is diſcharged or not by a certificate? the point agitated has always been, whether it could be proved or not; the creditor's right to prove, and the bankrupt's right to be diſcharged by the certificate, being reciprocal and co-extenſive.

Mayor v. Steward, 4 Burr. 2443. Ludford v. Barber, 1 Term Rep. 86.

A certificate will not diſcharge the bankrupt from his own expreſs collateral covenant which doth not run with the land. Thus, on a covenant by the bankrupt to indemnify the aſſignor againſt covenants contained in a leaſe, which leaſe was aſſigned to the bankrupt before his bankruptcy, for his ſole benefit; the queſtion was, Whether the bankrupt's obtaining his certificate would bar this action of covenant? The court were clearly of opinion, that as this was not a caſe between leſſor and leſſee, but a diſtinct, detached, collateral, independent covenant and contract, and as the aſſignor could have no remedy under the commiſſion, the bankrupt was not diſcharged by his certificate.

Cockeril v. Owſton, 1 Burr. 434.

The certificate obtained after judgment upon a bail-bond againſt the bankrupt himſelf will not diſcharge the bail-bond, although it diſcharged the original debt, for it is a new and diſtinct cauſe of action.

Goodtitle v. North, Dougl. 584. Gulliver v. Drinkwater, 2 Term Rep. 261. Dougl. 168.

Bankruptcy is no plea in bar to an action of *treſpaſs for meſne profits*; for where damages are uncertain, they cannot be proved under the commiſſion.

A demand in *trover*, if for a liquidated amount, may be proved. But if *A.* lend ſtock to *B.*, to be replaced as ſtock, without naming any particular day, and *B.* become a bankrupt before any requeſt by *A.* to replace the ſtock, *A.* cannot come in under *B.*'s commiſſion. Utterſon v. Vernon, 4 Term Rep. 570.

Howard v. Jemmet, 1 Bl. 400.

A bankrupt executor pleading a falſe plea, after the commiſſion iſſued, is liable to execution for the coſts, for he becomes a debtor by his falſe

falſe plea, which amounts to contracting a new debt ſubſequent to the commiſſion.

The crown not being affected by the bankrupt laws, the certificate will not diſcharge the bankrupt from a commitment under an extent. Anon. 1 Atk. 262.

The allowing of the certificate of a bankrupt will not diſcharge his ſureties; and if they are forced to pay the debt after the commiſſion, the certificate will be no bar to their recovering it of the principal. 1 Atk. 84. See Taylor v. Mills, Cowp. 525.

Young v. Hockley, 2 Str. 1043. 1 Atk. 84.

But if a bankrupt obtains his certificate before his bail are fixed, it will diſcharge them. *Secùs*, if not till after they are fixed. Wooley v. Cobbe, 1 Burr. 244.

Tudway v. Bourn, 2 Burr. 716. Walker v. Giblet, 2 Bl. 812.

A certificate under a ſecond commiſſion will not protect future effects, unleſs fifteen ſhillings in the pound are paid under the ſecond commiſſion, notwithſtanding the firſt has been ſuperſeded. Thornton v. Dallas, Dougl. 46.

But a certificate under a ſecond commiſſion, during the ſubſiſtence of the firſt, is a mere nullity. Martin v. O'Hara, Cowp. 823.

Ex parte Proudfoot, 1 Atk. 252. *Ex parte* Brown, 4 Br. Ch. Rep. 210.

As the certificate diſchargeth only ſuch debts as are proveable under the commiſſion; as the ſtatutes leave the bankrupt at liberty to enter into new engagements, and contract new debts; and as the debts proveable under the commiſſion are, notwithſtanding the certificate, due in conſcience; a new promiſe or agreement by the bankrupt, to pay the whole, or part of ſuch debts, will, therefore, be obligatory on him. *Ex parte* Burton, 1 Atk. 255. Twiſs v. Maſſey, *id.* 67. Truman v. Fenton, Cowp. 544.

The payment of intereſt by the *bankrupt himſelf* on a bond, will be ſuch an admiſſion, as will make him liable as on a new debt. Alſop v. Brown, Dougl. 192. See too, Beaford v. Saunders, 2 H. Bl. 116. But if the bankrupt promiſe to pay, *when he is able*, *query*, Whether it be not incumbent on the plaintiff to prove his ability? *Id.*

The certificate determines the power of the commiſſioners, and, of courſe, incapacitates them from making a ſubſequent aſſignment. 1 P. Wms. 386.

The certificate may be entirely defeated by a *ſuperſedeas*. 1 Atk. 145.

And the writ of *ſuperſedeas* may be iſſued at the diſcretion of the chancellor, when the creditors, who have proved, agree to ſuperſede the commiſſion; or becauſe the party appears not to have been a trader, or was an infant, or had not committed an act of bankruptcy, or that the commiſſion was not opened till ſix months after it iſſued, or that it has not been proſecuted within fifteen days from the date of it, if executed in *London*, or within twenty-nine days, if in the country, or that he has paid all his creditors. 1 Vern. 208. 2 Ch. Ca. 292. Sel. Ch. Ca. 46. 1 Atk. 135. 146. 2 P. Wms. 545. 4 Br. Ch. Rep. 432.

So if the petitioning creditor had not a legal debt to the amount ſpecified in the ſtatute, or if his debt accrued ſubſequent to an act of bankruptcy aſcertained by a trial at law, or if it iſſued againſt an uncertificated bankrupt, or on a debt barred by the ſtatute of limitations, or if at the time it iſſued the petitioning creditor had the debtor in execution, or if it was fraudulently iſſued, in which caſe, indeed, the court will puniſh the parties concerned by commitment, and by making them pay the coſts. 2 Bl. Rep. 702. 1 Str. 653, 4 Br. Ch. Rep. 210. 3 Wilſ. 271. 1 Ves. jun. 394.

But upon an application to the lord chancellor, on the part of the bankrupt, to ſuperſede the commiſſion upon a legal objection to it, if the caſe appear unfavourable, as if a great length of time has intervened between the 1 Atk. 102. *Ex parte* Gulſton, 1 Atk. 193. 139.

the iſſuing of the commiſſion and the application, the chancellor will not grant an iſſue to try the bankruptcy, but leave the property to bring his action. However, if creditors apply to have the commiſſion ſuperſeded, it ſeemeth the chancellor will order the bankruptcy to be tried in an iſſue, becauſe they can have no action at law, in which the validity of the commiſſion can be conteſted, as the bankrupt's certificate is a concluſive bar againſt them, that of itſelf being evidence of the commiſſion, *&c.*

Though the uſual courſe is for the lord chancellor to order a feigned iſſue to try the bankruptcy at law; yet if the commiſſion appears plainly to have been taken out fraudulently and vexatiouſly, the court will at once ſuperſede it, and order the petitioning creditor's bond to be aſſigned.

Richardſon v. Bradſhaw 1 Atk. 128. 218. *Ex parte* Gayter 1 Atk. 144.

But where a commiſſion is ſuperſeded merely becauſe there is a defect in form, as to the petitioning creditor's debt, and no doubt as to the act of bankruptcy, the coſts of the *ſuperſedeas* only ſhall be allowed; but it would be otherwiſe, if the act of bankruptcy was not fully proved.

Ex parte Goodwin, 2 Atk. 100.

If there be a ſurplus coming to a bankrupt, the creditors ſhall have intereſt out of it, wherever it is apparent, either upon the face of the ſecurity or by evidence, that there was a contract for it.

Ex parte Mills, *Id.* 295.

A bankrupt cannot call upon his aſſignees for his allowance under the ſtat. of 5 *G.* 2. *c.* 30. § 7. (his eſtate paying 10*s.* in the pound,) if his certificate be not allowed before payment of the dividends.

Groome v. Potts, 6 Term Rep. 548.

If a judgment be recovered againſt a party, before he becomes bankrupt, and it be revived by *ſcire facias* after the bankruptcy, the coſts of the *ſcire facias* relate back to the judgment, and may be proved under the commiſſion. So, if a writ of error be brought after the bankruptcy to reverſe a judgment obtained before, and the judgment be affirmed, the coſts of the writ of error refer to the judgment. In either caſe therefore the certificate diſcharges the bankrupt as well from the coſts as the judgment.

Phillips v. Brown, *Id.* 281.

Rolfe v. Caſlon, 2 H. Bl. 570.

A. draws a bill of exchange upon *B.* payable to the order of *A.*, which *B.* accepts, and *B.* draws a bill upon *A.* payable to the order of *B.*, which *B.* accepts, for their mutual accommodation. Both bills are payable at the ſame time, are of the ſame date, and for the ſame ſum. Theſe bills are mutual engagements, conſtituting on each part a debt, the one being a conſideration for the other: they are not mutually given as an indemnity, which is in its nature conditional, but create an abſolute debt from the beginning, ſo that if either party becomes bankrupt, the bill accepted by him may be proved under his commiſſion, and being ſo provable is neceſſarily barred by the certificate.

Quin v. Keefe, 2 H. Bl. 553.

The court of Common Pleas have refuſed to diſcharge a defendant, who was holden to bail for a debt contracted *in this country*, out of cuſtody, on a common appearance, upon an affidavit of his having become a bankrupt in *Ireland*, and there obtained his certificate. In ſuch caſe, they ſaid, he muſt at leaſt plead the certificate. But a general plea of bankruptcy, referring to an *Iriſh* act of parliament, and concluding to the country in a mode ſimilar to that given by *ſtat.* 5 *G.* 2. *c.* 30. § 7. to bankrupts in *England*, they held to be clearly bad.

In a late caſe in the Exchequer, a motion to diſcharge a defendant out of cuſtody on the ground of a bankruptcy and certificate in Ireland was rejected, becauſe the affidavit did not ſtate the effect of the certificate by the laws of Ireland. Anon. Anſtr. 80. In this caſe it does not appear whether the debt was contracted in this country or in Ireland.

A certificated

A certificated bankrupt is not a competent witneſs to prove the debt of the petitioning creditor, or any other fact neceſſary to ſupport the commiſſion. Chapman v. Gardner, 2 H.Bl.279.

But, where the aſſignees ſigned the certificate, and got a releaſe from the bankrupt, in order to produce him as a witneſs to prove a debt to his eſtate; this was admitted to be a fair tranſaction. Selby v. Crew, Anſtr. 504.

The certificate, though ſigned, yet, till allowed, operates as nothing. Where, therefore, a lottery-ticket was given to the bankrupt by a creditor who had ſigned his certificate, as a mark of his approbation of his conduct, and the ticket was drawn a conſiderable prize before the allowance of the certificate, it was claimed and ſhared by the creditors at large. 7 Term Rep. 297.

If an uncertificated bankrupt bring an action, the benefit of which, if he ſucceeds, muſt accrue to his aſſignees, the court will compel him to give ſecurity for the coſts. Webb v. Ward, 7 Term Rep. 296.

Whether an uncertificated bankrupt can maintain any action for property acquired ſubſequent to his bankruptcy, whether any one but the aſſignees may diſpute his title, is a point upon which the opinions of the courts of *Weſtminſter-Hall* are not ſettled. The court of Common Pleas have lately determined in favour of his competency to maintain ſuch action. But the queſtion is ſtill pending in the court of King's Bench. Fowler v. Down, E. 37 G. 3. C. B.

(L) Of Partners.

A Separate commiſſion may iſſue againſt one partner without making the reſt bankrupts. But where a joint commiſſion is proſecuted, all the partners muſt be included; for a commiſſion againſt two or more of ſeveral partners, is neither joint nor ſeparate. Allan v. Hartley, M. 25 G. 3. B. R. Co. *Bankrupt Laws*, 7.

But by ſtat. 10 Ann. c. 15. § 3. the certificate, under a ſeparate commiſſion, will not diſcharge any other than the bankrupt partner, from a joint debt. It was formerly the practice to take out a ſeparate commiſſion againſt each partner, and then a joint commiſſion againſt all; the chancellor, upon recent application, directing the former to be ſuperſeded, in order to give validity to the latter, under which both ſets of creditors might have their proper relief. 1 Atk. 98. 138. But it ſeemeth now to be holden, that whilſt there is a ſeparate commiſſion ſubſiſting, a joint one cannot be ſupported. Cowp. 824. 1 Atk. 252. 4 Br. Ch. Rep. 210. Co. *Bankrupt Laws*, 9.

Joint creditors are entitled to a diſtribution of the joint or partnerſhip eſtate, without the ſeparate creditors being permitted to participate with them: but notwithſtanding ſeparate creditors are not entitled to ſhare the dividend of the joint property, until the joint creditors have received twenty ſhillings in the pound, yet they are upon petition let in to prove their reſpective ſeparate debts under the joint commiſſion, *paying contribution to the charge of it*; and as the joint or partnerſhip eſtate is in the firſt place to be applied to pay the joint or partnerſhip debts, ſo in like manner, the ſeparate eſtate ſhall be in the firſt place applied to pay all the ſeparate debts. This is ſettled as a rule of convenience, and it is reſolved, that if there be a ſurplus of the joint eſtate, beſides what will pay the joint creditors, the ſame ſhall be allotted in due proportion to the ſeparate eſtate of ſuch partner, and applied to pay the ſeparate creditors. And if there be on the other hand a ſurplus of the ſeparate eſtate, beyond what will ſatisfy the ſeparate creditors, it ſhall go to ſupply any deficiency that may remain as to the joint creditors. Co. *Bankrupt Laws*, 297. *Ex parte* Sandon, 1 Atk. 68. *Ex parte* Crowder, 2 Vern. 706. *Ex parte* Bond, 1 Atk. 98. *Ex parte* Rowlandſon, 3 P. W. 405. Goſs v. Du Freſnoy, Davies, 373. *Ex parte* Cook, 2 P. W. 501.

This

Ex parte Baudier, 1 Atk. 98. *Ex parte* Oldknow, 8 May 1783, Co. *Bankrupt Laws*, 299.

This mode of adjuſting the rights of each claſs of creditors where a joint commiſſion is taken out, ſeems at one time to have been extended by the court into a rule, to direct the proof of debts under a ſeparate commiſſion, by virtue of which the ſeparate eſtate only can be aſſigned, and therefore it was holden, that joint creditors could not prove under ſuch a commiſſion, except for the purpoſe of aſſenting to, or diſſenting from, the bankrupt's certificate.

Ex parte Hodgſon, 2 Br. Ch. Rep. 5.

But it is now fully eſtabliſhed, that joint creditors may be permitted to prove under ſeparate commiſſions, and receive a dividend in proportion with the ſeparate creditors.

Ex parte Page, *id.* 119. *Ex parte* Flintam, 1 Br. Ch. Rep. 120. *Ex parte* Hayden, 24th June 1785. *Ex parte* Copland, 24th Dec. 1787.

Hankey v. Garrat, 3 Br. Ch. Rep. 457. *Ex parte* Lydiard, 19th May 1790. Laſabloniere v. Swinton, 18th June 1793.

Where the aſſignees under a ſeparate commiſſion poſſeſs themſelves of the joint property, it may frequently be to the intereſt of the joint creditors, that diſtinct accounts ſhould be kept of the joint and ſeparate eſtate, and each applied to the payment of the reſpective creditors; and an order to this purpoſe may, *with conſent*, be obtained upon petition: but as the ſolvent debtor hath an intereſt in the diſtribution of the joint property, and the demands which may be made upon it, if he do not conſent, relief cannot be had without a bill.

Co. *Bankrupt Laws*, 311, 12.

Ex parte Marlin, 2 Br. Ch. Rep. 15, *Ex parte* Parker, 22d. Dec. 1791. Co. *Bankrupt Laws*, 314.

Where perſons in trade have been connected in various partnerſhips, and a joint commiſſion is taken out againſt them all, an order hath been made for keeping diſtinct accounts of the different partnerſhips, as well as the ſeparate eſtates of each partner. But where there have been various partnerſhips, and a joint commiſſion is taken out againſt one firm, in which ſome of the parties were not engaged, there can be only the common order for keeping the diſtinct accounts of the joint and ſeparate eſtate.

Ex parte Blankenhagen, June 23, 1785. *Ex parte* Banks, 1 Atk. 106. *Ex parte* Bond and Hill, 1 Atk. 98. *Ex parte* Rowlandſon, 3 P. Wms. 405. (*a*) *Ex parte* Clowes, 2 Br. Ch. Rep. 595.

Where there is a joint and ſeveral creditor, he muſt, according to the rule of the court now firmly eſtabliſhed, make his election whether he will come in upon the joint or the ſeparate eſtate, that is, which he will come in upon in *preference*; for whichever he may elect, he will be entitled to come in upon the ſurplus of the other, if there ſhould be any. And in order (*a*) to make his election, he muſt have a reaſonable time to inquire into the ſtate of the different funds; and it hath been determined, that he is entitled to defer his election until a dividend.

Ex parte Smith, 1 P. Wms. 237.

A. lent money upon bond to *B.* and *C.*; *B.* became bankrupt, and afterwards *A.* ſued *C.* upon the bond, and took him in execution, but conſented to his diſcharge. Upon application by *A.* to Lord *Harcourt*, to prove under *B.*'s commiſſion; his lordſhip permitted him to come in as a creditor for a moiety; and ſaid he would have admitted him for the whole, if, in fact, the whole had been lent to *B.*

Keble v. Thompſon, 3 Br. Ch. Rep. 112.

If one truſtee ſuffer a co-truſtee to detain a ſum of money belonging to the truſt eſtate, they are both liable, and if they afterwards become bankrupt, the debt may be proved under both their commiſſions.

Weſt v. Skipp, 1 Ves. 242.

Partners being joint-tenants in their ſtock and effects, both original and accruing, and therefore ſeiſed *per my et per tout*, upon an account being taken, each is entitled to be allowed againſt the other any thing he has brought

brought in as a partnerſhip tranſaction, and to charge the other in account with what that other has not brought in, or has taken out more than he ought; and nothing is to be conſidered as his ſhare, but his proportion of the reſidue upon balance of the account. Upon this principle, where one of three partners had embezzled and waſted the joint ſtock, and contracting private debts become a bankrupt; the court ſeemed to think, that out of the produce of the goods, the debts owing by the joint trade ought to be paid in the firſt place, and that out of the bankrupt's ſhare, ſatisfaction muſt be made for what he had waſted or embezzled; and that the aſſignees could be in no better caſe than the bankrupt himſelf, and were entitled only to what his third part would amount unto, clear after debts paid, and deductions for his embezzlement.

Cowp. 471. 2 Ld. Raym. 871. 1 Salk. 392. 1 Show. 173. Dougl. 650. 2 Ch. Ca. 139. 12 Mod. 446. Richardſon v Goodwin, 2 Vern. 293. See too, Goſs v. Dufreſnoy, Davies 371. Hankey v. Garrat, 3 Br. Ch. Rep. 457.

An act of bankruptcy, if followed by a commiſſion, is a diſſolution of the partnerſhip, by virtue of the relation in the ſtatutes which avoids all the acts of the bankrupt from the day of the bankruptcy, and from the neceſſity of the thing; all his property being veſted in the aſſignees, who cannot carry on a trade.

Hague v. Rolleſton, 4 Burr. 2176. Cowp. 471.

Upon a queſtion, Whether aſſignees under a joint commiſſion againſt two partners taken out after the bankruptcy of both, could maintain an action of *trover* againſt a perſon in poſſeſſion of goods under a ſale, or conſignment, *bonâ fide*, for a valuable conſideration, and without any mixture of fraud, from one of the partners, who had not then committed any act of bankruptcy himſelf, but after an act of bankruptcy committed by the other partner; the court held, the action could not be maintained, becauſe the act of the partner, who, at the time of the conſignment, had not committed any act of bankruptcy, bound both, and alſo becauſe, ſuppoſing the conſignment avoided by the act of bankruptcy of the other party, then it is an action of *trover* by one tenant in common againſt another, which cannot be.

Fox v Hanbury, Cowp. 448.

One of three partners in a ſhip and cargo, the coſt and out-fit of which was 4,568*l.*, pays only 410*l.* in part of his third ſhare, and gives his notes for the remainder; but, before they become due, is declared a bankrupt. The other partners cannot, by voluntarily diſcharging the notes, ſtand in his place for any ſhare of the profits; but the aſſignees are entitled to a full third, both of the profits of the adventure, and the value of the ſhip.

Smith v. De Silva, Cowp. 469.

If a partner is a creditor upon the partnerſhip-fund, he can have no ſatisfaction but out of the ſurplus which ſhall remain after the joint creditors are paid. And Lord *Hardwicke* ſaid, that where there are joint and ſeparate creditors, if one partner lends a ſum of money to the partnerſhip, the creditors of his ſeparate eſtate have a right to this in the firſt place.

Ex parte Hunter, 1 Atk. 227. Co. *Bankrupt Laws*, 602. *Ex parte* Batſon, 1 Vez. jun. 207.

But the contrary has been determined in a caſe where there was a joint commiſſion againſt two partners, and a ſeparate one againſt one of them. The petitioners, aſſignees under the ſeparate commiſſion, petition to be admitted creditors under the joint commiſſion, for a ſum of money brought by their bankrupt into the partnerſhip beyond his ſhare, and as being therefore a creditor on the partnerſhip for that ſum; but were refuſed on the principle, that he cannot be a creditor on the partnerſhip in competition with the joint creditors.

Ex parte Burrell, 22d July 1783. *Ex parte* Pine, 2d of Aug. 1783. Co *Bankrupt Laws*, 605.

So

Ex parte Batſon, 20th Jan. 1791. Co. *Bankrupt Laws*, 608

So where one partner hath taken more than his ſhare out of the partnerſhip-fund, the joint creditors, as the rule ſeems to be now ſettled, cannot be admitted to prove againſt the ſeparate eſtate of the partner who drew out the money, until his ſeparate creditors are ſatisfied, unleſs it can be ſhewn, that the partner acted fraudulently with a view to benefit his ſeparate creditors at the expence of the joint creditors.

In the caſe of Fordyce, who had had taken property from the partnerſhip fund, and applied the ſame to his own uſe, without the knowledge of his partners, the aſſignees, on the behalf of the joint creditors, were allowed to prove againſt the ſeparate eſtate. *Ex parte* Cuſt, 29th March 1774. Co. *Bankrupt Laws*, 609.

Ex parte Drake, cited in 1 Atk. 225. Craven v. Knight, 2 Ch. Rep. 226.

Where there were two partners, and one had taken out more money from the partnerſhip-ſtock than his ſhare amounted to, and therefore became a debtor for ſo much; Lord *Talbot* was of opinion, that the partnerſhip creditor had a right to come upon the ſeparate eſtate of the partner who was ſo indebted.

Ex parte Apſey, 3 Br. Ch. Rep. 165.

If one partner is an executor or truſtee, and, *with the knowledge of his co-partner*, lends the truſt-fund to the eſtate, it becomes a debt which may be proved againſt the joint eſtate: *Secùs*, if *without* the knowledge of the co-partner.

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BARGAIN and SALE.

(*Bargain and*) See further, Weſt Symb. part 1. lib. 2. §393. Terms de la Ley, tit. *Bargain and Sale* Cowel, tit. *Bargain and Sale*. Ld. Bacon's *Uſe of the Law*, Mo. 41. Touchſt. 221. 2 Bl. Comm. 338. So there is a bargain and ſale, where a man makes a contract with another for ſale of goods or chattels, and at the ſame time makes the ſale of them. Com. Dig. tit. *Bargain and Sale*, (A). Touchſt. 221. It is ſaid that a *bargain* and *ſale* is not ſo ſtrong a conveyance as a livery; for, if I have a rent-charge out of the manor of *D.*, and afterwards purchaſe the manor; and afterwards by deed indented and enrolled, I bargain and ſell the manor, the rent-charge ſhall not paſs. 1 Leon. 6. By *feoffment* or *fine*, all uſes and poſſibilities are conveyed by reaſon of the forcible operation; but it is otherwiſe by *bargain* and *ſale*. 1 Leon. 33. A bargain and ſale doth not paſs away, or affect a *contingent* uſe in the bargainor; but a feoffment or fine would transfer it. Hardr. 416.

(*By the* 27 *H.* 8 *cap.*) Deeds were enrolled at common law for their preſervation, though not to paſs any eſtate. Sty. 370. The eſtate paſſeth not by the ſtatute of enrolment, but by the ſtatute of uſes. Dimmock's caſe, Hob. 136. The objects of the ſtatute of enrolment evidently were, firſt, to force the contracting parties to aſcertain the terms of the conveyance by reducing it into writing; ſecondly, to make the proof of it eaſy, by requiring their ſeals to it, and conſequently, the preſence of a witneſs; and, laſtly, to prevent the frauds of ſecret conveyances by ſubſtituting the more effectual notoriety of enrolment for the more ancient one of livery. But the latter part of this proviſion, which, if it had not been evaded, would have introduced an almoſt univerſal regiſter of conveyances of the freehold in the caſe of corporeal hereditaments, was ſoon defeated by the invention of the conveyance by leaſe and releaſe, which ſprung from the omiſſion to extend the ſtatute to bargains and ſales for terms of years; and the other parts of the ſtatute were neceſſarily ineffectual in our courts of equity, becauſe theſe were ſtill left at liberty to compel the execution of truſts of the freehold, though created without deed or writing. The inconveniencies, however, from this inſufficiency of the ſtatute, are now, in ſome meaſure prevented, by the 29 Car. 2. c. 3. which provides againſt conveying any lands or hereditaments for more than three years, or declaring truſts of them, otherwiſe than by writing. Hargr. Co. Lit. 48. a. n. 3.

By 5 *Ann. c.* 18., Bargains and ſales of any manors, lands, *&c.* within the *Weſt Riding* of the county of *York*, which ſhall be enrolled before the regiſtrar for the ſaid *Weſt Riding*, or his deputy for the time being, in the publick office at *Wakefield*, ſhall be as good and available, as if the ſame had been enrolled in one of the king's courts of record at *Weſtminſter*, or before the *cuſtos rotulorum*, and two juſtices of the peace, and the clerk of the peace of the ſaid *Weſt Riding*, or two of them, according to the ſtatute of the 27th *H.* 8.—By 6 *Anne c.* 35. § 16., the like proviſion is made for enrolling bargains and ſales in *Beverley* of lands within the *Eaſt Riding* of the county of *York*, or the town and county of the town of *Kingſton upon Hull*; and by § 30. of that ſtatute it is enacted, "That in all deeds "of bargains and ſales enrolled in purſuance of that act, whereby *any* "*eſtate of inheritance in fee-ſimple* is limited to the bargainee and his "heirs, the words *grant*, *bargain*, and *ſell*, ſhall amount to and be con-"ſtrued and adjudged in all courts of judicature, to be expreſs covenants "to the bargainee, his heirs and aſſigns, from the bargainor, for himſelf, "his heirs, executors, and adminiſtrators, that the bargainor, notwith-"ſtanding any act done by him, was at the time of the execution of ſuch "deed, ſeiſed of the hereditaments and premiſes thereby granted, bar-"gained, and ſold, of an indefeaſible eſtate in fee-ſimple, free from all "incumbrances (rents and ſervices due to the lord of the fee only ex-"cepted), and for quiet enjoyment thereof againſt the bargainor, his "heirs and aſſigns, and all claiming under him, and alſo for further aſſur-"ance thereof to be made by the bargainor, his heirs and aſſigns, and all "claiming under him; unleſs the ſame ſhall be reſtrained and limited by "expreſs particular words contained in ſuch deed; and that the bargai-"nee, his heirs, executors, adminiſtrators, and aſſigns reſpectively, ſhall "and may, in any action to be brought, aſſign a breach or breaches there-"upon, as they might do in caſe ſuch covenants were expreſsly inſerted "in ſuch bargain and ſale."—By 8 *Geo.* 2. *c* 6. § 21., the enrolment of bargains and ſales of lands in the *North Riding* of the county of *York* is authoriſed in the regiſter-office for that Riding.

By the 33 *Geo.* 2. *c.* 30. § 10., being an act for widening certain ſtreets, *&c.* in *London*, it is enacted, That all bargains and ſales made and acknowledged by any perſon or perſons whomſoever, *which ſhall be enrolled in the huſtings of the ſaid city*, of any lands, tenements, and hereditaments, purchaſed by virtue of and for the purpoſes of that act, ſhall have the force, effect, and operation in law, to all intents and purpoſes, which any fine or fines, recovery or recoveries whatſoever, would have if levied or ſuffered by the bargainor or bargainors, or any perſon or perſons ſeiſed of any eſtate in the premiſes, in truſt for, or to the uſe of, ſuch bargainor or bargainors, in any legal manner or form whatſoever.

(A) Who may bargain and ſell, and to whom.

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(*If tenant*) But not an eſtate in fee ſo determinable, but only a deſcendible freehold. Anon. Carter, 208.

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(*If there be two*) This diſtinction is not warranted by the authorities referred to, nor is it to be found in any caſe-book wherein this caſe is reported. Br. tit. *Faits enroll.* p. 11. Cro Car. 217. 569. Bac. Max. Reg. 14. Brook, in his Abridgment, uſeth the general words, "all his "lands and tenements in *D.*;" and ſaith, that they will not paſs the entierty, becauſe the enrolment hath relation to the delivery of the deed; and, of courſe, can paſs no more than the bargainor had at the time of the delivery. The bargain and ſale, it hath been ſaid, occaſions, of itſelf, *before* enrolment, a ſeverance of the joint-tenancy. Owen, 70. *argumto.*

Cro. El. 402. cited as adjudged in 10. Eliz. Bac. Max. Reg. 14.

If a mortgagor entreats a ſtranger to redeem the land at the day, and covenants by indenture, that after ſuch redemption the ſtranger ſhall have the land to him and his heirs; and that he, in conſideration of ſuch a ſum, will ſtand ſeiſed to the uſe of him and his heirs; the ſtranger redeems the land at the day the mortgagor enters, and the deed is enrolled within ſix months; yet nothing paſſeth, becauſe he had not any eſtate or intereſt therein at the time to contract for it.

(*If a wife*) But a fine, and recovery upon it, will bind the wife. Mo. 22. By cuſtom, the deed itſelf will bind her. Br. Abr. tit. *Faits enroll.* pl. 10.

(B) What may be bargained and ſold, and how a Bargain and Sale ſhall be taken.

(*A rent*) Upon a bargain and ſale according to the ſtatute, a rent may be reſerved. 2 Co. 54.

1 Co. 87. b. 100. b. Co. Lit. 10. a. Br. tit. *Contract, Bargaine, et Achate*, pl. 1.

Before the ſtatute of *H.* 8., if a man had bargained his land for money generally, without the words "his heirs," the chancellor would oblige him, according to conſcience and the intent of the parties according to the value, to execute an eſtate in fee, for uſes were then things merely in truſt and confidence; but, ſince the ſtatute, they are transferred and made into an eſtate in the land; and therefore without the word "heirs" the bargainee hath only an eſtate for life.

Tyrrel's caſe, Dy. 155. 1 And. 37. S. C. 1 Co. 136. b. Co. Lit. 271. b.

If one, in conſideration of ten pounds, bargain and ſell his land to *A.* and his heirs, to have and to hold to *A.* to the uſe of the bargainor for life, the remainder in tail to *A.*, the remainder to the right heirs of the bargainor; the *habendum* in this caſe is void, and *A.* and his heirs ſhall have the land for ever.

Though a uſe could not riſe as a uſe upon a uſe, whether equity would not ſupport it as a truſt? Aſh v. Gallen 1 Ch. Ca. 114.

(C) In what Manner a Bargain and Sale may be made; and herein of the Words to be made Uſe of.

Lord Ewre v. Strickland, Cro. J. 240.

A bargain and ſale made to one with the addition of knight, who is not ſo, is good.

(D) Of the Conſideration.

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(*If there be*) But ſee Thurle v. Madiſon, Sty. 462.

2 Inſt. 672. *A.* by deed indented and enrolled, in conſideration of 100*l.* paid by *B.*, bargains and ſells land to *B.*, *C.*, and *D.*, parties to the indenture; in this caſe the land paſſeth to all; for although the valuable conſideration be expreſſed to be paid only by one, yet it muſt be intended that it was paid by all, that the land may paſs to all according to the meaning of the parties: and conſideration given by one, is ſufficient to convey the land to all.

(E) Of the Enrolment: And herein,

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(*If A. Bargains*) If two bargains and ſales are made of the ſame lands, to two ſeveral perſons, and the laſt deed is firſt enrolled, and afterwards the firſt deed is alſo enrolled within ſix months, the firſt buyer ſhall have the land: for when the deed is enrolled, the bargainee is ſeiſed of the land from the delivery of the deed, and the enrollment ſhall relate to it. Wood's Inſt. 259. See Mo. 41. Cro. Ja. 409. Noy, 106. If a man bargains and ſells to *A.*, and afterwards makes a bargain and ſale of the ſame land to *B.*, and the deed to *B.* is firſt enrolled, *B.*

the deed to *A.* is not enrolled within the ſix months, the bargain and ſale to *B.* is good; but if the deed to *A.* had been enrolled within the ſix months, the deed to *B.* had been void. Hob. 165.

If a diſſeiſor bargain and ſell land, and the diſſeiſee releaſe to the bargainee before enrolment, it is void. But a releaſe (*a*) to the diſſeiſor before enrolment had been good; and then the enrolment ſhould paſs the eſtate to the bargainee, and he ſhould take advantage of the releaſe. 1 Ro. Rep. ſaid to be ſo adjudged, Mo. 10. El. in Mocket's caſe.

(*a*) 1 Ro. Rep. *ibid.* Northcott v. Underhill 1 Salk. 199.

A covenant in a bargain and ſale not enrolled, is binding. 1 Ld. Raym. 388.

(F) The Manner of pleading Bargains and Sales. Page 289

(*In Pleading*) By 10 Ann c. 18. § 3., if a bargain and ſale enrolled, be pleaded with a *profert*, a copy examined, and proved on oath, ſigned by the proper officer, having cuſtody of ſuch enrolment, ſhall be of the ſame effect as the original.—The indorſement on the deed, by the proper officer, is always received as ſufficient evidence of the enrolment. Dougl. 56. If divers perſons ſeal a deed, and but one of them acknowledge it, and it be thereupon enrolled, this is a good enrolment within the ſtatute, and it may be given in evidence, as a deed enrolled. Thurle v. Madiſon, Sty. 462.

BARRATRY.

(A) Who ſhall be ſaid to be a Barrator. Page 280

(*A Barrator*) Barrator, according to Junius, is *vitilitigator*, and is a forenſick term taken from the *Normans*. The Iſlandick and Scandinavian, *baratta*; the Anglo-Norman, *barat*; and the Italian *baratta*, are all words ſignifying a quarrel, or contention. Skene ſaith that barrators were ſimoniſts, ſo called from the Italian, *barraturia*, which ſignifieth corruption in a judge, who giveth an unjuſt ſentence for money. And, with us, it may be obſerved, by ſtat. 3 E. 1. c. 33., barrators are forbidden to give judgments.

BARON and FEME.

(B) Of the Power given the Huſband by Law, over the Perſon of his Wife; and herein of her Remedy for any Injury done her by him. Page 285

(*The huſband hath*) Or by application to the court of K. B. or a juſtice of the peace. Poſt. 259. 1 Hawk. P. C. 253. Ca. Temp. Hardw. 74. 2 Str. 1202. 1 Burr. 621. 703. 11 Mod. 10. And the huſband may demand ſurety of the peace againſt the wife. 2 Str. 1207.

(*A Wife Separated*) If, upon the return of a *habeas corpus* ſued out by the huſband to bring up the wife, it appear that he hath uſed her ill, and ſhe exhibit articles of the peace againſt him, the court will not order her to be delivered to him. Anne Gregory's caſe, 4 Burr. 1991.

(C) Of his Intereſt in her Eſtate and Property: And herein.. Page 286

The huſband may make a tenant

But it muſt be pleaded, that the huſband and wife, in right of the wife, were ſeiſed in fee, not of freehold merely.

nant of the *præcipe* of his wife's eſtate, for the purpoſe of ſuffering a common recovery of it, without the wife's joining him in a fine. Robinſon v. Cummins, Cruiſe on *Recoveries*, 52. Co. Lit. 326. b. note. Pig. 72. Ro. Abr. tit. *Recovery* (A), pl. 4

(*The Marriage is*) An aſſignment of the real eſtate of the wife will bind her, though it be made without a conſideration. So if the wife has a judgment, and it is extended on an *elegit*, the huſband may aſſign it without a conſideration: So if a judgment is given in truſt for a feme ſole, who marries, and, by conſent of her truſtees, is in poſſeſſion of the land extended, the huſband may aſſign over the extended intereſt: and by the ſame reaſon, if the feme has a decree to hold and enjoy lands until a debt due to her is paid, and ſhe is in poſſeſſion of the land under this decree, and marries, the huſband may aſſign it without any conſideration; for it is in nature of an extent. 3 P. Wms. 200.

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(*If a Man marries*) It is true, that the huſband is entitled to diſpoſe of the truſt of the wife's term, equally with the term itſelf; and that, whether it be the truſt of a preſent actual and veſted intereſt in the term; Pre. Ch. 418 Factor v. Samyne, 2 Vern. 270. Bates v. Dandy, 2 Atk. 207.; or of a poſſible or contingent intereſt, if it is a legal intereſt, that is, ſuch an intereſt as, upon the determination of the previous eſtate, or the happening of the contingency, will immediately veſt in poſſeſſion in the wife; unleſs, perhaps, in thoſe caſes where the poſſibility or contingency is of ſuch a nature, that it cannot happen during the huſband's lifetime. Co. Lit. 46. b. 10 Co. 51. a. Hutt. 17. 1 Salk. 326. But it is an exception to this rule, at leaſt in equity, that if a future, or executory intereſt, in a term or other chattel, be provided for the wife, with the conſent of the huſband, the huſband cannot diſpoſe of it from her; as it would be abſurd and unfair in the higheſt degree, that he ſhould be allowed to defeat his own agreement. But this ſuppoſeth the proviſion to be made *before* marriage; for if it be made *ſubſequent* to the marriage, it is a mere voluntary act, and void againſt an aſſignee for a valuable conſideration. Doyly v. Perſull, 1 Ch. Ca. 225. Turner's caſe, 1 Vern. 7. Pitt v. Hunt, *id.* 18. Walter v. Saunders, 1 Eq. Ca. Abr. 58. Co. Lit. 351. b. note.

(*All the Perſonal Eſtate*) The wife's paraphernalia are, by the common law, excepted out of the power of the huſband, ſo that he cannot deviſe them. 1 P. Wms. 729. But by articles before marriage, expreſsly barring her of every thing ſhe can claim out of her huſband's eſtate by common law, cuſtom, or otherwiſe, the huſband is entitled to theſe. 2 Atk. 642. It ſeemeth doubtful, whether the paraphernalia are exempted from the claim of creditors. 2 Atk. 79. Ambl. 6. 2 Vez. 7. Her neceſſary apparel certainly is. 2 Bl. Comm. 436. 2 Atk. 105.

(*But Choſes in*) In equity, a ſettlement made before marriage, if made in conſideration of the wife's fortune, entitles the repreſentative of the huſband dying in the wife's lifetime, to the whole of her things in action; but it hath been ſaid, that if it is not made in conſideration of her fortune, the ſurviving wife will be entitled to the things in action, the property of which hath not been reduced into poſſeſſion by the huſband in his lifetime: ſo, if it is in conſideration of a particular part of her fortune, ſuch of the things in action, as are not comprized in that part, it hath been ſaid, ſurvive to the wife. Cleland v. Cleland, Pr. Ch. 63. 2 Vern. 502. Adams v. Cole, Ca. Temp. Talb. 168. In the caſe of Blois v. the Counteſs of Hereford, 2 Vern. 501., a ſettlement was made for the benefit of the wife, but no mention was made of her perſonal eſtate. Lord Keeper decreed, that it ſhould belong to the repreſentatives of the huſband, and ſaid, that, in all caſes where there was a ſettlement equivalent to the wife's portion, it ſhould be intended that he is to have the portion, though there be no agreement for that purpoſe. Eq. Ca. Abr. 69.

And the repreſentative of the huſband is entitled as much to this ſpecies of his wife's property as to any other; for the right of adminiſtration follows the right of eſtate; and ought, in caſe of the huſband's death, after the wife, to be granted to the huſband's next of kin. Bacon v. Bryant, Vin. Abr. tit. *Executors* (K). pl. 25. Humphry v. Bullen, *ibid.* pl. 27. Elliot v. Collier, 3 Atk. 526 1 Vez 15. 1 Wilſ. 168. Bouchier v. Taylor. Hargr. *Law Tracts*, 473. Br. Rep. 414. If, therefore, adminiſtration *de bonis non* of the wife be granted to any third perſon, he is a truſtee for the repreſentative of the huſband. Squib v. Wyn, 1 P. Wms. 378. Cas. v. Rees, *id.* 381.

Boſvil v. Brander, 1 P. Wms. 4078. Bates v. Dandy, 2 Atk. 208. b.

Money due upon mortgage is conſidered as a thing in action, and ſubject to the diſpoſal of the huſband only, whether it be a mortgage in fee or for a term: for though in the caſe of a mortgage in fee, the legal fee of the lands in mortgage continues in the wife, ſhe is but a truſtee, and the truſt of the mortgage follows the property of the debt.

In one caſe (*b*) it is ruled, that a voluntary aſſignment by the huſband of the wife's *choſes in action*, though void, as between the huſband and the aſſignee, will yet have the effect of altering the property, as between the huſband and wife. But it ſeemeth to be now ſettled (*c*), that the huſband's aſſignment in ſuch caſe muſt be for a valuable conſideration, and that beyond the conſideration the aſſignment will not bind the wife ſurviving.

(*b*) Squib v. Wyn, 1 P. Wms. 378.

(*c*) Bates v. Dandy, 2 Atk. 207. Jewſon v. Moulſon, *id.* 417. Saddington v. Kinſman, 1 Br. Ch. Rep. 44. Volunteers and general aſſignees (whether by operation of law, or otherwiſe) are ſubject to the ſame equity, with reſpect to the wife's property, as the huſband is. 2 Atk. 420. 1 P. Wms 382. 4 Br. Ch. Rep. 139. It doth not ſeem to have been yet determined, that a court of equity will interfere and interrupt the *legal* right of the huſband, or of ſuch aſſignees, where they can get poſſeſſion of the wife's property without the aid of the court. Winch v. Page, Bunb 86. Anon. Pr. Ch. 548. Harriſon v. Buckle, 1 Str. 248. Gardner v. Walker, *id.* 503. Jewſon v. Moulſon, 2 Atk. 420.; but where the property is a ſubject of *equitable* juriſdiction, where they are obliged to go into equity in order to enable them to recover it, there the court will oblige them previouſly to make a proviſion for the wife. Jacobſon v. Williams, 1 P. Wms. 382. But as againſt an aſſignee of ſome *particular* choſe in action, or truſt term of the wife, for a *full valuable conſideration*, ſuch equity, it ſeemeth, doth not ariſe. But ſee Sir Edward Turner's caſe, 1 Vern. 7. Pit v. Hunt. *id.* 18. Tudor v. Sanizne, 2 Vern. 270. Packer v. Wyndham, Pr. Ch. 412. Walter v. Saunders, 1 Eq. Ca. Abr. 58 pl. 5. Bates v. Dandy, 2 Atk. 207. Pope v. Craſhaw, 4 Br. Ch. Rep. 326. *Qu.* Whether in theſe caſes of *particular* aſſignments, any diſtinction hath been made between a truſt term, and a choſe in action of the wife? Cox's note in 1 P. Wms. 459.

The intereſt of the wife's ſeparate property is always payable to the huſband if he maintains the wife. But (*d*) where he receives a great part of her fortune, and will not ſettle the reſt, a court of equity will not only ſtop the payment of the reſidue of her fortune, but will even prevent him from receiving the intereſt of the reſidue, that it may accumulate for her benefit.

2 Vez. 561.

(*b*) 3 Atk. 21.

If truſtees pay the wife's ſeparate fortune to the huſband, it is irrecoverable,

Pr. Ch. 414. Squire v. Dean, 4 Br. Ch. Rep. 326.

As to what things ſhall ſurvive to the wife, and what go to the huſband's executors, ſee tit. *Executors*, (H. 4.) As to the ſeparate property of the wife, *vide infra*.

(D) Of the huſband's Right to Things accruing to the Wife during Coverture.

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(*A Legacy was*) But in an anonymous caſe, 9 Mod. 43., the huſband, though divorced *a menſa et toro*; and though the wife had alimony, was reſtrained by injunction from ſelling a term which belonged to the wife. And in Newſome v. Bowyer, 3 P. Wms. 37., it was holden, that the huſband being attainted of felony, and pardoned on condition of tranſportation; and the wife becoming afterwards entitled to ſome perſonal eſtate, as orphan to a freeman of *London*, it belonged to her as a feme ſole.

Yet it was formerly very much doubted, whether the feme could take an eſtate to her ſeparate uſe, unleſs truſtees were interpoſed. Harvey v. Harvey, 2 Vern. 659. 1 P. Wms. 126. S. C. Burton v. Pierpoint, 2 P. Wms. 79. But in Bennett v. Davis, 2 P. Wms. 316., it was holden, that where one deviſed lands in fee to his daughter, being a feme covert, for her ſeparate uſe, without appointing any truſtees, it ſhould be a truſt in the huſband; for that there is no difference where a truſt is created by act of the party, and where by act of law; and ſo it was decreed in Rolfe v. Budder, Bunb. 187. Darly v. Darly, 3 Atk. 399. And equity will not only raiſe a truſt, where the object of the gift is to the ſeparate uſe of the wife, but will alſo, from the nature of ſome gifts, infer them to be to the ſeparate uſe of the wife. Graham v. Londonderry, 3 Atk. 393. As to agreements by the huſband after marriage, by which the wife claims a ſeparate eſtate, it was formerly underſtood that the wife muſt take through the medium

of

of truſtees, or others, and not immediately from her huſband; for unleſs by particular cuſtom, as by the cuſtom of *York*, (Fitz. Preſcription, 61. Br. Cuſtom, 56) a feme covert is incapable of taking any thing by the gift of her huſband, Co. Litt. 3., except by will, Litt. § 168. See alſo Moyſe v. Giles, 2 Vern. 385. Beard v. Beard, 3 Atk. 72. But in Lucas v. Lucas, 3 Atk. 270, Lord Hardwicke obſerved, that in equity, gifts between huſband and wife had been often ſupported, though the law does not allow the property to paſs. See Slanning v. Style, 3 P. Wms. 334.; and Calmady v. Calmady, there cited. Bletſow v. Sawyer, 1 Vern. 245 Moore v. Freeman, Bunb. 205. and Mitchell v. Mitchell, there cited. Bell v. Hyde, Pr. Ch. 328. Gilb. Eq. Rep. 83. Pybus v. Smith, 3 Br. Ch. Rep. 340. Lord Hardwicke, indeed, alluded to caſes, in which the courts would not ſupport ſuch gifts; but thoſe ſeem to be where their allowance would prejudice creditors, Slanning v. Style; and where the gift is of the whole of the huſband's eſtate, Beard v. Beard, 3 Atk. 72. But though the wife may take a ſeparate eſtate from her huſband, and even have a decree againſt her huſband in reſpect of ſuch eſtate, Cecil v. Juxon, 1 Atk. 278.; yet, if ſhe do not demand the produce during his-lifetime, and he maintain her, an account of ſuch ſeparate eſtate ſhall not be carried back beyond the year. Powell v. Hankey, 2 P. Wms. 82. Thomas v. Bennet. *id.* 341. Fowler v. Fowler, 3 P. Wms. 355. Lord Townſend v. Wyndham, 2 Vez. 7. Peacock v. Monk, *id.* 190. Blagrave v. Blagrave, Mich. 1789. This rule, however, proceeds on the notion of the wife's conſent: but if, during the huſband's life-time, ſhe demand ſuch account, and he promiſe to pay whatever is due to her, ſhe ſhall be allowed to come upon his eſtate, as a creditor, for the amount. Ridout v. Lewis, 1 Atk. 269. Counteſs of Warwick v. Edwards, 1 Eq. Ca. Abr. 140. pl. 7. Fonbl. notes on Eq. Tr. 94, 5.

(E) Of the Wife's Acts and Agreements before Marriage; in what Caſes revoked and made void by the Marriage.

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(*But if a Feme*) Cotter v. Layer, 2 P. Wms. 624. S P. 2 Bl. Comm. 499 S. P. It is ſo totally revoked, that it will not revive in the event of her ſurviving her huſband. Mrs. Lewis's caſe, 4 Burn's *E. L.* 48. And where the intended huſband agrees to give his wife power of making a will *after* marriage, and ſhe afterwards makes one *before* marriage, the marriage will revoke it. Hodſden v. Lloyd, 2 Br. Ch. Rep. 534. 2 Term Rep. 684.

George v. ——, Ambl. 627. A ſurrender of a copyhold eſtate by a feme ſole to the uſe of her will, if not made abſolutely void, is at leaſt ſuſpended by a ſubſequent marriage; in either of which caſes its operation is prevented.

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(*A Man enters*) 2 P. Wms. 243. 2 Atk. 97. It is now ſettled, that ſuch a bond may be enforced *at law* againſt the heirs of the huſband. Milbourn v. Ewart, 5 Term Rep. 381. and Hayes *ex dim.* Foord v. Foord, there cited.

(*Alſo Equity*) 2 Freem. 29. Gilb. *Lex Prætor*, 267. 2 P. Wms. 535, 6. *id.* 358. 674. Mod. 177. 2 Vez. 264. 2 Br. Ch. Rep. 345. Fonbl. notes on Eq. Tr. 98, 9.

(*But where a Widow*) Newſtead v. Searles, 1 Atk. 265. Doe v. Routledge, Cowp. 711.

(F) Where the Huſband ſhall be liable to the Wife's Debts contracted before Marriage; and herein of a Wife that is Executrix or Adminiſtratrix.

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(*So though there*) But *Qu.* A court of equity cannot make the huſband liable in reſpect of the fortune he may have had with the wife. Earl of Thomond v. Earl of Suffolk, 1 P. Wms. 461. Heard v. Stamford, 3 P. Wms. 410. Ca. Temp. Talb. 173. S. C.

(G) Where ſhe alone ſhall be puniſhed for a criminal Offence; and where the Huſband ſhall be anſwerable for what ſhe does in a Civil Action.

(*A Feme Covert is ſo*) This exemption extends to burglary, Kely. 31. Fitzh. Cor. 199. ſeemingly to robbery, as an offence of a nature certainly not *more* heinous. The reaſon of the

rule is said to be, "because the wife cannot know what property her husband may claim in the goods taken." 10 Mod. 63. If this be the true principle, the cases of burglary and robbery are in some measure distinguishable; for in burglary, the absence or presence of the party is immaterial; but in robbery, presence is an essential ingredient to the crime, and affords to the wife an opportunity of judging in what sort of right the goods are taken. 1 Hawk. P. C. 4. note.

Nor a principal, though the husband's offence be treason, for she is *sub potestate viri*, and bound to receive him. Neither is she affected by receiving, jointly with her husband, any other offender. 1 Hale, 48. For she cannot be admitted as a witness to discover, even collaterally, her husband's guilt. Brownl. 47. Dalt. 540. 1 Hale, 301. O. B. 1785. 1 Hawk. P. C. 4. note.

(*But if she*) Or receive stolen goods of her own separate act, without the privity of her husband; or if he, knowing thereof, leave the house and forsake her company, she alone shall be guilty, as accessary, 22 Ass. 40. Dalt. 157.; for the coercion which is supposed to be conveyed by the command or presence of the husband, is only a presumption of law, and, like other presumptions, may be repelled. 1 Hale, 516 And though the husband be an agent in the transaction, yet if he be ignorantly so, by the artifice of the wife, she alone is punishable. Hammond's case, Leach's Cases, 354.

(H) Of her Contracts for Necessaries, and how far the Husband is bound by such Contracts.

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(*It is clear*) 1 Term Rep. 5. 1 H. Bl. 334. 348. Co. *Bankrupt Laws*, 32. 36. See 2 Br. Ch. Rep. 377. Fontbl. notes on Eq. Tr. 100. But the contract in such case will not avail, if made under illegal circumstances. 2 Str. 1122. Or if she goes away with an adulterer, whether the tradesman have notice of it, or not. 1 Str. 647. 706. 2 Str. 875. 1 Salk. 119. See 2 Bl. Rep. 1079. But if he turns away his wife causelessly, he will be liable, notwithstanding a particular prohibition. 2 Str. 1214.—Where the husband claimeth to be discharged from liability to his wife's debts, in respect of her having a separate maintenance, it seemeth, that it must be a provision proceeding from himself, and not from a third person. 4 Burr. 2177. The modern cases, with respect to a separate maintenance, have gone very far: for it hath been lately adjudged, that the wife may, in such case, contract and be sued as a feme sole; that she continues liable, though she alien or exhaust the whole of the distinct fund; that the husband is not liable even for necessaries; and that the second husband is accountable for debts contracted during the state of separation from a former. 1 Term Rep. 5.

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(*If the wife*) At law a wife cannot make her husband liable for money *borrowed*, though lent and applied for the buying of necessaries. 1 Salk. 387. But in equity, the creditor will be allowed to stand in the place of the tradesmen, and to have satisfaction, as far as they could, if they had been plaintiffs. Preced in Chan. 502. 1 P. Wms. 482. Where equity will decree a wife a separate maintenance, *vide* Abr. Eq. 68.

There certainly are cases where equity has decreed alimony to the wife; but, whether the decrees proceeded upon a previous divorce in the ecclesiastical court, or upon an agreement between the parties, in many cases, doth not appear. Lasbrook v. Tyler, 1 Ch. Rep. 24. Ashton v. Ashton, *id.* 87. Russell v. Bodwill, *id.* 99. Whorewood v. Whorewood, *id.* 118. 1 Ch. Cas. 230. But it is observable, that all these cases, except that of Lasbrook v. Tyler, were during the times of the troubles, when commissioners were appointed, to whom jurisdiction was expressly given, and whose decrees were holden to be confirmed by the act for the confirmation of judicial proceedings. 1 Ch. Rep. 118. In Nichols v. Danvers, 2 Vern. 761. proceedings had been had against the husband, as appears from the registrar's book, (though not noticed in Mr. Vernon's report,) in the ecclesiastical court, *propter sævit am*; and in Oxenden v. Oxenden, it appears from Gilbert's report of it, that there had actually been a divorce *propter sævitiam*; and in Angier v. Angier, Gilb. Eq. Rep. 172. there was an agreement. But in Williams v. Callow, 2 Vern. 752. the court certainly does appear to have decreed the wife a separate maintenance out of a trust fund, on account of the cruelty and ill-behaviour of the husband, though there was no evidence of a divorce or agreement that the fund in dispute should be so applied. And in Watkyns v. Watkyns, 2 Atk. 96. the husband having quitted the kingdom, Lord *Hardwicke* decreed the wife the interest of a trust fund till he should return, and maintain her as he ought. Yet in Head v. Head, 3 Atk. 547. Lord *Hardwicke* observes, that he could find no decree to compel a husband to pay a separate maintenance to his wife, unless upon an agreement between them, and

even

even then unwillingly; and this opinion of Lord *Hardwicke* appears moſt reconcilable to principle; for the caſe of a divorce *propter ſævitiam*, may lie conſidered as an implied agreement; and if there be an expreſs or implied agreement, there ſeems no doubt, but that courts of equity may, concurrently with the ſpiritual court in proceeding upon it, decree a ſeparate maintenance. Wood's Inſt 62. Sealing v. Crawley, 2 Vern. 386. Guth v. Guth, 3 Br. Ch. Rep. 6. The ſpiritual court however would be the more proper juriſdiction, if it acted *in rem*. Lit. Rep. 98. 2 Atk. 511. But if after an agreement between huſband and wife to live ſeparate, they appear to have cohabited, equity will conſider the agreement as thereby waved. Fletcher v. Fletcher, M. 1788. It is obſervable, that if courts of equity had an original and concurrent juriſdiction with the ſpiritual courts, it would have been unneceſſary to have given the commiſſioners, during the troubles, ſuch juriſdiction; and that the doubt in 1 Ch. Rep. 118 could not have been raiſed, reſpecting the validity of their decrees, after the act for confirming judicial proceedings. Beſides, even in the ſpiritual courts, they do not pretend to the right of decreeing alimony, but as incidental to a decree of divorce; and a decree of divorce or ſeparation was never ſuggeſted to be within the juriſdiction of a court of equity. Fonbl. notes on Eq. Tr. 96, 97. And Lord Chancellor Loughborough is reported to have ſaid, that he took it to be eſtabliſhed law, that no court, not even the eccleſiaſtical court, hath any *original* juriſdiction to give a wife ſeparate maintenance. It is always as *incidental* to other matter, that ſhe becomes entitled to a ſeparate proviſion. If ſhe applies to the Chancery, upon a *ſupplicavit*, for ſecurity of the peace againſt her huſband, and it is neceſſary that ſhe ſhould live apart; as incidental to that, the chancellor will allow her a ſeparate maintenance; So in the eccleſiaſtical court, if it is neceſſary for a divorce *a menſâ et toro propter ſævitiam*. 2 Vez. jun. 195.

Govier v. Hancock, 6 Term Rep. 603. (a) Gilchriſt v. Brown, 4 Term Rep. 766.

If a wife commit adultery, the huſband is diſcharged from all obligation to provide her afterwards with neceſſaries, even though it ſhould appear that ſhe was provoked to the commiſſion of the crime by the adultery of the huſband himſelf, and his having cauſeleſsly turned her out of doors. And yet in ſuch caſe the wife cannot be ſued as a feme ſole (*a*), unleſs ſhe have a ſeparate eſtate. The conſequence is, that no one will give her credit, and ſhe muſt ſtarve.

(I) What Acts done by the Husband or Wife alone, or jointly with the Wife, ſhall bind the Wife; and herein of her Agreement or Diſagreement to ſuch Acts after the Death of her Husband.

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(*The huſband*) In equity the wife's conſent is neceſſary to the diſpoſal of her perſonal eſtate; and ſhe is perſonally examined in court, as in the caſe of fines levied at law.

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(*At common law*) The huſband alone may make a tenant to the præcipe. *Vide ſupra* (C).

(*If a feme covert*) An entry by the huſband into part only of the land, whereof the wife alone levied a fine, will avoid the whole fine. Mayo v. Combes, 1 Freem. 396. There is one inſtance of a married woman being allowed to levy a fine without her huſband. The huſband had ſold lands, and covenanted that he and his wife, (when of age,) ſhould levy a fine. When the wife came of age, ſhe refuſed to join in it; but it was levied by the huſband alone, who afterwards went abroad. The wife afterwards conſented to levy it, but the huſband was abſent. It was ſaid, upon motion to levy it, that it had been uſual in ſuch caſes for the cuſtos to make out a *præcipe* to the wife as a *feme ſole*; but no example of it was produced. The court would make no rule to authenticate ſuch a fine, but it was afterwards acknowledged *de bene eſſe* before the lord chief juſtice, then in court. Moreau's caſe, 2 Bl. Rep. 1205.

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(*If a feme covert joins*) If a wife charge her eſtate with payment of her huſband's debts, or apply her ſeparate eſtate to ſuch purpoſe, and it do not appear to have been intended by her as a gift to her huſband, equity will decree the huſband's aſſets to be applied in exoneration of her eſtate, or in re-payment of the money advanced. Earl of Huntingdon v. Counteſs of Huntingdon, 2 Vern. 437. 1 Br. P. C. 1 S. C. Pocock v. Lee, 2 Vern. 604. Tate v. Auſtin, 2 Vern. 689. 1 P. Wms. 264. S. C. Bagot v. Oughton, 1 P. Wms. 347. Evelyn v. Evelyn, 2 P. Wms.

Wms. 659. Lewis v. Nangle, Ambl. 150, Earl of Kinnoul v. Money, cited in 3 Br. Ch. Rep. 206. Clinton v. Hooper, 3 Br. Ch. Rep. 201. Parteriche v. Powlet, 2 Atk. 384. Lacam v. Mertins, 1 Vez. 313. Aſtley v. Earl of Tankerville, 3 Br. Ch. Rep. 545.

(*If the huſband*) It hath been holden that a mortgage for years by husband and wife of the wife's inheritance, without any fine levied, may be confirmed by circumſtances by the wife when diſcovert, although there be no actual re-delivery of the deed. Goodright v. Straphan, Cowp. 201. But ſee Drybutter v. Bartholomew, 2 P. Wms. 126.

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(*A feme covert is*) A bond to her ſingly is good. Br. tit. *Obligation*, p. 36. *Teſtament. et Volunt.* p. 9. And if he do, he may maintain trover for the recovery of the purchaſe-money. Garbrand v. Allan. 1 Ld. Raym. 224. The like remedy he may have for money loſt by the feme at cards. Rey v. Stephens, cited in 1 Sid. 112. The receipt of money by the feme will be binding upon the husband, if it appear that ſhe *uſually* receives and pays money for him. Seaborne v. Blackſton, 2 Freem. 178.

A wife may, without her huſband, execute a naked authority, whether given before or after marriage. So where both an intereſt and an authority paſs to the wife, if the authority be collateral to, and do not flow from the intereſt; becauſe, then the two are as unconnected as if they were veſted in different perſons. And as a feme covert may, without her huſband, convey lands in mere execution of a power or authority, ſo may ſhe, with equal effect, in performance of a condition, where land is veſted in her on condition to convey to others. It ſeemeth doubtful, however, whether ſhe can convey lands which ſhe holds as truſtee without her huſband joining in the conveyance.

Co. Lit. 112. a. note 6. Peacock v. Monk, 2 Vez. 191. Gibbons v. Moulto, Rep. temp. Finch, 346. Sir W. Jones, 137. *Vide* note 6. Co. Lit. 112. a. Fonbl. notes on Eq. Tr. 85.

If a note be made payable to a feme ſole or order, and ſhe afterwards marry, ſhe cannot, during the coverture, indorſe it.

Connor v. Martin, 3 Wilſ. 5.

The bond of a feme covert is void; and ſo is her appointment of an attorney; for ſhe is incapable of executing a deed.

2 Wilſ. 3. 2 Saund. 213. But if a woman ſeal a bond in the preſence of her husband, and he ſtand by, and do not gainſay, it ſhall bind him. Cited *per* Maſter of the Rolls, as adjudged in the time of H. 8. 2 Freem. 218.

(K) Where the Husband and Wife muſt join in bringing Actions.

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(*If A. leaſes*) They may join, or not, at their election. Aleberry v. Walby, 1 Str. 229. Beaver v. Lane, 2 Mod. 217.

(*But if a bond*) 1 Str. 229.; though it be entered into to the wife as adminiſtratrix. Ankerſtein v. Clarke, 4 Term Rep. 616.

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(*If A. in*) *Qu.* If this be not the proper mode? Style, 297.

(*In an action*) But ſee 3 Term Rep. 631., in confirmation of the poſition in the text. *Vide* Ca. Temp. Hardw. 119.

(*For a battery*) 1 Wilſ. 224. 2 Str. 726. In equity, the husband cannot file a bill for a choſe in action in right of the wife, without making her a party: if he do, and it be diſmiſſed, it will not conclude the wife; and if he die before judgment or decree, ſhe cannot revive the ſuit. Clarke v. Lord Angier, 2 Freem. 160.

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(*So in treſpaſs*) 6 Mod. 127. S. C. 2 Ld. Raym. 1031. Andr. 245. and 2 Str. 1094. S. C. cited. 11 Mod. 264.

Although

Although an action cannot, regularly, be brought by or againſt a feme covert, yet the objection to it by the parties to the ſuit, it hath in ſome caſes been laid down, can be taken only (*a*) in abatement: therefore the feme (*b*), after ſhe has been treated by a plaintiff as a feme ſole, may have proceſs of execution for the coſts in her own name, as ſole, for the plaintiff is concluded from denying it. And huſband and wife (*c*), who have improperly joined in an action, are not at liberty after verdict for the defendant, to object to ſuch impropriety, in order to diſcharge themſelves of coſts.

Milner v. Milner, 3 Term Rep. 627.

(*a*) But ſee Candell v. Shaw, 4 Term Rep. 361. and Read v. Jewſon, there cited,

where the objection was made by the defendant after verdict, and allowed. And to an action on a bond acknowledged by a feme covert, coverture may be given in evidence on *non eſt factum*, for the inſtrument is merely void. 1 Ld. Raym. 313. 3 Burr. 1805. (*b*) Wortley v. Rayner, Dougl. 637. But the huſband cannot have execution without a *ſcire facias*. *Ibid.* (*c*) ——v. Helyers, Cro. Car. 175.

(L) Where they muſt be jointly ſued.

(*If goods*) This point is ſettled as laid down in the text. 1 Salk. 114. Andr. 245.

Swithin v. Vincent, 2 Wilſ. 227.

It would be error to join the wife in a declaration for words ſpoken by the huſband *only*, and ſuch declaration would be bad either upon demurrer, or in arreſt of judgment: two declarations therefore for words, the one againſt huſband and wife, the other againſt huſband only, cannot be conſolidated.

Pitts v. Meller, 2 Str. 1167.

The court will not diſcharge a wife taken in execution upon a judgment obtained againſt her and her huſband.

Pinch v. Duddin, *id.* 1237. Langſtaff v. Rain, 1 Wilſ. 149. Anon, 3 Wilſ. 124.

Gordon v. Halpen, Ca. Temp. Hardw. 101.

On a motion that the wife may have leave to plead ſeparately from her huſband, it appeared that her eſtate was ſettled upon her, and that the ſettlement had been confirmed in the Houſe of Lords to be for her ſeparate maintenance, but the eſtate was made liable to anſwer all actions brought againſt the huſband on her account: it was ſuggeſted, in ſupport of the motion, that this was a fictitious demand in the plaintiff ſet up by connivance of the huſband, and that he would let judgment go by default, and ſo ſhare with the plaintiff in what ſhould be recovered. But *per Cur.* We cannot allow you to ſever in pleading; your beſt way will be to plead in the name of huſband and wife; and if the huſband ſhould diſavow, and that be contrary to the order of the Houſe of Lords, you will know how to enforce that order; but we can do nothing in it.

Clark v. Norris, 1 H. Bl. 235.

If the huſband enter an appearance for himſelf only, where he is ſued with his wife, this is not ſuch an irregularity as will authorize the plaintiff to ſign judgment without demanding a plea.

Hutchinſon v. Hewſon, Tr. 37 G. 3. B. R.

An *aſſumpſit* againſt the huſband alone for a debt due from the wife before marriage cannot be ſupported.

(M) Where a Wife ſhall be conſidered as a Feme Sole; and herein of her ſeparate Eſtate.

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(*A huſband*) Though the baniſhment be only for a limited time. Sparrow v. Carruthers, cited in 1 Term. Rep. 7.

In equity, if the husband is out of the jurisdiction of the court, though not an exile, Dubois v. Hole, 2. Vern. 613.; or if he cannot be found, Bell v. Commissary Hyde, Pr. Ch. 328., the wife may be compelled to answer separately.

(*By the custom*) But the custom is confined to suits in the city courts: she cannot sue alone in the superior courts, upon a cause of action accruing during the coverture, even though she be discovert at the time of commencing the suit. Caudell v. Shaw, 4 Term Rep. 361. That she may be a bankrupt, see tit. *Bankrupt* (A). By a settlement *before* marriage, the husband may put his wife in a situation to carry on a separate trade; and if he do not intermeddle therewith, the stock in trade will be exempt from his debts; and the wife will be solely entitled to the increase and produce. Jarman v. Woolloton, 3 Term Rep. 628., and Haselinton, v. Gill, there cited.

In the case of a divorce *a mensâ et thoro*, of which alimony is a consequent, the wife, it seems, becomes solely (*a*) responsible to creditors: and so in the case of a voluntary parting, and a separate maintenance allowed her by the husband; for as soon as she acquireth a will, and an interest distinct from, and independent on her husband, the disability of coverture is supposed to cease. It hath therefore been determined by the court of K. B., though it by no means appears to be settled (*b*), that a woman so separated and with such maintenance, may contract and be sued alone for any personal demand. And the liability of her being sued alone must necessarily infer her capacity of being sole plaintiff against those with whom she may contract. Her power too, in such circumstances, over her real property at law, hath lately been asserted to a very considerable extent (*c*): for it hath been holden, that a wife who had a copyhold estate to her separate use, and lived separate from her husband, could surrender the same without her husband, he having, upon the separation, covenanted to join in all necessary conveyance of such estates, and to such uses as she should appoint.

Ringstead v. Lady Lanesborough, Co. *Bankrupt Laws*, 32. Barwell v. Brookes, *id.* 36. Corbet v. Poelnitz, 1 Term Rep. 5. See *contr.* Hatchett v. Baddeley, 2 Bl. Rep. 1079. Lean v. Schutz, *id.* 11.

(*a*) But not where alimony is allowed only *pendente lite*: the fund must be permanent. Ellah v. Leigh, 5 Term Rep. 679. See too the observations of the court in that case. (*b*) *Vide* 6 Term Rep. 604. (*c*) Compton v. Collinson, 1 H. Bl. 334. The adequacy of the settlement, or the circumstances of the husband at the time of making it, are points which have not yet been discussed. Such a settlement, indeed, *with a covenant by the trustees to indemnify the husband against the wife's debts*, hath been holden to be good against creditors prior to the time of making it, for the covenant is a valuable consideration. Stephens v. Olive, 2 Br. Ch. Rep. 90.; and King v. Brewer, there cited, as decided by Lord Loughborough, at *Gbelmsford* assizes 1776. But without such covenant the husband is discharged from the wife's debts; for, as to him, the reason of introducing it, is, that he may be protected against the costs he may incur by being sued for those debts. Angier v. Angier, Gilb. Eq. Rep. 152. But if the operation of the covenant be, as stated in the case of Stephens v. Olive, it would follow, that any agreement between husband and wife, securing her a separate maintenance, without such covenant, may be set aside by creditors; unless it could be shewn that the conduct of the husband had been so harsh and cruel, as to afford the wife a sufficient ground for a sentence of alimony in the spiritual court, if the wife had sued him in such court; under which circumstance, it seems, a court of equity will sustain a conveyance by the husband of part of his estate, as a separate maintenance for his wife, even against the claims of creditors. Hobbs v. Hull, July 1786, Fonbl. notes on Eq. Tr. 102.

But it is in a court of equity, where a feme covert is usually, and where perhaps only she can properly be, considered as a feme sole; it being competent to that court to act upon her property in the hands of her trustees, and therefore to treat her as having interests and obligations distinct from those of her husband. If, therefore, she claims any rights in opposition to those claimed by her husband, or if she lives separate from him (*a*), or disapproves (*b*) the defence he wishes her to make, she may, in equity, obtain an order (*c*) to defend a suit separately. If a husband is plaintiff in a suit (*d*), and makes his wife a defendant, he is considered as thereby renouncing his marital right over her, and she is allowed to answer separately without an order of the court for the purpose. And as she may defend a suit instituted against her by her husband, so she may institute against him: but the bill must

(*a*) Pr. Ch. 329. (*b*) 2 Atk. 50. 2 Eq. Ca. Abr. 66. (*c*) But a separate answer put in without such order may

be suppressed as irregularly filed. 1 Ch. Rep. 68. But see 2. P. Wms. 371. where allowed

must (*e*) be exhibited in her name by her next friend, though she may defend without such protection. And the court (*f*) will not permit a bill to be filed by any one without her consent.

(*d*) 3 Atk. 478. (*e*) 2 Vez. 452. (*f*) Pre. Ch. 326. If a married woman obstinately refuseth to join with her husband, she may be compelled to make a separate defence; and for that purpose an order may be obtained that process may issue against her separately. 1 Ch. Ca. 296. It should be observed, however, that though a woman may be proceeded against without her husband, yet the court cannot make a personal decree against her for the payment of a debt; all they can do is, to call forth her personal property in the hands of trustees, and to direct the application of it. 1. Br. Ch. Rep. 16. 2. Atk. 68.

(*g*) 2 Vez. 452. For if no trustees are interposed, the husband is considered as a trustee for the wife. 2 P Wms. 316. And where a legacy was given to a feme covert, with a direction "that her receipt should be a sufficient discharge to the executors," it was holden to be equivalent to the testator's saying, "that it should be to her separate use." Lee v. Prieaux, 3 Br. Ch. Rep. 381.

The general grounds upon which equity allows a wife to institute a suit against her husband, are, where any thing is given (*g*) to her separate use; or the husband refuseth (*h*) to perform marriage-articles; or articles (*i*) for a separate maintenance; or where the wife (*k*) having been deserted by her husband, hath, during his absence, acquired by her labour a separate property, of which he hath plundered her. And it will decree a specifick performance of articles of separation (*l*) at the suit of the wife, though the husband offer to take her back again, if it appears that a *perpetual* separation was intended by the parties: but not so, where the separation is merely (*m*) temporary, or there (*n*) hath been a subsequent cohabitation. Nor is it any answer to such a suit, that the wife (*o*) hath been guilty even of adultery. However, in most cases, where a wife comes into equity to support her possession independent on her husband, it is her merit which entitles her to relief; and therefore the court will not decree maintenance (*p*) where there is full proof of elopement and adultery.

(*b*) 2 Vern. 493. (*i*) Gilb. Eq. Rep. 152. (*k*) 1 Atk. 278. (*l*) 3 Br. Ch. Rep. 614. (*m*) 1 Vez. 17., and 3 Atk. 547. (*n*) Fletcher v. Fletcher cited in 3 Br. Ch. Rep. 619. (*o*) 3 P. Wms. 269.; and Blount v. Winter, reported in 3 P. Wms. 276. Cox's edition. (*p*) 2 Atk. 96.

Finch's Rep 145. 2 P. Wms. 639. 3 P. Wms. 12. 205. 1 Str. 238. 1 Vez. 538.

Where the property of a wife is in the power of a court of equity, it will not part with it, unless the husband make a proper settlement, or the wife in court consent to his receiving it. And it hath gone so far (*q*) as to restrain him from proceeding in the spiritual court for the wife's portion arising out of personal estate, because that court cannot oblige him to make an adequate provision on her.

But this equity is personal to the wife; for if she die in her husband's lifetime, though she leave children, her husband is entitled to her personal property, without making any provision for them. Scriven v. Tapley, Ambl. 599. Phipps v. Earl of *Anglesea*, Fonbl. notes on Eq. Tr. 89. (*q*) Pre. Ch. 548., 2 Atk. 420. Toth. 111.

(*a*) 2 Br. Ch. Ca. 663. (*b*) 3 Br. Ch. Ca. 237. (*c*) 2 Br. Ch. Ca. 663. 2 Vez. jun. 38.

The wife's consent (*a*) to the payment of money to her husband, though she be not personally present, being resident abroad, may be given, and acted upon; but it cannot, by the rules of (*b*) the court in such case, be dispensed with, if the sum exceed 100 guineas; nor will the court part with the property, even with such consent, unless there be an affidavit both by husband and wife that it is not settled (*c*).

In *ex parte* Higham, 2 Vez. 579., Lord Hardwicke appears to have refused to order the whole of the wife's fortune to be paid to the husband, though the wife was in court, and desired it might. See also Blackwood v. Morris, cited in Ca. Temp. Talb. 43., to the same effect. But in Willetts v. Cay, 2 Atk. 67., the Master of the Rolls is reported to have ordered the wife's whole fortune to be paid to the husband, though insolvent, the wife being in court and giving her consent. As to part of her fortune, if she will persist in requesting it to be paid to her husband, the court must comply with her request. Dimmock v. Atkinson, 1 Br. Ch. Ca. 197. With the consent of the wife, money left in trust for the wife and her be

to be laid out in land, ordered to be paid to the husband, without being invested in land. Pearson v. Brereton, 3 Atk. 71. Stock standing in the names of trustees under a settlement, the dividends to be paid to the wife, or to such uses as she should from time to time, during coverture, appoint; the principal to be transferred, after her death, to the husband, ordered, upon her consent, to be paid, though no appointment to the husband. Clarke v. Pister, 26th March 1778. cited in 3 Br. Ch. Rep. 568. So a legacy given to a wife for her sole use, with a power of appointment by will, and in default of appointment, to her executors, ordered, upon her consent, to be paid to her husband. Newman v. Cartony, 24th April 1771. *Ibid.* So of money settled in like manner. Ellis v. Atkinson, 3 Br. Ch. Rep. 565.

And a woman, having a separate estate, may pass it without an examination in court; and she will be bound to a specifick performance, unless there be any proof of fraud or undue influence on the part of the husband. Lord *Hardwicke* (*d*) indeed seems to have thought, that the power of a feme covert to dispose of her separate estate must be confined to such part of it as was personal; for that of her real estate she could make no disposition during her coverture, unless by fine, or unless she had, before marriage, reserved to herself such right by way of trust, or of a power over an use; and doubted, whether a court of equity would carry into execution a bare agreement to the prejudice of the heir at law. But this doubt (*e*) is now done away; for it hath been since determined, that a court of equity will compel the heir to make a conveyance to the party in whose favour such an agreement was made. And in all those (*f*) cases where a feme covert hath such power, she may exercise it without joining her trustees, unless their joining is made necessary.

Allen v. Papworth, 1 Vez. 163. Pybus v. Smith, 3 Br. Ch. Rep. 340.

(*d*) Peacock v. Monk, 2 Vez. 191.

(*e*) Wright v. Cadogan, 6 Br. P. C. 156. Rippon v. Dawding. Ambl. 565.

(*f*) Grigby v. Cox, 1 Vez. 517.

If a feme covert, having separate property, borrows money, and executes a bond, or enters into a bond conjointly with her husband, as a security for his debts, this will give a foundation to demand the money out of her separate estate; and her declarations may in such case be read in evidence against her.

Peacock v. Monk, 2 Vez. 190. Norton v. Turvill, 2 P. Wms. 144. Hulme v. Tenant, 1 Br. Ch. Rep. 16. It hath been holden, too, that the separate property may be applied to the discharge of a bond given by her *before* marriage. In this case, it must be observed, that two bills were filed; the first against the wife only, in respect of her separate property, which was dismissed; the plaintiff then sued out writs against husband and wife; but the husband absconding, so that he could not be served, the plaintiff proceeded to outlawry, and then filed a second bill against the wife only. Briscoe v. Kennedy, at the Rolls, 21st July 1762; cited in 1 Br. Ch. Rep. 18.

If a wife charge her estate with the payment of her husband's debts, or apply her separate estate to such purpose, and it do not appear to be intended by her as a gift to him, equity will decree the husband's assets to be applied in exoneration of her estate, or in re-payment of the money advanced.

Huntingdon v. Huntingdon, 2 Vern. 437. 1 Br. P. C. 1 Pocock v. Lee, 2 Vern. 604. Tate v. Austin, 1 P. Wms. 264. 2 Vern. 689. Parteriche v. Pawlett, 2 Atk. 384. Clinton v. Hooper, 3 Br. Ch. Rep. 201.

In equity gifts may be supported, between husband and wife, though the law doth not allow the property to pass. Such gifts however must not be prejudicial to creditors; nor must they be of the whole of the husband's estate.

Slanning v. Style, 3 P. Wms. 334. and Calmady v. Calmady, there cited. Bletsow v. Sawyer, 1 Vern. 245. Moor v. Freeman, Bunb. 205. Mitchell v. Mitchell, there cited. Beard v. Beard, 3 Atk. 72.

A wife will not be permitted to put in an answer as a feme sole, separately from her husband, on the ground of his being a prisoner in the King's Bench.

Anon, 2 Vez. jun. 332.

In

Clayton v. Adams, 6 Term Rep. 604.

In *assumpsit* against *A.* as executor of *B.*, the defendant pleaded that *B.* was covert of *C.*: the plaintiff replied, that *B.* lived apart from *C.* and carried on a separate trade; that the credit was given to her, and the promises made by her; and that after her death *A.*, as her executor, poſſeſſed himſelf of her effects, more than ſufficient to ſatisfy the plaintiff's demand. To this replication there was a demurrer, againſt which it was argued by the plaintiff's counſel, that as it was admitted on the record, that the defendant poſſeſſed himſelf of *B.*'s effects, he was liable as her executor to the plaintiff's demand: that in *Norton* v. *Turville*, (1 *P. Wms.* 144.) it was holden, that the ſeparate eſtate of a feme covert was liable for the diſcharge of her bond debt: that in *Hulme* v. *Tenant*, (1 *Br. Ch. Rep.* 16.) Lord *Thurlowe* ſaid, that the engagements of the wife ſhould operate on her perſonal property. But by Lord *Kenyon*—To the equity caſes that have been cited I fully ſubſcribe: but they cannot govern us in a court of law. A court of equity can mould intereſts differently from a court of law; and can give relief in caſes where a court of law cannot. In order to enable the plaintiff to recover in this action, he ſhould have ſhewn that the feme covert, when alive, might have been ſued, and that the defendant was poſſeſſed of that property in reſpect of which ſhe might have been liable: but it does not appear that this could have been the ſeparate property of the wife. And the probate of the will of the wife was abſolutely void. We cannot determine that an action might have been maintained againſt this feme covert, without alſo ſaying that ſhe might have been taken in execution: but that would operate as a divorce between huſband and wife. In a late caſe (*a*), the Lord Chancellour ſaid, that if the huſband and wife be ſeparated by deed or ſentence, an action may be brought againſt the wife alone. I take it for granted that the doctrine there laid down was correct, as far as it applied to that particular caſe; but I doubt extremely the generality of that rule; according to that a wife might be taken from her huſband, though the ſeparation by deed was only temporary. *We muſt not by any whimſical conceits, ſuppoſed to be adapted to the varying faſhions of the times, overturn the eſtabliſhed law of the land: it deſcended to us as a ſacred charge, and it is our duty to preſerve it.* And if any one propoſition in the law can be more clear than another, it is this, that an action cannot be brought againſt a feme covert, except by the cuſtom of *London*. A court of law cannot get at the property of the wife, if ſhe have any. But courts of equity make their decrees ſo as to arrive at the juſtice of the caſe without violating the rules of law; to effect which they follow the property of a feme covert in the hands of her truſtees. And I particularly remember when the caſe of *Hulme* v. *Tenant* firſt came before Lord *Bathurſt*, he inſiſted that the truſtees ſhould be made parties to the bill before he would give any relief.

(*a*) Duke of Bolton v. Williams, 2 Vez. jun. 146.

Milnes v. Buſk, 2 Vez. jun. 488.

The rule, that a feme covert is to be conſidered as a feme ſole as to her ſeparate property, does not extend to tranſactions with her huſband. In *Paulet* v. *Delaval*, (2 *Vez.* 663.) the only caſe in the court of Chancery according to Lord Chancellour *Loughborough*, where the queſtion arose directly upon a gift between huſband and wife, Lord *Hardwicke* indeed eſtabliſhed the gift; but under circumſtances that marked very ſtrongly how much of aid he required to eſtabliſh a conveyance by a married woman of her ſeparate property in favour of her huſband: in that caſe, his Lordſhip relied mainly upon confirmation, when ſhe was ſole, and upon acts done after her huſband's death, when ſhe was under no control

Nor will the court eſtabliſh ſuch a conveyance without the actual preſence of the wife in court, where the truſtees put the parties to file a bill. It muſt appear to be done by the wife deliberately, and with full knowledge of all the circumſtances. The exact amount of the property, therefore, muſt be aſcertained, before her conſent to the diſpoſal of it can be admitted. Edmundſon v. Townſhend Anſtr. 93.

Money was veſted in truſtees, in truſt for the huſband and wife ſucceſſively for life, remainder to the children, and in failure of children, to ſuch perſon as the wife ſhould appoint. The huſband being in diſtreſs, the wife executed a deed, by which ſhe conveyed all her intereſt in this money to the plaintiff, and executed her power of appointment in his favour. A bill was filed, to have the conſent of the wife taken to this conveyance, and the aſſignment and appointment eſtabliſhed; ſubject to the claims of the huſband and wife for life, and the claims of the children. The court doubted, if they could eſtabliſh a conveyance of money which may never be in the wife's diſpoſal: but upon conſideration ordered the money to be paid into court for the contingent truſts of the ſettlement; and upon taking the conſent of the wife in court, decreed that the conveyance ſhould be eſtabliſhed. Guiſe v. Small, Anſtr. 277.

Where money is declared to be due to a feme covert, the court will not on motion, direct it to be paid to the truſtees in her marriage ſettlement, till it is reported by the maſter that there is a ſettlement. Hardwick v. Mynd. Anſtr. 294.

The plaintiff having come into court to obtain money found by the report of the Deputy Remembrancer to be due to his wife, upon the diſtribution of an inteſtate's effects, the court took into conſideration, whether they ſhould order the money recovered to be ſettled on the wife or paid to the huſband. Upon reference to the Maſter, he certified, that by the laws of *Pruſſia*, of which the plaintiff and his wife were inhabitants, the whole perſonalty of the huſband and wife is, during the coverture, at the abſolute diſpoſal of the huſband; but on the death of either is divided between the ſurvivor and the heirs of the deceaſed. The wife made no application to the court, either to have it ſettled or otherwiſe. The court ordered the money to be paid to the huſband, obſerving, that it would be very difficult to direct any way by which it could be ſettled, ſo as not to be liable to be defeated by the laws of *Pruſſia*. Sawer v. Shute, Anſtr. 63.

BASTARDY.

(*All well regulated*) According to Ld. Coke "*baſtardus dicitur a Græco verbo* "βασταζις," viz. *meretrix, ſeu concubina, quia procreatur ex meretrice ſeu concubinâ.* But Sir Henry Spelman, *verbo baſtard*, rejects this derivation, and holds it to be a pure *Saxon* word, "*baſtart*;" viz. *impurè natus, quod nos, upſtart dicitur homo novus.* It is compounded of *baſe*, vile, or ignoble; and ρτ, *natus*. Others, among whom is Dr. Johnſon, derive it from the *Britiſh*, "baſtaerd," or, "baſtardd," a word compounded of bâs, *minimè profundus*, et tardd, *germinatio*, tarddu, *germinare, oriri, ſalire, oriri ut fontes, q. d. qui non a profundâ et antiquâ nobilitate ortum deduxit, ſed qui ſuper terram ſe germinavit.* The word *bas*, or *baſe*, it may be obſerved, is from the *Perſick*, *baſt*, *baſy*. Page 309

Hickes

Hickes deduceth it from the Islandick, *buſta*; and *ar*, or, and *ord*, viz. *principium*, whence *buſt-ord*, or *buſtard*, *origine vel ortu non legitimus*. *Vide* Davies, Cambro. Brit. Lexi., Du Freſne's Gloſſ. Jun. Etymol., and Hickes' Theſ.

See notes, Co. Lit. 244. b. 245. a. 13th edit. In *Germany*, and with us, (who derive many of our cuſtoms and political opinions from the *Germans*,) baſtardy was always a circumſtance of ignominy. But in *Spain*, *Italy*, and *France*, baſtards were, in many reſpects, on an equal footing with legitimate children. Butler's Co. Lit. 243. b. note 2. But Sir H. Spelman tells us, (he doth not, indeed, refer to any authority,) that, among the northern nations, baſtardy was no bar to ſucceſſion; and, to ſhew that it was not conſidered by them as ignominious, he cites the letter of the Conqueror to Allan Count of *Brittany*, beginning with theſe words: "*Ego Willelmus Rex, cognomento* baſtardus." Euſtathius aſſerts, that baſtards were as honourable as legitimate children about the time of the *Trojan* war; but the paſſage in the Iliad, Θ 281., which he refers to as eſtabliſhing this equality, evidently ſhews the contrary. Perhaps there was no time, among any civilized people, when illegitimacy was not reputed a diſgrace.

See Metham v. Duke of *Devon*, 1 P. Wms. 529., where L.d. Macclesfield inclined againſt ſuch a remainder; and ſee M. Hargrave's obſervations upon this caſe. Co. Lit. 3. b. note 1.

If a baſtard, poſſeſſed of perſonal eſtate, dies inteſtate, and without wife or children, the crown is entitled to ſuch property, including leaſes or terms of years. The king, or other immediate lord of the fee, is alſo entitled to a real eſtate of inheritance, of which a baſtard dies ſeiſed, without having deviſed it, and without leaving iſſue. This is the reſult of a baſtard's being ſuppoſed to have no other relations, or next of kin, except thoſe ariſing from his own contract of marriage, namely, his wife and progeny. But the rigorous exertion of this prerogative would, in many obvious caſes, carry the appearance of great hardſhip. It is uſual, therefore, to make over the royal prerogative to ſome one; not indeed quite unconditionally and gratuitouſly, but the reſervation of a tenth, or other ſmall proportion of the value, both of real and perſonal eſtate. 3 P. Wms. 33. 1 Wooddeſ. 397, 8. Baſtards are within the ſtat. 26 Geo. 3. c. 33. which requireth the conſent of parents or guardians to the marriage of perſons under age; but the rule of *nullius filius* applies only to caſes of inheritance. 1 Term Rep. 96.

(A) Who are Baſtards.

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(*All Perſons Born*) 1 Bl. Comm. 454, 5. By the *Roman* law, it ſhould be obſerved, the father could legitimate only his "*natural children*," or the offspring of his concubine, who, by this epithet of "*natural*," were diſtinguiſhed from the ſpurious brood of adultery, proſtitution, and incеſt, to whom *Juſtinian* reluctantly grants the neceſſary aliments of life. *Vide* Inſt. l. 1. tit. Pandect. l. 1. tit. 7. Cod. l. 1. tit. 27. Nov. 74. 89. Heinec. Elem. Jur. de Legitimationе.

(*If the Huſband be under*) 1 H. 6. 3. b. Bro. *Baſtardy*, 26. Ro. Abr. *Baſtard*, (B). 13.

The age of puberty is fixed by us, after the *Roman* law, at the age of fourteen. Before the time of *Juſtinian*, puberty, in males, was judged of *ex habitu corporis*: but that emperor, thinking *inſpectionem habitudinis corporis* an indecent practice, fixed its commencement immediately upon the completion of the fourteenth year. Inſt. l. 1. tit. 22. But it is abſurd to ſuppoſe that generation is phyſically impoſſible before the age of fourteen; nor is it ſo concluded in the authority to which the paſſage in the text refers. 1 H. 6. 3. b. What is there ſaid, (and it is, by the way, merely the ſpeech of counſel,) is, that in ſuch caſe, the iſſue ſhall be baſtard, "*pur ceo ne poit eſtre* entendus par nul ley *que l'enfant deins cel age poit engend.*"

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(*An order of Two*) But it hath been ſettled ever ſince Pendrel's caſe, in 5 G. 2., that not only proof of being out of the kingdom, but alſo every other kind of evidence tending to prove the impoſſibility, or even improbability, of the huſbands being the father, is admiſſible. 2 Str. 925. P. Wms. 365. 1 Bl. Comm. 457. Lomax v. Holmden, 2 Str. 940. Rex. v. Inhabitants of *Bedall*, *id.* 1076. Ca. Temp. Hardw. 379.; and Andr. 8. 3. C. Goodright v. Saul, 4 Term R. 356. Rex. v. Inhabitants of *Lubbenham*, *id.* 251.

Where parliament diſſolves a marriage for a cauſe ſubſequent thereto, there is no neceſſary or general occaſion for reputing the children illegitimate. 1 Wood. 394. In the caſe of adultery clauſe is caſionally inſerted for illegitimating children born after a particular time. See Martin's *Bill*, 1793.

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(*A wife marries*) This writ is grantable to tenant in tail. *Ex parte* Aiſcough, 2 P. Wms. 591. Moſel 391. It is now granted to a deviſee, whether for life, or in tail, or in fee. *Ex parte* Bateman, at the Rolls, 16th Dec. 1784. *Ex parte* Bellett, at the Rolls, 20th Dec. 1786. *Ex parte* Wallop, 4 Br. Ch. Rep. 90. In Moſely, a caſe of *perſonal eſtate* is cited, in which the then Maſter of the Rolls, in conformity to the reaſon of the common law, directed, that the maſter ſhould appoint two matrons to inſpect a woman. Moſ. 391.

(D) How Baſtards are to be provided for: And herein of the Duty and Power of Juſtices of the Peace.

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(*By the* 18 *Eliz.*) Both juſtices muſt be preſent at the ſame time and place when the woman is examined; and if ſhe refuſe to filiate, the warrant of commitment muſt be ſigned by them both together. 2 Bl. Rep. 1017. An order of removal, however, by two juſtices, ſeparately, and in different counties, hath been adjudged not *void* but *voidable* only by appeal to the next ſeſſions. 4 Term Rep. 596. The order muſt bear, upon the face of it, that it was made on the complaint of the pariſh where the child was born. 1 Bott. 3d edit. p. 561. But the complaint may be made by others as well as the pariſh. 1 Barnard K. B. 261. If a child be born in an extra-parochial place, no order can be made. 1 Bott. 421. pl. 553.

The ſummons may be by a third juſtice. Ca. Temp. Hardw. 112.; the order need not ſtate it. Caſ. Sett. 127. The preſence of the putative father not neceſſary. Cald. 308.

It muſt appear by the order, that the child was born in the pariſh to which the money is ordered to be paid. Sty. 368.; and it muſt be ſo adjudged. Cald. 172. An order, deſcribing the child as chargeable to an hamlet, is bad. Caſ. Sett. 164. It muſt mention the ſex, and name of the child. 1 Str. 503.

The father hath no ſuch power, nor any right to the cuſtody of it; for, till ſeven years of * age, the child ſhall ſtay with the mother for nurture. 2. Saund. 183. 1 Ventr. 210. Caſ. of S. 64. Newland v. Oſman, Tr. 27. G. 2. 1 Burn. Juſt. 199. 15th ed. 2 Wilſ. 126. 5 Term Rep. 278.

A feme covert, and a ſoldier, may be committed for diſobedience to an order of baſtardy; and the commitment may be, either to the common gaol, or houſe of correction. 3 Burr. 1679. 2. Term Rep. 270. 5 Term Rep. 156. But a perſon cannot be committed for refuſing to diſcover the father of a baſtard child. 1 Bott. 422. pl. 554. An order cannot be made for ſecurity till after contempt. 2 Ld. Raym. 858.

If an order of baſtardy be quaſhed by the court of general quarter ſeſſions next after ſuch order, the court of K. B. will not intend that a court of general ſeſſions intervened. 3 Term Rep. 496.

It is ſettled, that the juſtices at ſeſſions have ſuch power. Dougl. 610.

It is for this reaſon, that the perſonal appearance of the defendant is required on a motion to quaſh an order. 1 Bl. Rep. 198. The ſeſſions, in the caſe of an appeal, cannot commit for non-payment, but muſt proceed on the original order. 2 Ld. Raym. 1157. After the defendant is diſcharged by the ſeſſions, on the merits, a new order cannot be made. 2 Ld. Raym. 1423.

* The ſame law prevailed in *France*; for, in the caſe of ſeparation between husband and wife, the children under ſeven years old, were to remain with their mother, according to the cuſtom of *Beauvoiſis*, in 1283, c. 57. p. 294. And this law goes as far back as the time of the Emperor *Juſtinian*: for that prince informs us, in his *Miſopogon*, that he was placed, at that age, under the care of a governor.

(*Baſtard Children*) So, if a woman comes to beg as a vagrant in a pariſh to which ſhe does not belong, and drops her baſtard there, it ſhall be ſettled in the mother's own pariſh, if ſhe is apprehended for her vagrancy. Stat. 17 G. 2. c. 5. So a baſtard born in gaol. Seſſ. Ca. V. 1. 94.; or in a licenced lying-in hoſpital, 13 Geo. 3. c. 82. § 5.; or in any houſe of induſtry, 20 Geo. 3; c. 36. § 2.; or under a certificate, 1 Str. 186. 2. Str. 1168. Burr. Sett. Ca. 187. 264. 650.; ſhall follow the mother's ſettlement.

Dougl. 7. 9. n. 2. When a baſtard, having a different ſettlement from its mother, lives with her for nurture, the pariſh where the baſtard's ſettlement is, muſt maintain it.

1 H. Bl. Rep. 253. See Dougl. 9. If the parents neglect to provide for the ſuſtenance of a baſtard child, the pariſh where it is born muſt do it, though the juſtices make no order for that purpoſe.

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(*By* 13 *and* 14 *Car.*) An order, giving the church-wardens power to ſeize ſuch of the putative father's goods as they may think proper, is bad. 2 Ld. Raym. 858.

(*By* 6 *Geo.* 2.) An examination taken under this act, is admiſſible evidence on an application to the court of ſeſſions to make an order of filiation, though the woman die before ſuch application can be made. Rex. v. Ravenſtone, 5 Term Rep. 373.

(*Provided always*) This proviſion ſhews the humanity of our laws; but it proves very frequently an hardſhip upon pariſhes, by ſuffering the parents to eſcape. 1 Black. Comm. 458. To an indictment, before the paſſing of this act, for ſecreting a woman big with an illegitimate child, ſo that ſhe could not be had to give evidence againſt the father, the defendant demurred: *Et per Cur.* Judgment for the defendant, for it cannot be illegitimate before born, there being always a poſſibility that it may be born in lawful wedlock. 1 Str. 612. 2 Ld. Raym. 1368.

Rex v. Price, 6 Term Rep. 147. If a perſon be bound by a recognizance by one magiſtrate under 6 Geo. 2. *c.* 31. to appear at the next ſeſſions, and perform ſuch order as ſhall there be made upon him under 18 *Eliz. c.* 3. reſpecting baſtards, the ſeſſions can only make an order of baſtardy on him, but cannot order him alſo to give ſecurity for the performance of that order.

(E) Murdering Baſtards.

(*By the ſtat.* 21 *Jac.*) Upon this ſtatute, it hath been adjudged, that it is not neceſſary that the indictment be drawn ſpecially, or conclude *contra formam ſtatuti*; for the ſtatute doth not create a new offence, but only makes the concealment undeniable evidence of murder. It hath been agreed, too, that where a woman appears to have endeavoured to conceal the death of ſuch child, within the ſtatute, there is no need of any proof that the child was born alive; but it ſhall be undeniably taken, that the child was born alive, and murdered by the mother. 2 Hawk. P. C. c. 46. § 43. But of late years, as this law ſeemeth to be ſomewhat ſevere, it hath been uſual, upon trials for this offence, to require ſome ſort of preſumptive evidence that the child was born alive, before the other conſtrained preſumption is admitted. 4 Bl. Comm. 198. It hath been adjudged, that where a woman lay in a chamber by herſelf, and went to bed without pain, and waked in the night, and knocked for help, but could get none, and was delivered of a child, and put it in a trunk, and did not diſcover it till the following night, yet ſhe was not within the ſtatute, becauſe ſhe knocked for help. Kelynge, 32. Alſo it hath been agreed, that if a woman confeſs herſelf with child before-hand, and afterwards be ſurpriſed and delivered, nobody being with her, ſhe is not within the ſtatute, becauſe there was no intent of concealment. Kelynge, 33. So, if it appear that ſhe hath made any the ſlighteſt proviſion for clothing the child.

BIGAMY.

(*Matrimonial*) This offence is corruptly called *bigamy*; for *that* properly ſignifies being twice married: it is more juſtly denominated *polygamy*, or having a plurality of wives.—Bigamy, accor-

ing to the canoniſts, conſiſted in marrying two virgins ſucceſſively; one after the death of the other, or in once marrying a widow. Such were eſteemed incapable of orders; and by a canon of the council of *Lyons*, A. D. 1274, holden under pope Gregory X. were *omni privilegio clericali nudati et coercione fori ſecularis addicti.* (6 Decretal. l. 12.) This canon was adopted and explained in *England*, by ſtatute 4 E. 1. ſt. 3. c. 5., and bigamy thereupon became no uncommon counterplea to the claim of benefit of the clergy. (M. 40 E. 3. 42. M. 1 H. 4. 11. 48. M. 13 H. 4 6. Staunf. P. C. 134.) The cogniſance of the plea of bigamy was declared by ſtat. 18 E. 3. ſt. 3. c. 2. to belong to the court chriſtian, like that of baſtardy. But by ſt. 1 Edw. 6. c. 12. § 16. bigamy was declared to be no longer an impediment to the claim of clergy. See Dal. 21. Dy. 201. 4 Bl. Comm. 163.—It may be added, as a further mark, perhaps, of the odiouſneſs of bigamy, among the very early inhabitants of this iſland, that by the cuſtom of gavelkind, which was very extenſive, and is ſuppoſed to be a relick of the ancient Britons, (1 Inſt. 175. b.) a ſecond marriage incurred a forfeiture of dower. 1 Inſt. 33. b. 1 Wooddeſ. 425.

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(*By* 1 *Jac.* 1. *cap.* 11.) In proſecutions on this ſtatute, a marriage in fact muſt be proved. 4 Burr. 2059.

If a marriage be declared void by an eccleſiaſtical ſentence, and there be an appeal to a higher ſpiritual tribunal, which, by ſuſpending that ſentence, is a ſuppoſed continuation of the marriage, yet one of the parties marrying again doth not incur the penalties of this law, although ſuch ſecond marriage is indeed unlawful. Gibſ. Cod. c. 22. c. 4. A ſentence in the eccleſiaſtical court in a ſuit for jactitation doth not preclude the crown from proving the marriage in an indictment on this ſtatute. And admitting that ſuch a ſentence were ſo far concluſive as to the fact of marriage, the crown may avoid the effect of the concluſion by giving evidence that the ſentence had been obtained by fraud and colluſion. Ducheſs of Kingſton's trial, 11 St. Tr. 262.

The firſt and true wife is not an admiſſible witneſs againſt her husband. 1 Hale, 692. Even an affidavit by the firſt wife, to poſtpone the trial againſt the husband, on an indictment upon this ſtatute, hath been rejected. O. B. Feb. 1786. But ſee Adding. P. S. 411. But the ſecond woman is competent to prove the marriage, for ſhe is not his wife ſo much as *de facto*. 1 Hale, 693.

By *ſt.* 35 *G.* 3. *c.* 67. perſons convicted of bigamy are ſubjected to the penalties of grand larceny.

Bills of Sale.

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BY ſt. 26 *Geo.* 3. *c.* 60. § 17. it is enacted, "That when and ſo often "as the property in any ſhip or veſſel, belonging to any of his majeſty's "ſubjects, ſhall be transferred to any other or others of his majeſty's ſub- "jects, in whole or in part, the certificate of the regiſtry of ſuch ſhip or "veſſel (required by this act) ſhall be truly and accurately (*a*) recited in "words at length, in the bill or other inſtrument of ſale thereof; and "that otherwiſe ſuch bill of ſale ſhall be utterly null and void to all in- "tents and purpoſes."

3 Term Rep. 406.

(*a*) A mere clerical miſtake will not vitiate it. 4 Term Rep. 161.

The deciſions upon bills of ſale having ariſen chiefly upon the ſtatute of 13 *El. c.* 5., the reader is referred for them to tit. *Fraud*, C.

If the certificate of regiſtry be not accurately recited in the bill of ſale of a ſhip, the conveyance is *void*, and not *voidable* only; and the objection may be made by any third perſon, though the vendor and vendee treat the conveyance as valid.

Weſterdell v. Dale, Tr. 37 G. 3. B. R.

Bill of Exceptions.

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Bridgman and Holt, Show. P. C. 120. Bull. *N. P.* 316.

A bill of exceptions ought to be upon ſome point of law, either in admitting or denying evidence, or a challenge, or ſome matter of law ariſing upon a fact not denied, in which either party is over-ruled by the court. If ſuch bill be tendered, and the exceptions in it truly ſtated, the judges ought to ſet their ſeals in teſtimony that ſuch exceptions were taken at the trial: but if the bill contain matters falſe, or untruly ſtated, or matters wherein they were not over-ruled, they are not obliged to affix the ſeal. A bill of exceptions is not to draw the whole matter into examination again; it is only for a ſingle point, and the truth of it can never be doubted after the bill is ſealed, for the adverſe party is concluded from averring the contrary, or ſupplying the omiſſion of it.

(*It ſeems*) In 1 Leon. 5. it was allowed in an indictment for a treſpaſs; in 1 Vent. 336., in an information in nature of a *quo warranto;* in 1 Vern. 175., in an indictment for a riot; and in K. v. Bounce, cited in Ca. Temp. Hardw. 250., it was allowed by Lord Raym. at *Ni. Pri.* that it might be done in an indictment for a libel. In the Exchequer, it is allowed upon information; but thoſe are properly civil ſuits for the king's debts: So in *devenerunt*; but they are called the king's actions of trover. *Per* Ld. Hardwicke, Ca. Temp. Hardw. 251.

Rex v. Preſton, Burr. S. C. 77. 2 Str. 1040. Ca. Temp. Hardw. 249. 1 Barnard. K. B. 415. S. C.

A bill of exceptions will not lie to the juſtices at ſeſſions on hearing an appeal againſt an order of removal; for their authority is final as to matters of fact.

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(*When this bill*) But the bill of exceptions is in nature of a writ of error, and therefore cannot be determined in the court out of which the record iſſues. Davenport v. Tyrrell, 1 Bl. Rep. 675. Searle v. Lord Barrington, 2 Str. 826. Money v. Leach, 3 Burr. 1692. But though that court hath no juriſdiction in ſuch caſe, yet if a ſpecial verdict be found in the ſame cauſe, upon which they pronounce judgment, and that judgment be right, their proceeding on the bill of exceptions will not alone be a ground for a court of error to reverſe the judgment. Cowp. 501.

(*When a bill of*) If the court of error give judgment in favour of the bill of exceptions, and are of opinion, that the evidence, though not concluſive, ought to have been received, they will award a *venire facias de novo*. Davies v. Pierce, 2 Term Rep. 125. But where there is a bill of exceptions, the court below will not grant a new trial on the very point obtained in it. Fabrigas v. Moſtyn, 2 Bl. Rep. 929.

Borough-Engliſh.

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(*Borough*) But this reaſon is rejected; for tho' perhaps, ſufficient to exclude the eldeſt, it would only, if taken in its full force, convey the inheritance to the ſecond ſon, as the next worthy, and not to the youngeſt. This barbarous cuſtom, Sir W. Blackſtone thinks, never prevailed in *England*, tho he ſaith, it certainly did in *Scotland*, (under the name of *mercheta*, or *marcheta*,) till aboliſhed by *Malcolm* 3. Mr. Robinſon, however, tells us, that it prevailed here, in ſeveral manors in the [illegible] the

thern counties, in which a fine is now paid as a commutation for the right; though he acknowledges that the cuſtom of borough-engliſh doth not particularly obtain in thoſe manors where ſuch fine is paid. Rob. on *Gavelkind*, Appendix. It ſhould be obſerved, that in Scotland, it was the fine paid by way of commutation for the exerciſe of the right, not the right itſelf, which was called *marcheta*; Skene *verbo Marcheta*. Buchan. Hiſt. of *Scot.* lin. 7. And the ſame term is well known in our law, for a fine due to the lord on the marriage of the ſon or daughter of his villein. Co. Lit. 117. b. 140. a. Bract. lib. 2. f. 26. And a late ingenious writer hath thought, that the *merchet* of the *Scots* is merely *Britiſh*, and nothing more than the Merch-ed of Howel Dha, the daughter-hood, or the fine for the marriage of the daughter. Whitaker's Hiſt. of *Manchester*, vol. 1. 359. Sir W. Blackſtone deduceth the origin of this cuſtom from the *Tartars*, among whom, according to Father Duhalde, it alſo prevails. 2 Bl. Com. 85.

There is no difference between the law concerning copyholds in borough-engliſh, and freeholds in borough-engliſh, as is agreed in Cro. Car. 411.

(*If the land in*) 2 Lev. 138. 3 Keb. 475. 486. 498. But he takes, as heir. 2 Vern. 226. Vaugh. 201. Robinſ. *Gavelkind*, 97.

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(*The law takes*) As to the ſpecial cuſtoms, ſome of them reſtrain, and others extend the general cuſtom. Of the firſt ſort are, 1. The cuſtom of a manor in the duchy of *Cornwall*, that an eſtate in fee in the lands ſhall go to the eldeſt ſon; but if in tail, the tenements ſhall deſcend to the heir at common law; and this was holden a good cuſtom in the caſe of Chapman and Chapman, March 54. 2. In 32 E. 3. Age, 81, it is pleaded, that in the ſoke of *B.*, if a man has ſeveral ſons by one wife, the youngeſt ſhall inherit after the death of the father: but if he has two ſons by different venters, the eldeſt ſhall inherit to the father, and not the youngeſt; and this cuſtom is there allowed good. Co. Lit. 140. b. Thoſe more extenſive than the general cuſtom, are, 1. That if the tenant has no ſons, but ſeveral brothers, his youngeſt brother ſhall inherit. Co. Lit. 110. b. 2. That the youngeſt ſiſter ſhall inherit. Co. Lit. 140. b.

The youngeſt ſon, it hath been determined, ſhall have his whole diſtributive ſhare of the perſonal eſtate of his father dying inteſtate, without bringing into hotchpot an eſtate of the nature of borough-engliſh deſcended to him from his father; for that ſuch eſtate deſcended is not within the ſtatute of diſtributions. Lutwyche v Lutwyche, Ca. Temp. Talb. 276.

BRIDGES.

(*Public Bridges*) The reparation of public bridges was part of the *trinoda neceſſitas*, to which, by the ancient law, every man's eſtate was liable, *expeditio contra hoſtem, arcium conſtructio, et pontium reparatio*. So in the *Roman* law, *ad inſtructiones reparationeſque itinerum et pontium, nullum genus hominum, nulliuſq. dignitatis ac venerationis meritis, ceſſare oportet.* C. 11. 74. 4.

The obligation to repair being upon all the inhabitants of a county, it follows, that they are not liable to an action, at the ſuit of an individual, for an injury ſuſtained by him in conſequence of a bridge being out of repair. 2 Term Rep. K. B. 667.

(*If a manor held*) A tenant at will, of a houſe adjoining to a common bridge, is compellable, in reſpect of his poſſeſſion, to repair the houſe, ſo as the public ſuſtain no injury by it; though he is not bound to repair as to his landlord. 2 Ld. Raym. 856.

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(*It is ſaid*) An indictment for not repairing a bridge, muſt ſhew what ſort of bridge it is, whether for carts and carriages, or for horſes, or for footmen only. 2 Ld. Raym. 1175. Where the obligation to repair ariſeth from the tenure of certain lands, the indictment muſt ſtate where thoſe lands lie. 2 H. H. P. C. 181.

No

(*No Inhabitant of a*) He is made ſo by 1 Ann. ſt. 1. c. 18. § 13. Upon a ſuggeſtion on the record, that the queſtion was between the Citizens of *Norwich* and the Inhabitants of the County of *Norfolk*; and they being intereſted, there could be no indifferent trial had there; the court awarded the *venire* for the trial of an information for not repairing a bridge within the boundaries of the county of the city of *Norwich* into *Suffolk*. And the trial in *Suffolk* was ruled to be proper by three Juſtices, againſt Forteſcue, J.; though the defendants had pleaded only the general iſſue. Str. 177. And if the juſtices are all intereſted, the trial ſhall be in the next county. 1 Burr. 859. If the boundaries of a city are enlarged by letters patent, the obligation to repair bridges, upon the newly annexed lands, paſſeth with thoſe lands. Str. 177.

Roll. Abr. 368. pl. 2. Com. Dig. tit. *Chimin*, B. 2. 5 Burr. 2594. 2 Bl. Rep. 685.

Where an owner of a mill cut a channel to it acroſs the highway, and threw a bridge over that part of the highway which was ſo cut through; which bridge was uſed as a publick bridge; it was adjudged, that the repair of it lay upon him. But where a townſhip that were bound to repair a foot-bridge, pulled down that bridge, and built another for horſes and carriages in a different and more commodious part of the river; and this bridge became afterwards of general publick utility; it was holden that the county, and not the townſhip, ought to repair it. In this latter caſe, beſides that the bridge was of a *different* kind, and in a *different* ſituation, from that which the townſhip were originally charged with the repair of, it did not appear that they derived any greater or other advantage from it, than the publick at large; but in the former caſe, the bridge was erected in conſequence of the new cut which the owner of the mill had made, which cut was a publick nuiſance, and was merely for the particular accommodation of his mill, ſo that he received benefit from the bridge beyond that which the publick enjoyed by it. This diſtinction was made by Lord *Kenyon*, in the caſe of the King v. the Inhabitants of *Glamorganſhire*.—To an indictment againſt the county for not repairing a bridge, they pleaded that it had been built by a Mr. *Mackworth* for his private accommodation, in order to lead to his tin-mines; and that the preſent proprietor of thoſe mines ſtill made uſe of it for that purpoſe. But as there was no evidence that the *Mackworth* family had done any thing which induced the neceſſity of erecting that bridge; and as it was become of publick utility; the learned judge ruled, that the county was bound to repair it, notwithſtanding that it ſtill continued to be a benefit to the preſent proprietors of the mines.

Summer aſſizes at *Hereford*, 1788.

1 Salk. 359. pl. 7.

Juſtices at ſeſſions cannot make an order for the repair of a bridge, but muſt proceed by indictment.

Vin. Abr. tit. *Bridges*. (B). pl. 38.

Nor can they make an aſſeſſment upon a hundred, for reimburſing two of the inhabitants the expences they incur, by being diſtrained to appear and defend an indictment for not repairipg a bridge within the hundred.

By ſtat. 1 *Ann. ſeſſ* 1. *c.* 18. The act of 22 *Hen.* 8. *c.* 5. is confirmed, except where altered by this act.

(*a*) The bridge to be repaired muſt be ſtated in the preſentment to be a publick bridge, and out of repair; and this muſt appear upon the face of the order of aſſeſſment; but it is not neceſſary that the jury ſhould preſent by whom the bridge ought to be repaired. Andr. 285. (*b*) A general rate by the ſeſſions on the ſeveral pariſhes, &c. with orders to the churchwardens, &c. to aſſeſs the inhabitants, is ſufficient. *Id.* 101.

By § 2. Juſtices at their general or quarter ſeſſions have power upon preſentment (*a*) that any bridge is out of repair within their commiſſions, which by them ought to be repaired, to lay (*b*) ſuch ſum on every pariſh as it hath uſually been aſſeſſed at towards the repair of ſuch bridge, which ſhall be levied by the conſtables of each pariſh or ſuch other perſons as the juſtices ſhall appoint, and by them in ſix days after the receipt thereof paid to the high conſtables, who are to pay it over in ten days to the perſons appointed by the ſeſſions to be treaſurers.—On non payment in ten days after demand, the money to be levied by diſtreſs and ſale.

§ 3. Conſtables

§ 3. Conſtables neglecting to aſſeſs, collect, or pay the money, to forfeit forty ſhillings, and treaſurers paying any money but by order of juſtices at ſeſſions, to forfeit five pounds.

‡ 4. Fines impoſed upon preſentments or indictments not to be returned into the Exchequer, but to be paid to the treaſurers, and applied towards the building or repairing of the bridges.

§ 5. All matters concerning the repair of bridges to be determined in the county where they lie, and not elſewhere; and no preſentment or indictment for non-repair of bridges and the highways at the end thereof, to be removed by *certiorari* (*c*).

(*c*) This act extends only to bridges which the county is bound to repair; for where a private perſon, or a pariſh, is charged, and the right queſtion, the ſtat. of 5 & 6 W. & M. c. 11. hath allowed the granting of a *certiorari*. 1 Barnard. 445. will come in 2 Str. 900.

§ 6. Juſtices to allow a ſum not exceeding 3*d.* in the pound to perſons concerned in the execution of this act.

§ 7. Perſons proſecuted for any thing done by them under this act to plead the general iſſue, and give this act, and the act of 22 *H.* 8. *c.* 5., and the ſpecial matter in evidence; and upon the plaintiff being nonſuited, or having a verdict againſt him, to have double coſts.

§ 8. This act not to diſcharge particular perſons, eſtates, or places heretofore liable to the repairs of any bridge.

§ 9. All forfeitures and penalties incurred by this act to be applied towards repairs.

§ 13. In all informations or indictments the evidence of the inhabitants of the town or county in which decayed bridges or highways lie, ſhall be admitted.

By 12 G. 2. *c.* 29. § 13., No part of the county rate to be levied by that act ſhall be applied to the repair of any bridges, but upon preſentment of the grand jury.

By § 14. Juſtices (*a*) at their general or quarter ſeſſions may contract for the repairs of bridges for any term not exceeding ſeven years, the contractor giving ſecurity for the due performance of his contract, and the juſtices giving notice at their ſeſſions of their intention of entering into ſuch contract. The contract to be made at the loweſt price propoſed, and when agreed to, to be entered, together with all orders relating thereto, in a book to be kept by the clerk of the peace, &c., who ſhall keep it among the records of the county, &c., to be open to the inſpection of any of the juſtices within the limits of their commiſſions, and by perſons employed under this act, without fee or reward.

(*a*) Where the juſtices at ſeſſions appointed a committee of magiſtrates to inſpect the ſtate of a county bridge, and to make any contract for repairing or rebuilding, to be executed by the clerk of the peace on behalf of the county; and afterwards made an order adopting a contract for rebuilding, propoſed by the committee, and directed to be prepared by the clerk of the peace; which contract was thereupon executed by the clerk of the peace; and the juſtices, at a ſubſequent ſeſſions, confirmed all the reſolutions of the committee: the acts of the committee, ſo confirmed, were the acts of the ſeſſions, and the authority given to the committee, and ſo exerciſed by them, was not ſuch a delegation of power by the ſeſſions as invalidated their order. 5 Term. Rep. 279.

By 14 G. 2. *c.* 33. Juſtices at their general or general quarter ſeſſions are empowered to purchaſe lands (*b*) near to any county bridge, for the purpoſe of enlarging or rebuilding ſuch bridge, not exceeding one acre for each bridge, which land ſhall be paid for out of the monies raiſed by the county rate under the 12 G. 2., by the county treaſurer thereto authoriſed

(*b*) This power of purchaſing lands, impliedly gives the power of altering the poſition of the bridge to ſuit the conveniency of the publick. 5 Term Rep. 282, 3.

rised by order under the hands and seals of the majority of the justices at sessions, and shall be conveyed to such person or persons as the majority of the said justices at such sessions shall appoint, in trust for the enlarging or rebuilding of the respective bridges.

Rex v. Inhabitants of Cumberland, 6 Term Rep. 194.

If a bridge used for carriages, though formerly adequate to the purposes intended, be not now of sufficient width to meet the publick exigencies, owing to the increased width of carriages, the burden of widening it must be borne by those who are bound to repair the bridge.

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BURGLARY.

(*Burglary is a*) 4 Bl. Com. 223. *Burglatores*, or *burgatores*, were so called, according to Sir H. Spelman. *quod dum aliis per campos latrocinantur eminùs, hi burgos pertinaciùs effringunt, et depradantur.* And, in the opinion of the same writer, the word *burglaria* was brought here by the *Normans*, for he doth not find it among the *Saxons*. The crime, however, is noticed in our earliest laws, under the names of hurbrec, and hamfocne, and was punishable with death. *Vide* LL. Canuti, cap. 61. & Hen. 1. c. 13.—The description of the offence hath varied at different times, and hath been much larger than it is at present: nor doth the circumstance of *time*, which is now of its very essence, seem to have been formerly much, if at all, attended to; its malignity, for many centuries, being supposed to consist merely in the invasion on the right of habitation, of which the law of *England* hath always had so tender a regard. It doth not appear, at least the editor's researches have not enabled him to discover, at what particular period this circumstance was first deemed essential to the crime. However, it must have been settled before the reign of H. 6.; for, in the 4th year of that king, we find it expressly laid down, that it shall not be adjudged burglary, "*nisi ou le infreinder del meason est per noctem*, Br. tit. *Corone*, pl. 185.; and two years before, we meet with *per noctem*, introduced, as of course, in the mention of this offence. *Id.* pl. 180.

(A) What Breaking is sufficient to constitute this Offence.

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(*By the* 12 *Ann.*) Lord Bacon was of opinion that it was burglary; but Lord Hale thought that it was not. Bac. El. 65. H. H. P. C. 554.

(B) What Entry.

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(*Any the least*) But it seems, that the instrument must actually be introduced for the purpose of committing the felony; and therefore, where thieves had bored a hole through the door with a centre-bit, and part of the chips were found in the house, but they had neither gotten in themselves, nor introduced a hand or instrument for the purpose of taking the property, the entry was ruled to be incomplete. *O. B.* 1785. Hawk. P. C. 6th ed. 162. n. 1.

(D) What shall be accounted Night-time for this Purpose.

(*The word*) But this does not extend to moon-light; for then many midnight burglaries would go unpunished; and besides, the malignity of the offence doth not so properly arise from its being done in the dark, as at the dead of night, when all the creation, except beasts of prey, are at rest, when sleep has disarmed the owner, and rendered his castle defenceless. 4 Bl. Comm. 224.

(E) [illegible]

(E) In what Place this Offence may be committed.

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(*A houſe which*) But it hath been determined, that a houſe under repair, but not yet inhabited, though the owner have depoſited part of his effects in it with a view to reſide in it, is not his dwelling-houſe, and therefore not the object of burglary. Lyon's caſe, *O. B.* Jan. 1778. Leach's Caſes, 169. So of an unfiniſhed houſe, though one of the workmen conſtantly ſlept in it for the purpoſe of protecting it. Fuller's caſe, *O. B.* Dec. 1782. *Ibid.* n.

(*Alſo all*) Garland's caſe. Leach's Caſ. 130.

(*Alſo a Chamber*) If the owner of the houſe inhabit any part of it, and there be no ſeparate outer door to ſuch part, the houſe ſhall be ſaid to be his dwelling-houſe; but if he do not ſleep under the ſame roof, then the different apartments ſhall be ſaid to be the reſpective dwelling-houſes of the ſeveral perſons renting them. Rex. v. Rogers, Leach's Caſ. 84. Cowp. 1. Leach. 205. 333. Lofts over coach-houſes and ſtables, converted into lodging-rooms, and having an outer door common to the ſeveral inmates, may be ſaid to be the dwelling-houſes of their inhabitants, though not rated to the pariſh books as dwelling-houſes, but merely as appurtenances to the coach-houſe and ſtables. Leach, 205.

(*If ſeveral perſons*) This was determined in the caſe of *Somerſet-houſe*, belonging to the Queen mother. If a burglary be committed in the apartments of a palace, it muſt be ſtated to be in the manſion-houſe of the king. 1 Hal. 522. But Q. in whoſe houſe ſtealing in the Invalid-office at *Chelſea* ſhould be laid to be? If burglary be committed in one of two adjoining houſes belonging to two partners, it ought to be laid to be in the ſeparate manſion of the partner in whoſe houſe it was committed, if there be no internal communication between the two houſes, although the rent and taxes of the houſe are paid out of the partnerſhip fund. Martha Jones's caſe, Leach, 434.

(*Burglary cannot*) It hath been determined, that burglary may be committed in a ſhop adjoining to a houſe, if under the ſame roof, and within the curtilage, although there be no internal communication between the ſhop and the houſe, and no perſon ſleep in the houſe, and the ſhop, together with ſome apartments in the houſe, be rented out by the owner. Gibſon, Mutton, and Wigg's caſe, Leach, 287.

By 13 *G.* 3. *c.* 38. burglary in any houſe, ſhop, &c. belonging to the plate-glaſs company, with intent to ſteal or deſtroy the ſtock or utenſils, is declared to be ſingle felony, and puniſhed with tranſportation for ſeven years.

(G) How this Offence is puniſhed, and the Offender excluded his Clergy.

BY 10 & 11 *W.* 3. *c.* 23. § 2., the proſecutor of a burglar to conviction is entitled to a certificate, which may be once aſſigned, and which diſcharges him or his aſſignee from all pariſh and ward offices. The 5 *Ann. c.* 31. hath added a reward of 40*l.*; and an accomplice being out of priſon, diſcovering two or more felons, is entitled to the like reward and a pardon. And by the laſt act, the receivers of the goods ſtolen, and receivers of the burglars, are declared acceſſaries, and excluded from their clergy. And if the principals cannot be taken, they may be tried as for a miſdemeanor. By 10 *G.* 3. *c.* 48., the receivers of ſtolen jewels, gold, or ſilver plate, watches, where the ſtealing ſhall be accompanied with a burglary, or robbing on the highway, ſhall be triable as well before conviction of the principal, whether he ſhall be in or out of cuſtody, as after, and be tranſported for fourteen years. By 23 *G.* 3. *c.* 88., every perſon apprehended

apprehended having upon him any implement of houſe-breaking, with intent feloniouſly to break and enter into any dwelling-houſe, ware-houſe, coach-houſe, ſtable, or out-houſe, ſhall be deemed a rogue, &c. within 17 G. 2. c. 5.

By-Laws.

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(*A bye-law*) The word *by-law* is derived by ſome from bupuz, burg, burh S. byr, I., a town or borough, and laga, S. law. By others from by, S. big, denoting private, and laga.

Where the power of making by laws is by charter given to a ſelect body, they do not repreſent the whole community, and therefore cannot aſſume to themſelves what belongs to the body at large. But where the power is in the body at large, they may delegate their right to a ſelect body, who thus become the repreſentative of the whole community. 3 Burr. 1837. But when a power is given by charter to a ſelect number to make by laws *in the ſtead, for, and in the name of, the whole*, and a by-law is returned as made by the body at large, ſuch by-law may be good, for it may have been made by the ſelect body acting in the name of the whole, and if found to be made *in due manner*, it ſhall be ſo intended. 1 Burr. 130, 1.

This ſtatute extends only to guilds, fraternities, &c.; not to cities, boroughs, &c. *Per* Att. *Quo W.* 44. And if lawful and reaſonable, the bye-law will be good, though not confirmed, or allowed according to this ſtatute.

2 Burr. 777. The validity of a by-law cannot be queſtioned in a ſummary way upon motion, on the return to a *habeas corpus cum cauſâ*, from any other corporation but that of *London*: but the plaintiff muſt begin *de novo*, and declare over again in the ſuperior court. The reaſon (*a*) of this diſtinction between the city of *London*, and all other cities and corporations, may perhaps ariſe from particular methods of recovery being eſtabliſhed and allowed by the cuſtoms of *London*, which cannot be purſued in the ſuperior courts; ſo that the ſhewing that to be the cauſe, is a good cauſe of detainer. For upon theſe writs of *habeas corpus*, the perſon to whom they are directed muſt ſhew a good cauſe of detainer: and if the ſuperior courts cannot proceed, as the cuſtoms of *London* authorize their courts to proceed, it is a good cauſe of detainer; therefore the ſuperior court will there enter into the validity of the by-law to ſee whether that be the caſe or not; and if the by-law appears to be bad, the party ſhall be diſcharged, as being detained without cauſe.

(a) Per Denniſon, J. *ibid.*

(*As every by-law*) It is ſaid to have been aſſerted by Holt, C. J. that every by-law, by which the benefit of the corporation is advanced, is, for that reaſon, good; ſuch common benefit being the true touchſtone of all by-laws. Carth. 482. But the true teſt of all by-laws, according to Mr. J. Wilmot, is the intention of the crown in granting the charter, and the apparent good of the corporation. 3 Burr. 1838. Perhaps the criterions are not ſufficiently marked out, and explicit, by either of theſe authorities.—It is not neceſſary to ſet out in the preamble all the reaſons of the by-law. 3 Burr. 1324.

(A) Such By-Laws as relate to the appointing and electing Members of a Corporation.

(*If there be*) 1 Str. 314. S. P. 3 Burr. 1833. S. P. But a by-law cannot ſtrike off an integral part of the electors; neither can it narrow the deſcription of perſons eligible, or ſuperadd a qualification not required by the charter. Rex v. Spencer, 3 Burr. 1827. See too, 4 Burr. 2204.

Where

Where a corporation having right to make by-laws to govern the inhabitants, and to make ſecondary burgeſſes out of the inhabitants, and capital burgeſſes out of the ſecondary burgeſſes, made a by-law, that every inhabitant choſen a burgeſs, and refuſing to ſerve, ſhould forfeit, &c.; this was holden to be a good by-law; though as framed, it could affect only an inhabitant refuſing to be a capital burgeſs. Mayor, &c. of *Wokingham* v. Johnſon, Ca. Temp. Hardw. 284.

Where the title to the freedom of a borough as given by the conſtitution of the crown was by birth, ſervitude, or election, a by-law that any perſon (not ſo entitled) ſhould be admitted to the freedom of the borough, upon payment of the ſum of ten pounds, was holden bad. Rex. v. Breton, 4 Burr. 2260

Where the mode of electing officers is not particularly pointed out by charter or preſcription, the corporation may from time to time make by-laws to regulate their elections. Newling v. Francis, 3 Term Rep. 189

Where a charter provided that the election of ſenior bailiff ſhould be made by a majority of a ſelect body, it was holden, that a by-law giving a caſting vote to the preſiding officer in caſe of an equality of voices was bad, as contrary to the conſtitution of the charter. Rex. v. Ginever, 6 Term Rep. 734.

(B) Such as are made in Reſtraint of Trade.

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(*Sowhere*) But a by-law that every candidate for the freedom of a city ſhall be called at three ſeveral meetings of the mayor, &c. and approved of by the majority, hath been holden good, as providing a method for previouſly examining into the right of thoſe who claim to be made free. Green v. Mayor of *Durham*, 1 Burr. 131.

(*If the city of London*) And a by-law that no ſtranger ſhall uſe a particular trade within a city, is good, if founded upon a cuſtom. Woolley v. Idle, 4 Burr. 1951. Bodwic v. Fennel, 1 Will. 233. *Secus*, if there be no ſuch precedent cuſtom, 1 P. Wms. 184. But general cuſtoms, in aid and ſupport of by-laws, may include new things and objects, which have not exiſted beyond the time of memory, if they are within the reaſon of ſuch cuſtoms. 1 Ld. Raym. 499.

A by-law of the Surgeons' Company in *London*, "That no member "ſhould take an apprentice who does not underſtand the *Latin* tongue, "his ability wherein ſhould be tried by the governors, or one of them, be-"fore his being bound," adjudged good." Rex. v. Surgeons' Company, 2 Burr. 892

A by-law requiring the indentures of apprenticeſhip of ſuch as are bound apprentices to freemen to be enrolled within four months from the date, in order to entitle them to their freedom, ſeemeth to be good. Rex. v. Marſhal, 2 Term Rep. 2.

(D) Such as affect Strangers.

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(*But if ſuch*) See *acc.* Pierce v. Bartram, Cowp. 269. Butcher's Company v. Morey, 1 H. Bl. 370.

(E) Such as in the Frame and Wake of them are void, by ordaining a Method of enforcing Obedience to them contrary to Law.

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(*By-laws are*) A by-law, which declared that none but freemen ſhould keep a ſhop, and confined the action to the Portmote courts, where the ſheriff or coroner (who muſt be freemen) arrayed the jury, was adjudged bad. Heſketh v. Broddock, 3 Burr. 1847.

(*Though*)

(*If the Company*) Though the corporation be created by act of parliament, if no such power be expresly given. Kirk v. Nowill, 1 Term Rep. 118.

Totterdell v. Glasby, 2 Wilf. 266 1 Wilf. 237. 5 Co. 62. b.

Although a by-law, in exclusion of foreigners from the exercise of a trade, may be good with a precedent custom to support it, yet it is void, if the penalty is made recoverable by a stranger, not a member of the corporation. It must be made recoverable by the corporation, or some person for their use, as, in *London*, by the chamberlain, else it would be like assigning a *chose in action*.

Rex v. Dean of *Dublin*, 1 Str. 536.

Under a power by charter to make by-laws, a corporation cannot make a law requiring their members to take an oath for the due observance of their statutes and ordinances, or to authorise themselves to administer an oath

CARRIERS.

(A) What Persons come under the Denomination of Carriers.

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(*All persons*) And being so, it is at least unnecessary, if not improper, to recite it in the declaration. 1 Wilf. 281.

The true ground of their liability is, the *public employment* they exercise. 2 Ld. Raym. 917. 12 Mod. 487.

Lane v. Cotton, 1 Ld. Raym. 646. Carth. 487. 12 Mod. 482 Whitfield v. Ld. Le Despencer, Cowp. 754.

The post-master general doth not come under the denomination of a carrier: he hath no hire; enters into no contract. The post-office is a branch of revenue, and a branch of police, created by act of parliament. The salary annexed to the office of post-master, is for no other consideration, than the trouble of executing it. He is, therefore, not liable for any constructive negligence.

See *Law of Bailments*, 109, 110.

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(B) In what Cases Carrier chargeable for a Failure in his Duty.

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Gartside v. The Proprietors of the Trent Navigation, 4 Term Rep. 581.

But if *A.* delivers goods to *B.* (who is a common carrier between *C.* and *D.*) to be carried from *C.* to *D.*, and then forwarded to *E.*, and *B.* carries them to *D.*, and there puts them in his ware-house, in which they are destroyed by an accidental fire, before he hath an opportunity of forwarding them, *B.* shall not be liable.

Hyde v. Trent and Mersey Navigation Company,

If *A.* delivers goods to *B.* to be carried from *C.* to *D.*, and *B.* charges and receives cartage of them to the consignee's house at *D.* from a ware-house there where they are usually unloaded, but which doth not belong to him, *B.* must answer for the goods if destroyed in the ware-house by an accident

l fire. Nor will it vary the caſe at all, that he allows all the profits of the 5 Term
artage to another perſon, and that that circumſtance is known to the con- Rep. 389.
gnee.

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(*If a merchant*) And *the act of God*, in this caſe, means ſuch act as could not happen by the inter-
ention of man, as lightning and tempeſts. Inevitable accident, happening by any human means,
reſiſtible force, if not occaſioned by the king's enemies; will not excuſe; for the carrier is in
he nature of an inſurer. Therefore, where a fire, not occaſioned by lightning, began at another
ooth in a fair, than that wherein the goods were placed, and afterwards ſpread thither, and con-
umed the goods, the carrier was holden liable, though actual negligence was expreſsly negatived
y the jury. Forward v. Pittard, 1 Term Rep. 27. So it was holden to be no excuſe, that the
hip was tight when the goods were placed on board, but that a rat, by gnawing out the oakum,
ad made a ſmall hole, through which the water had guſhed. Dale v. Hale, 1 Wilſ. 281. But
here a hoy, in good condition, ſhooting a bridge, *at a proper time*, was driven againſt a pier,
y a ſudden breeze, and overſet by the violence of the ſhock, the hoyman was holden not to be
nſwerable, the accident being occaſioned by the act of God. Amies v. Stephens, 1 Str. 128.
With reſpect to water-carriage, it is enacted by ſtat. 7. G. 2. c. 15., "That no owner of any
ſhip or veſſel ſhall be liable to make good any loſs or damage by reaſon of any embezzlement,
ſecreting, or making away with by the maſter, or mariners, or any of them, of any goods or
merchandize put on board, beyond the value of the ſhip and freight." If one of the mariners
e acceſſary to a robbery by giving intelligence, the owner is within the protection of this act, and
nſwerable no farther than to the extent of the value of the ſhip and freight. Sutton v. Mitchell,
Term Rep. 18.

(*So if A. delivers*) It is true, that if the carrier accept *generally*, he is liable, be the value what
t may. 1 Ventr. 238. 3 Keb. 133. But he may accept conditionally, as provided there be no
money, or it do not exceed a certain amount; or, in caſe of ſuch exceſs, he may refuſe to accept,
without an additional premium; and if there be proof that the bailor was appriſed of his inten-
tion, though there be no perſonal communication, the carrier ſhall be conſidered as a *ſpecial* ac-
cepter. Tichburne v. White, 1 Str. 145. Gibbon v. Paynton, 4 Burr. 2298. And the bailor,
thus knowing the conditions, but concealing the real value, is guilty of a fraud and impoſition,
nd therefore, he ſhall not only, where there hath been an expreſs declaration on the part of the
arrier, that he will not be anſwerable beyond a certain amount, without notice, not recover to
that amount, but ſhall not even recover back the money he may have paid for the carriage. Clay
v. Willan, 1 H. Bl. 298.

(D) Of the Regulations Carriers are under by Acts of Parliament, with reſpect to their Carriages, and the Prices they are to take.

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(*As to the*) This act is repealed, as to highways, by 13 G. 3. c. 78. 84.

For the regulations carriers are under with reſpect to the weight of their loads, and number of horſes, upon highways and turnpike roads, ſee 13 *Geo.* 3. *c.* 78. & *c.* 84. and 21 *Geo.* 3. *c.* 20., *and* tit. *Highways.*

For the ſtatutes reſpecting the poſt-office, ſee 12 *Car.* 2. *c.* 35. 9 *Ann.* c. 10. 6 *Geo.* 1. *c.* 21. § 51. 4 *Geo.* 2, *c.* 33. 26 *Geo.* 2. *c.* 13. 5 *Geo.* 3. *c.* 25. 7 *Geo.* 3. *c.* 50. 24 *Geo.* 3. *c.* 37.

A poſt-maſter, it hath been determined, cannot only not demand, as a duty, any additional ſum to the *legal* rate of poſtage, for the delivery of letters to the ſeveral perſons to whom they are directed within a poſt-town or place, at their reſpective places of abode, but he is moreover bound to deliver them at ſuch places. Barnes v. Foley, and Stock v. Harris, 4 Burr. 2153 5 Burr. 2709

Bowning v. Goodchild, 3 Wilſ. 443. 2 Bl. Rep. 906. S. C. Smith v. Powdich, Cowp. 182.

A place

Jones v. Walker, Cowp. 624. A place connected to *London* by a ſtreet of contiguous buildings, prior to the act of 9 *Ann. c.* 10., is within the ſuburbs of the city: the penny poſt-office, therefore, is entitled only to one penny for the carriage and delivery of a letter to any of the inhabitants thereof, *viz.* the penny paid upon putting the letter into the office.

Buddle v. Wilſon, Term Rep. 369. To an action on the cuſtom of the realm for not ſafely carrying goods, the defendant may plead in abatement, that his partners ought alſo to have been ſued; for the declaration upon the cuſtom of the realm, is the ſame in effect with the declaration in *aſſumpſit*. In the old forms it is, the defendant *ſuſcepit*, &c. which ſhews that is *ex contractu*.

CERTIORARI.

(L) Where the Defendant who has applied for it ſhall be liable to Coſts.

(A) Out of what Court it iſſues; and herein of the Diſcretionary Power of the Court of King's Bench in granting, denying, and filing it.

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(*A Certiorari it*) To remove proceedings of a *civil* nature, it iſſues out of the other courts at *Weſtminſter*. 2 Ld. Raym. 836. 1 Salk. 148. 1 H. Bl. Rep. 552.

(*The Court*) And this is done, ſometimes to conſider and determine the validity of the indictments, and to quaſh, or affirm them, as there is cauſe. Sometimes, to have the priſoner or defender tried either at the bar, or by *niſi prius*, before the king's juſtices of the courts of *Weſtminſter*. Sometimes to examine, and affirm, or reverſe, proceedings and judgments given by inferior judges. Sometimes, to plead the king's pardon. Sometimes, to iſſue proceſs of outlawry againſt the offender, in thoſe counties and places where the proceſs of inferior juſtices cannot reach him. 2 H. H. P. C. 210. Sometimes too, to iſſue writs of execution upon judgments in inferior courts where the defendant hath withdrawn his perſon and effects from the juriſdiction of thoſe courts. See the 19 Geo. 3. c. 70. § 4., with reſpect to inferior courts; and 33 Geo. 3. c. 19. with reſpect to *Wales*, and the counties palatine. 1 H. Bl. 552. In the caſe of outlawry, as ſoon as the object is attained, by the coming in of the offender, the court will remit the record. Rex v. Perry, Term Rep. 478. But there is a diſtinction between thoſe caſes, in which the crown is ſpecially concerned, and proſecutes by the attorney-general, and thoſe which are nominally at the ſuit of the crown, but, in reality, are proſecuted by a private perſon. In the former, the crown hath a right to *demand* a *certiorari*; the court are *bound* to grant it: in the latter, it iſſues, indeed, of courſe; but, upon good cauſe, a *procedendo* may be awarded. 4 Burr. 2458.

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(*But though*) 1 Mod. 41. 2 Ventr. 63. 2 Ld. Raym. 937. 2 Term Rep. 89.

(*Neither will*) To remove an indictment from *Hicks's-hall*, for bigamy, the conſent of the proſecutor muſt be had. Cowp. 283. So, from the *Old Bailey*, for forgery, 2 Str. 717. 877.—But the court have granted it, on the application of the defendant, in perjury, from the *Old Bailey*, upon affidavit, that he had twice paid coſts for not going on to trial, the judges being gone away. 2 Str. 1049. This, however, is not uſual; and was, in this inſtance, done upon the extraordinary circumſtances of the caſe. Ca. Temp. Hardw. 369, 370. They have alſo granted it at the inſtance of the defendant, upon affidavit that the proſecutor's attorney was under-ſheriff of Middleſex, and attended the grand jury on finding the bill. 2 Str. 1068. So, where the defendant [illegible]

peared to be a man of good repute, and the profecution on ſlight grounds. 1 Str. 549. So, where it was proved that the profecution was malicious. 1 Barnard. K. B. 7. 41. So, in the caſe of a conviction for compounding felony, where the objections, in arreſt of judgment, were ſerious and weighty. *Id.* 415. So, in the caſe of a nuiſance at the aſſizes, where a view was neceſſary. 2 Barnard. K. B. 214.

Nor will the court of *K. B.* grant it to remove the record and proceedings out of a court leet, in order to inquire into the propriety of an amerciament, where the fine hath been eſtreated into the duchy chamber of *Lancaſter* and paid. Rex v. Ritſon, 2 Term Rep. 184.

(*By a rule*) 2 Hawk. P. C. c. 27. § 34. 1 Salk. 145. 2 Keb. 157. ſeems contrary. A *certiorari* to bring up an order for the removal of their clerk is of common right, and not diſcretionary. 1 Str. 609.

The court of King's Bench will not grant a *certiorari* to remove a conviction before juſtices of the peace, where they ſee that the juſtices have drawn the proper concluſion from preſumptive evidence. Rex v. Baſs, 5 Term Rep. 251.

They will not grant it, where an appeal is given, if the objection be not to the want of juriſdiction but to the merits, for that is more properly the ſubject of appeal: *a fortiori* they will not grant it, pending an (*c*) appeal. Rex v. Whitbread, Dougl. 549. Rex v. Francis Abbot, *id.* 553.

(*c*) Rex v. Sparrow, 2 Term Rep. 169. n. a. With reſpect to appeals, there is this diſtinction: if one party only has a right of appeal, or no time is limited for bringing the appeal, the *certiorari* ſhall be immediately granted; for in the one caſe, the party having the right, may wave it; and in the other, if the objection were to be allowed, the *certiorari* might never iſſue: but if both parties have a right to appeal, and the time is fixed; in that caſe, it ſhall not be granted, until after the appeal hath been made, or the time for making it hath elapſed. Rex v. Harman, Andr. 143. But, notwithſtanding an appeal depending, if the order muſt be obeyed before the validity of it can be determined, a *certiorari* will lie. 2 Str. 991. Advantage muſt be taken of this rule, in the caſe of an order, before the order is filed. 1 Salk. 144.

They will not grant it, upon the ground of publick inconvenience, to remove (*d*) a poor's rate, or the aſſeſſments (*e*) of the land-tax, or proceedings before commiſſioners (*f*) of ſewers. (*d*) Rex v. Uttoxeter, 2 Str 932. Rex v. the Juſtices of *Shrewsbury*, *Id.* 975. (*e*) Rex v. King, 2 Term Rep. 234. (*f*) Rex v. Commiſſioners of Sewers in *Yorkſhire*, 1 Str. 609.

The writ of *certiorari* is uſed for the purpoſe of removing not only *legal*, but likewiſe *equitable* proceedings; for when an equitable right is ſued for in an inferior court of equity, and by reaſon of the limited juriſdiction of the court, the defendant cannot have complete juſtice, or the cauſe is without the juriſdiction of the inferior court; the defendant (*g*) may file bill in Chancery praying this writ to remove the cauſe into the court of Chancery. And when the bill is filed, he muſt enter into a bond with one ſurety in the penalty of 100*l.* to the Maſter of the Rolls and the ſenior Maſter in Chancery, to prove the ſuggeſtions of the bill within fourteen days: and in default of proof, a *procedendo* may be applied for of courſe. 2 Ch. Rep. 109. Pr. Reg. 41. Bon. *Priv. Lond.* 291. Car. Rep. 48. 1 Vern. 178. Eq. Abr. 80. (*g*) The *plaintiff* below, it ſeems, is not at liberty to make this application. Harriſon's Ch. Pr. 119.

If the defendant, who has been convicted on an indictment in an inferior juriſdiction, remove the record into the King's Bench by *certiorari* between verdict and judgment, with a view to making objections in arreſt of judgment, a *procedendo* will be immediately awarded. If he is adviſed that the record is erroneous, he muſt remove it after judgment by writ of error. Rex v. Jackſon, 6 Term Rep. 145.

(B) To what Courts it lies.

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(*The courts of Chancery*) But there must be express words in the statute to take away the jurisdiction of the court of King's Bench. 2 Burr. 1041. For, *per* Holt, C. J., this court will examine the proceedings of all jurisdictions erected by act of parliament. 1 Ld. Raym. 580.

(*And therefore*) It is to be observed, however, that a *certiorari* to remove proceedings from the courts of the counties palatine, and great sessions, cannot be sued out as of course, without laying some special ground. Zink v. Langton, Dougl. 749. Williams v. Thomas, *id.* 751. note (2).

2 Burr. 856. It lies also to *Berwick* and other dominions of the crown.

2 Ld. Raym. 1452. It lies to the quarter-sessions of a corporation.

Cowp. 458. It lies to remove a presentment in a court-leet; and the presentment, when removed, is traversable.

Rex v. Bolton, M. 26 G. 3. It lies to remove examinations taken before justices of the peace in pursuance of 2 & 3 *P. & M. c.* 10.

2 Hawk. P. C. c. 27. § 23. note.

(*i*) Andr. 27. (*k*) 10 Mod. 278. It lies (*i*) to remove an information before justices of assize, against a parson for non-residence, for they have no jurisdiction. But (*k*) not to justices of oyer and terminer to remove a recognizance of appearance.

(*a*) 2 Burr. 1040. (*b*) 3 Burr. 1458. (*c*) 2 Wilf. 35. 4 Burr. 2244. It lies (*a*) to remove orders of conviction on the conventicle act, 22 *Car. 2. c.* 1.; and orders (*b*) on appeal from a scavenger's rate; and orders (*c*) of bastardy, if applied for in six months.

It lies to remove an inquisition taken by the sheriff under a private act of parliament, and the verdict and judgment thereon.

(D) What the Party, who applies for it, must do before it is granted.

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(*And it is*) This act, it is said, relates only to quarter-sessions of the peace, not to indictments from the court of *oyer and terminer* at *Hicks's-hall*. For the sessions sit there in both capacities, and draw up their orders, with one title, or with the other, according to the offence, and the *certioraris* are directed accordingly. 1 Burr. 11. 3 Burr. 1462.

1 Wilf. 139. 1 Burr. 431. (*b*) 1 Burr. 34. That the statute of 5 & 6 *W. & M. c.* 11., respecting costs, doth not extend to a prosecutor, even when bound over by the magistrate to prosecute, unless he be either a civil officer, or the party injured. But (*b*) if it be proved that he is so, it is immaterial whether the name be on the back of the indictment or not.

2 Str. 1165. 1 Burr. 11. (*a*) 3 Burr. 1463. That costs being given only by the statute, if the recognizance be taken as at common law, and not upon the statute, the prosecutor is not entitled to them. But if the defendant (*a*) forfeit his recognizance under the statute, such recognizance shall stand as a security to the prosecutor for his costs (if taxed) for the defendant's not going to trial pursuant to the condition, notwithstanding he was afterwards acquitted, and the prosecutor had taken him in execution for the amount of them.

4 Burr. 2125. Rex v. Osborn, Say. That as the statute of 5 & 6 *W. & M.* empowers the court to give *reasonable* costs, if the prosecutor hath received a part of the fine, and then applies for his costs under the recognizance, they will order what he

hath received to be deducted from the amount of the taxation. But the payment of a fine doth not diſcharge the defendant's recognizance for coſts. *Law of Coſts*, 267.

That the repreſentatives of the proſecutor are entitled to the coſts taxed during his life, though no perſonal demand were ever made by him. 1 Term Rep. 103.

It is enacted by ſt. 16 *Geo.* 3. *c.* 30., againſt deer-ſtealers, "That no "*certiorari* ſhall be allowed to remove any proceedings on that act, unleſs "the party convict ſhall become bound to the perſon proſecuting, with "ſufficient ſureties in one hundred pounds, to pay full coſts and dama- "ges, within thirty days after ſuch conviction confirmed, or a *procedendo* "granted; and ſhall alſo have become bound to the juſtice before whom "the offender was convicted, in ſixty pounds for each offence; to pro- "ſecute ſuch *certiorari* with effect, and to pay the forfeitures, or to ſur- "render in thirty days, *&c.*" But by § 23., "If the party convicted, "giving ſix days notice to the proſecutor, and ſecurity to a juſtice, appeals "to the quarter ſeſſions, a *certiorari* ſhall be allowed." And the like in effect is enacted by 4 *&* 5 *W. & M. c.* 23. and 5 *Ann. ſeſſ.* 2. *c.* 14. in relation to convictions on thoſe acts of offences concerning the game.

And whereas in many caſes his majeſty's juſtices of the peace by law are empowered to give or make judgments or orders, and divers writs of *certiorari* have been procured to remove ſuch judgments or orders into his majeſty's court of King's Bench at *Weſtminſter*, in hopes thereby to diſcourage and weary out the parties concerned in ſuch judgments or orders by great delays and expences; it is therefore enacted by 5 *Geo.* 2. *c.* 19. § 2., "That no *certiorari* ſhall be allowed to remove any ſuch judgment "or order unleſs the party or parties (*b*) proſecuting ſuch *certiorari*, before "the allowance thereof, ſhall enter into a recognizance, with ſufficient "ſureties, before one or more juſtices of the peace of the county or place, "or before the juſtices at their general quarter ſeſſions, or general ſeſſions, "where ſuch judgment or order ſhall have been given or made, or be- "fore any one of his majeſty's juſtices of the ſaid court of King's Bench, "in the ſum of fifty pounds, with condition to proſecute the ſame at his "or their own coſts and charges with effect, without any wilful or "affected delay, and to pay the party or parties, in whoſe favour, and "for whoſe benefit ſuch judgment or order was given or made, within one "month after the ſaid order or judgment ſhall be confirmed, their full coſts "(*a*) and charges, to be taxed according to the courſe of the court where "ſuch judgments or orders ſhall be confirmed; and in caſe the party or "parties proſecuting ſuch *certiorari* ſhall not enter into ſuch recognizance, "or ſhall not perform the conditions aforeſaid, it ſhall and may be lawful "for the ſaid juſtices to proceed and make ſuch further order or orders "for the benefit of the party or parties for whom ſuch judgment ſhall be "given, in ſuch manner at if no *certiorari* had been granted."

(*b*) This requiſition cannot be diſpenſed with. 4 Term Rep. 281.

(*a*) But coſts are not to be paid where any material part of an order is quaſhed. 2 Str. 1108.

And it is further enacted, § 3. "That the recognizance ſhall be cer- "tified to the King's Bench, and there filed with the *certiorari*, and order "or judgment thereby removed; and if the ſaid order or judgment ſhall "be confirmed by the ſaid court, the perſons entitled to ſuch coſts, for "the recovery thereof within ten days after demand made of the perſon "or perſons who ought to pay the ſaid coſts, upon oath made of making "ſuch demand or refuſal, ſhall have an attachment for contempt, and the "recognizance ſhall not be diſcharged until the coſts ſhall be paid and the "order ſo confirmed complied with and obeyed."

(b) The *certiorari* must be applied for within six months after the *date* of the conviction. 4 Term Rep. 281.

(c) These words give the act a retrospective operation. 1 Wilf. 35.

(d) This notice must be given before moving for a rule to shew cause why the *certiorari* should not be granted. 5 Term Rep. 279.

And for the better preventing of vexatious delays and expences occasioned by suing forth writs of *certiorari* for the removal of convictions, judgments, orders, and other proceedings before justices of the peace; it is further enacted by 13 *Geo.* 2. *c.* 18. § 5. "That no writ of *certiorari* "shall be granted, issued forth, or allowed to remove any conviction, judg- "ment, order, or other proceeding had or made by or before any justice "or justices of the peace of any county, city, borough, town corporate, "or liberty, or the respective general or quarter sessions thereof, unless "such *certiorari* be moved or applied for within six calendar months next "after such conviction (*b*), judgment, order, or other proceedings shall be "so had or made (*c*), and unless it be duly proved upon oath, that the said "party or parties suing forth the same hath or have given six days (*d*) "notice thereof in writing to the justice or justices, or to two of them, "(if so many there be,) by and before whom such conviction, judgment, "order, or other proceedings shall be so had or made, to the end that "such justice or justices, or the parties therein concerned, may shew cause, "if he or they shall so think fit, against the issuing or granting of such "*certiorari*."

Rex v. Jenkinson, 1 Term Rep. 82.

If no recognizance hath been entered into, the court have no power under the above act of 13 *Geo.* 2. to award costs upon the removal of summary proceedings: but to obviate this mischief, they have resolved, before they allow the *certiorari*, to oblige the party applying for it to enter into such recognizance.

The case of Mayo and Parsons, 1 Str. 391.

By the 12 *Ann. ft.* 1. *c.* 2. it is provided, "That if any malt happens "to be burnt after the duty paid, the proprietor may apply to the next "quarter sessions, who are to adjust the *quantum*, and give him a certificate, "which entitles him to receive back the duty." The proceedings of the sessions in this case cannot be removed by *certiorari*; their granting or denying the certificate cannot be considered as an order of sessions; and the *certiorari* goes only to fetch up their orders.

(E) Where, by Acts of Parliament, the Court of King's Bench is restrained from granting it.

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(*And by* 5 *W. & M.*) On this statute no costs are payable, unless the indictment be preferred by the party grieved, or by justices, mayors, &c. or other civil officers prosecuting as such. Burr. 431.

It is enacted by 13 *Geo.* 3. *c.* 78. § 24. "That the justices shall make "presentment of any highway, causeway, or bridge, at their respective "assizes or sessions, wherein the same do lie, and not elsewhere; and that "no such presentment, nor any indictment shall be removed by *certiorari* "or otherwise, out of such jurisdiction till such indictment or presentment "be traversed, and judgment thereupon given, except where the duty or "obligation of repairing such highways, causeways, or bridges may come "in question."—And by § 81. it is further enacted, "That no pro- "ceedings to be had or taken in pursuance of this act shall be quashed or "vacated for want of form, or removed by *certiorari*, or any other writ or "process whatsoever (except as therein before excepted) into any of his "majesty's courts at *Westminster*."

But it is enacted by 5 & 6 *W. & M. c.* 11. "That if the right or title "to repair ſuch cauſeways, *&c.* may come in queſtion, upon ſuggeſtion "and affidavit of the truth thereof, a *certiorari* may be granted to remove "ſuch indictment into the King's Bench," upon the like recognizance which is required by this ſtatute for the removal of indictments from ſeſſions.

It hath been adjudged, that if the ſeſſions manifeſtly exceed their authority in making orders concerning the highways, ſuch orders may be removed by *certiorari* into the King's Bench, and quaſhed. 2 Str. 944. Say. Rep. 128.

It hath been adjudged too, that theſe acts relate only to *certiorari's* applied for on the part of the defendants: that a *certiorari* lies for the proſecutor without affidavit, or recognizance, and before traverſe and judgment. 2 Str. 1209. Cowp. 78.

And it is enacted by 12 *Car.* 2. *c.* 23. § 35., concerning the exciſe, "That no writ of *certiorari* ſhall ſuperſede execution or other proceed-"ings, upon any order by juſtices of peace, in purſuance of that ſtatute, "but that execution, and other proceedings ſhall and may be had there-"upon, any ſuch writ or allowance thereof notwithſtanding." And the like is generally enacted by other ſtatutes concerning the revenue.

If a new offence be created by ſtatute, and a ſpecial juriſdiction out of the courſe of the common law be preſcribed, in that caſe, though there be no words of excluſion, yet the ſuperior courts are ouſted, becauſe they never could have juriſdiction. Not ſo, where a new offence is created, and directed to be tried in an inferior court eſtabliſhed according to the courſe of the common law, for in that caſe the inferior court tries the offence as a common law court, ſubject to be removed by writs of error, *habeas corpus*, *certiorari*, and to all the conſequences of common law courts. In this laſt caſe, therefore, the court of King's Bench cannot be ouſted of its juriſdiction without expreſs negative words. But if a ſtatute creating an offence take away the *certiorari*, and another ſtatute be afterwards paſſed inflicting heavier puniſhment upon the offender, but not expreſsly taking away the *certiorari*; the clauſe in the former act for taking away the *certiorari*, cannot be extended to proceedings under the latter act. Cowp. 524. Rex v. Terret, 2 Term Rep. 735.

(*By the* 7 & 8 *W.* 3. *cap.* 6.) For obtaining goods by falſe pretences; 30 G. 2. c. 24. § 1. Cowp. 24. 2 Term Rep. 472.

An indictment for not repairing a bridge may be removed by *certiorari* at the inſtance of the proſecutor, notwithſtanding the general words of 1 *Ann. c.* 18. § 5. that no ſuch indictment ſhall be removed by *certiorari*. Rex v. Inhabitants of Cumberland, 6 Term Rep. 194.

A *certiorari* to remove the record of an indictment at the quarter-ſeſſions for a miſdemeanour *ſerved after judgment*, was quaſhed *quia improvidè emanavit*; though it was iſſued before verdict. Rex v. Inhabitants of Seton, Tr. 37 G. 3. B. R.

(F) To whom it ought to be directed.

A *Certiorari* to remove an order of two juſtices may be directed to the ſeſſions and returned by them. Rex v. Inhabitants of *Warminſter*, 1 Str. 470.

Daniel v. Phillips, 4 Term Rep. 499. If a *certiorari* be misdirected, no third person can object to it, if the proper officer in whose keeping the record was, waves the objection, and returns the record upon the writ.

Page 356 **(G) How far it is a *Supersedeas* to the Court below.**

2 Ld. Raym. 835. 1305. A *Certiorari* removes all things done between the *teste* and return.

(I) Where the Record shall be said to be removed.

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(*A certiorari may*) A *certiorari* to remove an indictment, will not remove a conviction. 2 Ld. Raym. 971.

A verdict cannot be removed from the sessions before judgment. 2 Str. 763. 819.

(*A variance*) A *certiorari* will remove an indictment upon a statute, though it do not so describe it. 2 Str. 845. But to remove an indictment after conviction, it must give the party a day in court. 2 Ld. Raym. 971.

(K) Of the Proceedings of the Superior or Inferior Court, after the issuing out of the *Certiorari*.

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(*But if an*) It is true, that while it continues on the file, the court cannot award a *procedendo*. But it may be taken off the file, if it have issued *improvide*; and when that is done, a *procedendo* will be granted. 1 Burr. 488. 4 Burr. 2459. 2522.

(L) Where the Defendant who has applied for it shall be liable to Costs.

Rex v. Williamson, 7 Term Rep. 32. THE prosecutor of an indictment for stopping a common foot-way, who has used it for some years before it was stopped, is a party grieved within the meaning of the 5 & 6 *W. & M. c.* 11. § 3. and as such entitled to costs.

CHAMPERTY.

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(*Champerty is the*) That is, *campum partire*. Champerty is derived immediately from the *French champart*, which signifies a division of the profits of the land, being a part of the crop annually due to the landlord by bargain or custom. In our sense of the word, it signifies the purchasing of a suit, or right of suing. This was an offence extremely abhorred by our law. Nor was it less so by the laws of other countries. By a statute of Robert I. of *Scotland*: "*Nec terram*
"*seu aliquam rem aliam capiat ad champarte, ad defendendum, differendum, seu prolongandum jus alte-*
"*rius extra formam juris.* Du Fresne, *verbo Campiparticeps.*" And, by the *Roman* law, "*qui in-*
"*cunt in alienam litem, ut quicquid ex condemnatione in rem ipsius redactum fuerit inter eos communicatur*
"*lege*

"*lege Julia de vi privata tenentur.*" F. 48. 7. 6. and the offenders were punished by the forfeiture of a third part of their goods, and perpetual infamy. 4 Bl. Com. 135.

Charitable Uses and Mortmain.

(A) Of the several Statutes prohibiting to purchase in Mortmain.

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(*The Clergy in*) Licences in mortmain were necessary, before the granting of *Magna Charta*, both from the king, as ultimate lord of the fee, and from the intermediate lord between the king and the alienor. And if no such license was obtained, the king, or other lord, might respectively enter on the lands aliened in mortmain, as a forfeiture. The necessity of this licence from the crown was acknowledged by the constitutions of Clarendon, in respect of advowsons, which the monks always greatly coveted, as being the ground-work of subsequent appropriations. "*Ecclesiæ de feudo domini regis non possunt in perpetuum dari sine assensu et concessione ipsius.*" MS. Cotton. Claud. B. fol. 26. When a licence could not be obtained, the clergy seem to have had this contrivance: that, as the forfeiture for such alienations accrued, in the first place, to the immediate lord of the fee, the tenant who meant to alienate, first conveyed his lands to the religious house, and instantly took them back again to hold as tenant to the monastery; which kind of instantaneous seisin was probably holden not to occasion any forfeiture; and then, by pretext of some other forfeiture, surrender, or escheat, the society entered into those lands in right of such their newly acquired signory, as immediate lords of the fee. And this was the mischief, which the clause in *Magna Charta* was intended to provide against. 2 Bl. Comm. 269.

(B) What Things are exempt from, or out of the Statutes of Mortmain.

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(*By the* 7 & 8 *W.* 3.) See the note in Co. Lit. 99. a. 13th ed.

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(*Also by the*) But he cannot so devise lands lying *out* of *London*, 4 Br. Ch. Rep. 409.

(C) What is a good Charitable Use within the 43 Eliz.

Augmentations made by ecclesiastical persons to small vicarages and curacies under the act of 29 *Car.* 2. *c.* 8. are to be considered by § 7. of that act, as charities within the intent of stat. 43 *Eliz.*; therefore an information may be filed in the name of the attorney-general to establish a right to a curacy so augmented. Attorney-General v. Breton, 2 Vez. 425.

(D) What is a superstitious Use to which the King is entitled.

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(*A Superstitious use*) Since the Reformation, a charitable foundation for saying mass, praying for the souls, &c. is adjudged to be performed by saying the service according to the liturgy. Co. Lit. 95. b.

Where

De Costa v. De Pas, Ambl. 228. *Per* Lord Hardwicke.

Where the deviſe is to a ſuperſtitious uſe, and made void by ſtatute; or to a charity, and made void by the ſtatute of mortmain; there, it ſhould belong to the heir at law, or next of kin: but where it is in itſelf a charity, but the mode in which it is to be diſpoſed is ſuch, that by the law of *England*, it cannot take effect, as, for inſtance, where it is for the promoting of a religion adverſe to chriſtianity; there, the crown by ſign-manual directed to the attorney general, may give orders in what charitable manner it ſhall be diſpoſed.

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(*A., being a beneficed*) It was reverſed on the ground of its not being a ſuperſtitious uſe: but nothing ſaid as to the Lord Keeper's opinion, that the power of directing came to the crown, if the truſt was not ſupportable as a charitable uſe.—That charitable gifts, in favour of Proteſtant diſſenters, are good, is now, ſince the toleration act, unqueſtionable. 2 Vez. 273. 3 P. Wms. 346.

(E) How Charitable Gifts and Diſpoſitions have been conſtrued; [and how far favoured in Equity.]

(*Our Chancellors have*) The uniform rule of a court of equity, before, at, and after the ſtatute of Elizabeth, had been, that where the uſes are charitable, *and the perſon hath, in himſelf, full power to convey*, it will aid a defective conveyance to ſuch uſes. *Per* Lord Henley, Keeper. 1 Bl. Rep. 90.—Where a donor hath expreſſed himſelf ſo obſcurely, as to leave it quite doubtful whether he intended to give a principal ſum to a charity, or only the intereſt and produce of it, a court of equity, it ſeems, will not confine it to the latter. 2 Atk. 328.

(*So if Copyhold*) But where there are prior limitations of copyhold to ſeveral perſons, a court of equity will not interfere in favour of a charity. Attorney-General v. Lady Downing. Ambl. 573.

Attorney-General v. Lady Downing, Highmore, 134. Ambl. 572.

If a deviſe be to a charitable uſe, though the object be not *in eſſe*, and though it depend on the will of the crown whether it ſhall be ever called into exiſtence, equity will eſtabliſh it.

Smith v. Stowel, 1 Ch. Ca. 195

An appointment to a charity, made precedent to the ſtat. of *Eliz.*, and ſo void, was holden to be made good by the ſtatute.

(*But if A. deviſes*) But where *copyhold* lands were ſurrendered to the uſe of a will, and deviſed in charity, Lord Hardwicke held the will, though not ſigned in the laſt ſheet, and without witneſſes, to be a good appointment of the eſtate for the charity, under the ſtat. 43 Eliz. Attorney-General v. Sawtell, 2 Atk. 497.

(*Alſo if Lands*) Where a conveyance was to certain officers of a corporation, and not to the body corporate, equity ſupplied the defect. 1 Bl Rep. 91.

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(*Where there has been*) So a legacy to the poor inhabitants of Saint *Leonard, Shoreditch*, was deemed to go to the poor not receiving alms. Attorney-General v. Clarke, Ambl 422. So where a legacy was given *to the poor*, the court directed it to be given to the poor *French* refugees, it appearing that the teſtator was a *French* refugee. Attorney-General v. Rance, cited, *ibid.* So where a bequeſt was for the benefit of poor diſſenting miniſters living in any of the counties of *England*, it was holden to be good; and it being in proof, that there are three diſtinct ſocieties of diſſenters, and that collections are made for the poor miniſters of each, it was directed to be ſo applied. Walker v. Childs, Ambl. 524. If the gift is for the poor of any city, and other pariſhes are afterwards admitted within the precincts of the city, and added thereto; the poor of the pariſhes admitted, ſhall have a portion of the charity. Attorney-General v. Corp. Roche ſter, Finch. 194 A legacy of 5*l.* was bequeathed to the poor of two hoſpitals in *Canterbury*, naming them; and, by a codicil, an annuity of 5*l.* *to all and every the hoſpitals*: it appearing that the teſtatrix lived at *Canterbury* many years, and died there; and that ſhe had taken notice by her will, of two *Canterbury* hoſpitals; the charity was holden not to be void for uncertainty, but to have been intended *for all the hoſpitals* in *Canterbury*; but not to extend, as was preſſed, to an hoſpital

hoſpital about a mile out of *Canterbury*, though founded by the ſame archbiſhop, and governed by the ſame ſtatutes. Maſters v. Maſters, 1 P. Wms. 425. One Penning, of *Saffron Walden*, and ſeveral others, ſubſcribed to a charity-ſchool there, of twelve boys and girls, which ſubſcription was only during the pleaſure of the benefactors. Penning, pleaſed with ſeeing theſe children, declared he would leave them ſomething at his death: there was alſo a free-ſchool in the ſame town; and Penning made his will, giving "500*l.* to the charity ſchool." Lord Chancellor Parker ſaid, that though the free-ſchool be a *charity-ſchool*; yet the charity ſchool for boys and girls went more commonly by that name: and, as the teſtator was fond of the latter, and declared he would leave them a legacy; therefore, *that*, and not the free-ſchool, was entitled thereto. Attorney-General v. Hudſon, 1 P Wms. 674. A ſum of money was bequeathed to be diſtributed every year, on certain days, to the poor of the pariſh of *L.* in the county of *M.*, in which county there was no ſuch pariſh; but there was in the county of *D.*; the court eſtabliſhed the will, becauſe it appeared that the teſtator was born there, and that both he and his parents lived and died there. Owen v. Bean, Finch. 395.

Noel Lord *Carron*, formerly ambaſſador here from the States General, being ſeiſed in fee of a great houſe in *Lambeth*, called *Garron-houſe*, and the lands thereto belonging called the Park, and having built an alms-houſe in that pariſh, wherein he placed ſeven poor women of *Lambeth*, of ſixty years of age and upwards, whilſt he lived, and appointed 4*l.* to be paid to them every year quarterly, did, in order to eſtabliſh the ſame as a perpetual charity, by his will, charge the premiſes with 28*l. per ann.*, to be diſtributed equally among *ſeven poor women*; and directed that when one or more of them died, their places ſhould be ſupplied, at the appointment of the owners of *Carron-houſe*, by other poor women, who, as it was ſuggeſted, and as had always been the caſe during his life, he intended ſhould be poor women of that pariſh. It appeared that the owners of *Carron-houſe* had for ſome time paid the charity, but of late had refuſed, ſo that it was become in arrear; neither did they fill up the vacant places, pretending that the charity was not payable in ſucceſſion, there being no ſuch direction in the will of the donor, but only to *ſeven* poor women who were in poſſeſſion at his death; or that if it muſt be paid, yet it might be to other poor women out of any other pariſh at their own appointment. A bill, therefore, was brought againſt the owners of *Carron-houſe*, to have the charity eſtabliſhed for ever, and the arrears thereof paid by the defendants, and the growing payments duly made for the time to come, and the poor women to be choſen in ſucceſſion out of *Lambeth* pariſh, and not out of any other pariſh; for otherwiſe the charity would rather be an injury than a kindneſs to *Lambeth*; becauſe, if taken out of other pariſhes, *Lambeth* muſt maintain them, the 4*l. per ann.* being not ſufficient. It was decreed as prayed, and a charity was eſtabliſhed in the hands of the churchwardens in ſucceſſion, though not given ſo in direct words. Finch. 353.

If a charity is deviſed to the poor indefinitely, the king ſhall have the diſpoſal thereof. Rep. Temp. Finch. 248. 1 Eq. Caſ. Abr. tit. *Charity*, pl. 7. See *acc.* Attorney-General v. Herrick, Ambl. 712.

A. having deviſed 100*l.* to be applied to ſuch charitable uſes as he had, by writing under his hand, formerly directed, and no ſuch writing being to be found, it was holden that the king ſhould appoint, who gave it to the mathematical boys in *Chriſt's Hoſpital*; which was decreed accordingly; and that the parties ſhould be indemnified againſt the writing referred to. Attorney-General v. Syderfin, 1 Vern. 224.

A., by his will, deviſed all his lands and tenements, in the event of his ſon's dying under age or without iſſue, to the defendant and four others by name, for ſuch charitable uſes and purpoſes as he ſhould direct by codicil or otherwiſe. By his codicil, he ordered and directed, purſuant to that Cook v. Duckenfield, 2 Atk. 562.

clauſe

clauſe in his will, that the ſaid lands and tenements ſhould, at the diſcretion of his ſaid truſtees, be ſold and diſpoſed of, or kept in their hands and poſſeſſion; and that the purchaſe-money ariſing thereby, or the rents and profits thereof, ſhould be applied and diſtributed to and amongſt ſuch perſons, or to and for ſuch uſes or purpoſes, in ſuch manner as he ſhould by any writing appoint; and for want of ſuch direction and appointment, then to ſuch perſon or perſons, or to ſuch uſes and purpoſes, as they the ſaid truſtees, or the major part of them, or, in caſe of death, the ſurvivors or ſurvivor of them, or the heirs of ſuch ſurvivor, ſhould judge fit and convenient. The teſtator's ſon died under age and without iſſue. The teſtator left no directions by writing or memorandum as to the application of the eſtates deviſed. The truſtees inſiſted upon the beneficial intereſt in them: the heir at law of the teſtator claimed them as a reſulting truſt. But Lord *Hardwicke* decreed, that, as the intention of the teſtator was clear in favour of charity, a ſcheme ſhould be laid before the maſter for applying the eſtate to ſuch charitable uſes and purpoſes as ſhould anſwer his intention, and alſo for the application and diſtribution of the money that ſhould be coming in out of the growing rents and profits, or out of the money that ſhould ariſe by any future ſale.

Baylis and Church v. Attorney-General, 2 Atk. 239.

A, by will, gives to *Bread-ſtreet* ward 200*l*., according to Mr. ——'s will: Lord *Hardwicke* decreed that the money ſhould be diſpoſed of in ſuch charities as the aldermen and inhabitants of the ward ſhould think moſt beneficial.

White v. White, 1 Br. Ch. Ca. 12.

The teſtator, by his will, gave a moiety of the reſidue of his eſtate to ſuch of the *lying-in hoſpitals* as his executor ſhould appoint. Afterwards he ſtruck out of his will the name of his executor, but did not appoint any other executor. It was decreed by Lord *Thurlow*, that the court would appoint; and it was accordingly referred to a maſter, to which of the *lying-in hoſpitals* the legacy ſhould be paid.

A legacy was given to *B.* for the benefit of non-conforming miniſters, with the advice of *C.* and *D.*: at the teſtator's death, *B. C.* and *D.* were all dead; yet the court ſuſtained the legacy. Attorney General v. Hickman, 2 Eq. Ca. Abr. tit. *Charity*, p. 14. So where a reſidue was given to *J. V.* to ſuch charitable uſes as he ſhould appoint, recommending poor clergymen, *&c.* and *J. V.* died in the lifetime of the teſtatrix, yet the charity was ſuſtained, and executed by the court. Mogridge v. Thackwell, 3 Br. Ch. Caſ. 517. See Wheeler v. Shove, Moſ. 288. 301. *contr.*

Attorney-General v. Lady Downing, Ambl. 575.

Sir *George Downing* deviſed an eſtate to truſtees for the purpoſe of founding a college; and directed them to form a plan for the government of it: the truſtees died in the teſtator's lifetime; and Lord *Camden* held the heirs at law entitled to the conduct of the charity.

Attorney-General v. Gleg, 1 Atk. 356.

W. left money to be diſtributed in charity at the diſcretion of his three executors, one of whom died before the information was filed. Lord *Hardwicke* held, that this not being a bare authority, but coupled with an intereſt, ſurvived to the other two executors: but that the executors, in this caſe, could not divide the charities into three parts, and each executor nominate a third abſolutely, becauſe the determination of the property of every object was left by the teſtator to the direction of all the executors.

Attorney-General v. Biſhop of *Cheſter*, 1 Br. Ch. Ca. 444.

Archbiſhop *Secker*, among many charitable legacies, gave to his truſtees, the defendant and Dr. *Stinton*, ſince dead, 1000*l*. ſtock, for the purpoſe of eſtabliſhing a biſhop in his majeſty's dominions of *America*, and ordered, that if any charity to which he had given a legacy, ſhould no longer ſubſiſt, ſuch legacy ſhould fall into the reſidue. It was contended, that there being

no

no biſhop in thoſe parts of *America*, nor any likelihood that there ever would be one, the legacy was void, and fell into the reſidue. But by Lord *Thurlow*, the money muſt remain in court, till it ſhall be ſeen whether any ſuch appointment ſhall take place.

Archbiſhop *Secker* alſo gave 1000*l.* to be laid out upon repairing parſonage-houſes. The counſel for the Biſhop of *Cheſter* ſaid, that the archbiſhop's other truſtee being dead, the ſelection of the objects belonged to his client alone. But by Lord *Thurlow*, it muſt be referred to the maſter, and propoſals of proper objects be laid before him. *Id. ibid.*

The teſtator gave 200*l.* to the corporation of *Q. Anne's Bounty*, to augment poor livings, and directed his executors to divide the reſidue of his perſonal eſtate into three parts, and to pay one third either to the corporation of *Q. Anne's Bounty*, or the ſociety for propagating the goſpel, and another third to ſome publick charity. The legacy to the corporation of *Q. Anne's Bounty* was holden to be void, as, by the rules of that inſtitution, it muſt have been laid out in lands. The legacy which was given to the ſame charity, or to the ſociety for propagating the goſpel, was, on the ſame account, ordered to be paid to the latter. And the legacy to ſome publick charity was declared to be good, but that the executors ought to diſpoſe of it under the eye of the court, and therefore were to propoſe a charity to the maſter. Widmore v. The Corporation of *Q. Anne's* Bounty, Ambl. 636. 1 Br. Ch. Ca. 13. in not. S. C.

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(*If one diſpoſes*) Attorney-General v. Mayor of *Coventry*, 2 Vern. 397. 2 Br. P. C. 236. S. C. Where lands were ſet at an under-value, and had been for a long time ſo enjoyed; the leaſe was ſet aſide, and the tenant decreed to pay the arrears of the rent according to the full value. Beverly v. Farrer, 2 Vern. 414. If there are ſeveral uſes, the court is not bound to direct that they ſhall all be augmented proportionably; but may uſe its diſcretion as to the method in which the ſurplus ſhall be diſtributed. Ambl. 191.

(*If A., ſeiſed*) Attorney-General v. Johnſon, Ambl. 190. Attorney-General v. Sparks, id. 201. Attorney-General v. Tonna, 2 Vez. jun. 1. 4 Br. Ch. Ca. 103. S. C. Theſe deciſions have proceeded upon the manifeſt intention of the donor, that the whole ſhould be applied to the charity: if, therefore, it turn out to be more than adequate to the number of objects for which it may have been originally provided, it muſt be diſpoſed of to ſimilar purpoſes. Attorney General v. Earl of *Winchelſea*, 3 Br. Ch. Rep. 373. Where, indeed, the object of the donor is definite, and that cannot take place, the court will not look for another object, but let the property go to the next of kin, or to the heir at law. Attorney-General v. Biſhop of *Oxford*, 1 Br. Ch. Rep. 444. So where a teſtator diſcovers no general intention beyond that ſpecified in his will, and that is diſappointed. Attorney-General v. Goulding, 2 Br. Ch. Rep. 428.

One ſeiſed in fee of a manor grants a rent in fee out of it, as a charity, for the ſupport of ſeveral poor perſons, and afterwards grants the manor to *J. S.* in fee: the nomination of the poor perſons belongs to the heir of the grantor, and doth not go with the manor. But foraſmuch as the grantees and owners of the lands had for upwards of ſixty years enjoyed the nomination of the perſons, who had partaken of the charity, the court allowed to them all the payments they had made to any of the poor, though nominated by themſelves, and would not diſturb any thing that had been already done. Attorney-General v. Rigby, 3 P. Wms. 145.

Where truſtees of a charity had a diſcretionary power to lay out money on a road, the court ſaid they would not interpoſe to control them, unleſs it had been ſhewn that they had acted corruptly or partially; at the ſame time they would not diſmiſs the information, but retained it, in order to keep a hand over them. Attorney-General v. Governors of *Harrow* School, 2 Vez. 552.

Dr. *Radcliffe*, by his will, deviſed 300*l.* a-year to two perſons to be choſen by the archbiſhop of *Canterbury*, and certain other truſtees out of Univerſity College in *Oxford*, which ſum he ordered to be paid to them for ten Attorney-General v. Stephens, 2 Jur. Eccl. 157. Burn's

E. L. tit. *Charitable Uſes*, 1 Atk. 358. S. C. 2 Eq. Ca. Abr. tit. *Charity*, (A), pl. 17.

ten years for their maintenance; five years whereof they were to ſpend in *England* in the ſtudy of phyſick, and the other five abroad. The defendant was one ſo choſen, and ſtudied here according to the directions of the will, and for that time he received his five years' ſalary; but afterwards did not go abroad on account of the ill ſtate of his health; and thereupon in the year 1730 reſigned to the truſtees, who accepted his reſignation, and choſe another in his room; and in the year 1735 an information was exhibited againſt him, that he might account for the five years' ſalary thus received. For the defendant it was argued, that in a late caſe which came before the Houſe of Lords, between *Gaudy* and *Anſtis*, upon an appeal, their lordſhips were of opinion, that the word *maintenance* included education; and therefore, though that word was uſed in the preſent will, *education* muſt be intended by it, as implied; and when the defendant had ſpent half of the time in his education here in *England*, and was prevented by ill health from going abroad, and thereupon had reſigned, and his reſignation had been accepted, and another choſen in his ſtead, it was ſubmitted that the preſent bill muſt be thought an unreaſonable one. And the lord-chancellor was of that opinion, and diſmiſſed the information.

Ex parte Bolton School, 2 Br. Ch. Rep. 662.

By a private act of parliament for regulating *Bolton* ſchool, the number of truſtees was limited to 12, of whom 7 were to conſtitute a *quorum*; and there was a clauſe in the act, that if any of the conſtitutions or proviſions in the act ſhould be found inconvenient or impracticable, the truſtees might apply by petition to the lord chancellor, who might in a ſummary way, vary ſuch conſtitution or proviſions. It having been found impracticable to collect ſo many as 7 out of 12 truſtees, inſomuch that no meeting had ever been had, application was made to the lord chancellor, either to increaſe the number of the truſtees, or to reduce the number of the *quorum*. But his lordſhip thought this not within his juriſdiction; that, though it might extend to varying by-laws, or particular proviſions, it did not comprize a power to alter the general conſtitution of the truſt itſelf; and, therefore, that the application muſt be to parliament.

Attorney-General v. Oglander, 3 Br. Ch. Rep. 166.

Where a charity is ſo given that there can be no objects of it, the court will order a different ſcheme to be laid before it: but if the objects may exiſt (*a*), though they do not at preſent, it will not. *Per* Lord *Thurlow*. And where (*b*) the truſts of a charity ceaſe for want of objects, the charity muſt be applied *de novo*.

(*a*) If it happen there are no perſons ſufficient to anſwer the deſcription of the charity, the land charged with the payment of the charity ſhall not be diſcharged in the interim, but the money ſhall accumulate, and be applied towards the advancement and increaſe of the charity. Ayſet v. Dodd, 2 Atk. 238. (*b*) Attorney-General v. City of *London*, 3 Br. Ch. Rep. 171.

3 Br. Ch. Rep. 171.

The college of *William* and *Mary* in *Virginia*, who were appointed adminiſtrators of certain charities, having become ſubject to a foreign power, it was ordered that a new ſcheme ſhould be laid before the court for the adminiſtration of the charities.

2 Atk. 87. *Per* Lord Hardwicke

Whether a charity be a publick one, or not, depends upon its extenſiveneſs; not upon the charter of the crown; for this can only make it more permanent than it otherwiſe would be. A deviſe to the poor of a parish is a publick charity. Where teſtators have not any particular perſon in their contemplation, but leave it to the diſcretion of a truſtee to chooſe out the object; though ſuch perſon is private, and each particular perſon may be ſaid to be private, yet in the extenſiveneſs of the benefit ariſing from them, they

may

ay very properly be called publick charities. A ſum to be diſpoſed of by . B. and his executors, at their diſcretion, among poor houſe-keepers, of this kind

A court of equity will give a proper direction as to a charity, without ny regard to the propriety or impropriety of the prayer of the information; nd though the relator be miſtaken in the title he hath ſet up, yet if in the auſe a title in fact comes out, that title muſt be eſtabliſhed. For it is a ule of equity, that an information for a charity muſt be eſtabliſhed. For is a rule of equity, that an information for a charity is not to be diſmiſſed; ut there muſt be a decree for its eſtabliſhment. 1 Atk. 355. 2 Vez. 426. 1 Vez. 43. 72.

It is not abſolutely neceſſary that the relators in an information ſhould e the perſons principally intereſted, for the court will take care at the hear- g to decree in ſuch a manner as ſhall beſt anſwer the purpoſes of the cha- ity; and, therefore, any perſons, though the moſt remote in the contem- lation of the charity, may be relators. 2 Atk. 328.

Although a court of equity gives a very unwilling ear to an application o declare void a charitable bequeſt as within the ſtatute of mortmain fter a long acquieſcence in the party applying; yet it doth not think itſelf n ſuch caſe warranted immediately to diſmiſs the bill, but will direct a eference to the maſter to inquire into the circumſtances. Pickering Earl of *Stamford*, 4 Br. Ch. Rep. 214.

If there be a deficiency of aſſets, charity legacies muſt abate in propor- ion as well as other legacies, notwithſtanding that by the civil law they ave preference to all others. 1 P. Wms. 675. 2 P. Wms. 25.

But where teſtator, among other bequeſts to charities, gave 3*l* a piece to the poor of three ſeveral pariſh- s; the court looked upon them as part of the funeral, and as doles at the funeral; and there- re held, that no abatement ought to be made out of them. 2 P. Wms. 25.

It was formerly the practice of the court to marſhal aſſets in favour of a harity; but this hath been over-ruled by the more recent determinations, aſmuch as it enables a man to do that *per obliquum*, which he could not o *per directum*. Makeham v. Hooper, 4 Br. Ch. Ca. 153. Attorney-General v. Tyndall, Ambl. 614. Foſter v. Blagden, *id.* 704. Hillyard v. Taylor, *id.* 713.

A court of equity will not decree execution of a truſt of a charity in manner different from that intended, except ſo far as they ſee, that the ntention cannot be executed literally, but another mode may be adopted conſiſtent with the donor's general intention, ſo as to execute it, though ot in mode, in ſubſtance. If the mode becomes impoſſible by ſubſequent ircumſtances, the general object is not to be defeated, if it can be attain- d. Where the purpoſe was to build a church in the pariſh of *A.* (*a*), nd the pariſh would not let the church be built, it was adjudged that it ould not be built any where elſe, and the intention muſt totally fail. So, here a perſonal bequeſt was attached to a void charity (*b*), it was holden hat it muſt fail with its principal. But, where a teſtator directed bread o be diſtributed among poor perſons attending divine ſervice (*c*), and hanting his verſion of the pſalms, though that verſion could not be chant- d, becauſe not authorized; yet the bequeſt of the bread was eſtabliſhed, hat being the teſtator's general object, and the chanting of the pſalms only eceſſary. So, where there are two purpoſes in a charitable donation, and y the neglect or obſtinacy of the perſons who are to adminiſter the cha- y, one of them is prevented from taking effect, that ſhall not defeat the By the Maſter of the Rolls, 2 Vez. jun. 387-8. (*a*) Attorney General v. Biſhop of Oxford, 1 Br. Ch. Rep. 444. (*b*) Attorney-General v. Golding, 2 Br. Ch. Rep. 428. Attorney-General v. Whitchurch, 3 Vez. jun. 141. (*c*) Brantham v. East Burgold, 2 Vez. jun. 388.

other.

(*d*) Attorney-General v. Boultbee, 2 Vez. jun 380.

other. Therefore, where upon a truſt for the vicars of *P.* (*d*), provided they were preſented at the recommendation of the truſtees, the truſtees neglected to recommend, and the Chancellour, the living being in the preſentation of the crown, preſented; it was holden, that the vicar was entitled to the benefit of the truſt.

(F) Of the Commiſſioners of Charitable Uſes, pursuant to the Statute 43 *Eliz.*

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(*The Commiſſioners of Charitable*) 1 Eq. Ca. Abr. 126. That the commiſſioners have no power to award coſts was expreſsly determined in Wharton v. Charles, Ch. Ca. Finch. 81. See too 2 Atk. 239. Lord Coke thought, that the power of the courts of appeal to give coſts, being limited by the act *againſt ſuch perſons as they ſhould find to complain without juſt cauſe*, no coſts (if the order, judgment, or decree be annulled, diminiſhed, or enlarged) ought to be given by the lord chancellor to the party complaining. 2 Inſt. 712. But in the caſe of the Corporation of *Beſford* v. Lenthall, Lord Hardwicke, on conſideration of precedents, allowed coſts to the exceptants upon thoſe exceptions in which they had prevailed; and to the reſpondents upon the exceptions in which the reſpondents had prevailed; and this, he ſaid, the courts of equity had always done, not from any authority, but from conſcience and honeſt diſcretion, as to the ſatisfaction on one ſide or other, on account of vexation. 2 Atk. 552. 239.

2 Atk. 552. 1 Ch. Ca. 135. 158. 193. 267. 3 Bl. Comm. 428.

The decree of the commiſſioners is returned into the petty-bag office; and then the defendant is ſerved with a writ of execution, upon which he may file exceptions, and pray to ſtay proceedings till they are heard.—It was formerly doubted, whether the court of Chancery could proceed in the manner here chalked out. It is now ſettled, however, that a ſuit may be inſtituted in that court either prior, or ſubſequent to ſuch decree; and if ſubſequent, it is treated as an original cauſe, in which neither party is bound by what appeared before the commiſſioners, but may ſet forth new matter. For the court of Chancery mix the juriſdiction of bringing informations in the name of the attorney-general, with the juriſdiction given them under the ſtatute, and proceed either way, according to their diſcretion.

Cro. Car. 40.

It was reſolved, in the 2 *Cha.* 1. That a determination once made by the chancellor under this act, could not be re-examined upon a bill of review, as is uſual in other caſes in Chancery; but that here the decree is concluſive, becauſe it takes its authority by the act of parliament, which mentions but one examination; and it is not like the caſe where the chancellor makes a decree by his ordinary authority. But in the year 1643, it was reſolved by the judges and king's counſel, aſſiſtants in the houſe of peers, that in ſuch caſe, the party grieved may petition the king in parliament, and have his complaint examined there; and ſo the decree may be confirmed, altered, or annulled; and then be final. All which was actually done, in the aforeſaid year, and purſuant to the aforeſaid reſolution, on occaſion of a decree of the Lord Keeper *Coventry*, in the caſe of *Eaſt Ham* in *Eſſex*.

Duke, 62. 3 Bl. Comm. 428.

Duke, 68, 69. See too, 2 P. Wms 325. The conſtruction of § 3 of the 43 of El. ſaith Lord Hardwicke, is, that where

Where land is given to perſons in truſt to perform a charitable uſe, and the donor hath appointed ſpecial viſitors to ſee that the truſtees perform the uſe according to his intent; in that caſe, if the truſtees defraud the truſt, the commiſſioners cannot meddle, but the viſitors are to perform it. But where the viſitors are truſtees alſo, there the commiſſioners may, by their decree, reform the abuſe of the charity; for, otherwiſe, ſuch breach of truſt would eſcape unpuniſhed, unleſs in Chancery or in parliament, which would be a tedious and diſagreeable ſuit for poor perſons.

a college

college, hoſpital, or ſchool is founded, and a ſpecial viſitor appointed, or a viſitor by operation of law, the commiſſion by virtue of that ſtatute, ſhall not interpoſe. But this doth not extend to a diſtinct, collateral charity. 2 Atk. 554. That the court of Chancery will not interfere, where there are local viſitors, or where the charities are eſtabliſhed by charter, unleſs the perſons, appointed as viſitors or governors, have alſo the management of the revenues, is ſettled in a variety of caſes. 1 Vez. 72 2 Vez. 328. 505. 3 Atk. 108. 2 Vez. jun. 47.

G) Of the Statute 9 *Geo.* 2. *c.* 36. for regulating Gifts in Mortmain by Will, *&c.*

§ 5. "*Provided nevertheleſs*, that no ſuch college, or houſe of learning, which doth or ſhall hold or enjoy ſo many advowſons of eccleſiaſtical benefices, as are or ſhall be equal in number to one moiety of the fellows, or perſons uſually ſtiled or reputed as fellows; or where there are or ſhall be no fellows, or perſons uſually ſtiled or reputed as fellows, to one moiety of the ſtudents upon the foundation, whereof any ſuch college or houſe of learning doth, or may, by the preſent conſtitution of ſuch college or houſe of learning, conſiſt—be capable of purchaſing, acquiring, receiving, taking, holding, or enjoying any other advowſons of eccleſiaſtical benefices by any means whatſoever: the advowſons of ſuch eccleſiaſtical benefices as are annexed to, or given for the better benefit or ſupport of the headſhips of any of the ſaid colleges or houſes of learning, not being computed in the number of advowſons hereby limited."

A will, deviſing lands to charitable uſes, was made before this ſtatute paſſed; but the teſtator did not die till after it had commenced: it was determined by eleven judges, that the deviſe was good in law, notwithſtanding the ſtatute. Aſhburnham v. Bradſhaw, Burn's E.L. tit. *Mortmain.*

A will, deviſing lands in truſt for a charity, was made *before* the ſtatute; and *after* the ſtatute, the teſtator made a codicil, deviſing the ſame lands, together with another piece of land, to the ſame truſtees, and to two others, for the ſame charity, making ſome ſlight alterations in other parts of the will, confirming it in the reſt, and declaring, that the codicil ſhould be annexed and taken as part of his will. Lord *Hardwicke* held, that as to the lands given by the will, the deviſe was good, as the codicil did not revoke either the beneficial or truſt eſtate, but was intended by the teſtator as a confirmation of the will; and, both from the nature of the inſtrument, and the words, was to be taken as a part of it. But as to the additional land given by the codicil, the deviſe was void, it being deviſed only by the codicil which was ſubſequent to the ſtatute. Willet v. Sandford, 1 Vez. 178. 186. Ambl. 453. S. C.

But a will of perſonal eſtate admits of a different conſideration: for where a teſtator, by a will dated prior to the ſtatute, deviſed the reſidue of his perſonal eſtate to be laid out in land, and ſettled to certain charitable uſes; and after the ſtatute, made a codicil, by which, after giving a few legacies, he confirmed the will; Lord *Northington* declared ſo much of the will as related to the reſidue, to be void by the ſtatute; the codicil, in this caſe, by altering the diſpoſition of the reſidue, and confirming the will, made a new publication of it. Attorney-General v. Hartwell, Ambl. 451.

A. (before the ſtatute) gave real and perſonal eſtate to a uſe that would be within the ſtatute, and to another uſe that would not be affected by it: Attorney-General v.

B. (after

Hartley, 4 Br. Ch. Rep. 412.

B. (after the ſtatute) gave perſonal eſtate to the uſe of *B.*'s will: the eſtate of *A.* being ſufficient for the firſt uſe, the whole of the ſecond gift ſhall go to the valid uſe.

(*a*) Screſby v. Holias, Burn's E.L. tit. *Mortmain.*

As land itſelf cannot be deviſed to a charitable uſe, ſo neither can perſonal eſtate to be laid out in land: but (*a*) if money is given to be laid out in lands or *otherwiſe, as the executors ſhall be adviſed*; *or if* (*a*) *the teſtator directs money to be placed in the funds, until it can be laid out in lands to the ſatisfaction of his truſtees*; it hath been determined, that ſuch deviſe is good, by reaſon of the election given to the truſtees. But the latter (*b*) part of this doctrine hath been conſiderably ſhaken by a late caſe, wherein it was adjudged, that a deviſe of money to be laid out in land, *and until an eligible purchaſe could be made, to be placed out at intereſt*, is void, becauſe land ultimately is the thing intended to be given.

(*a*) Grimmet v. Grimmet, Ambl. 210. Highmore, 70. S. C.

(*b*) Grieve v. Caſe, 4 Br. Ch. Ca. 67.

(*a*) Vaughan v. Farrer, 2 Vez. 182.

(*d*) Gaſtril v. Baker, cited in 2 Vez. 185. A gift of perſonalty to *eſtabliſh* a ſchool, was holden good by Lord Thurlow. Attorney-General v. Williams, 4 Br. Ch. Rep. 526.

A deviſe of money to truſtees *to erect* (*c*) *an hoſpital, in ſome convenient place in or near the city of Y.*; *or, in* (*d*) *order to and towards erecting a ſchool* was thought by Lord *Hardwicke* not be within the ſtatute; there being no expreſs direction to lay it out in the purchaſe of land; for that *erect* as much imports foundation as building. And where (*e*) indeed it was manifeſtly the intention of the teſtator, that the money ſhould be laid out in land; his Lordſhip held, that though it could not be lawfully ſo applied, yet it might be lawfully applied in building upon land already appropriated to charity, which the truſtees could get by the generoſity of any perſon. But late (*f*) determinations have ſaid, that if a building be expreſſly directed to be built upon ground purchaſed with the teſtator's money, a court of equity not at liberty to direct it to be built upon ground acquired by other means even though there be a clauſe in the will empowering the truſtees, in case the declared intention cannot take effect by law, to lay out the money in other charitable uſes as near ſuch intention as the law will admit.

(*c*) Attorney-General v. Bowles, 3 Atk. 806. 2 Vez 547. S. C. (*f*) Attorney-General v. Tyndall, Ambl. 614. Pelham v. Anderſon, 1 Br. Ch. Rep. 444. note. Attorney-General v. Naſh, 3 Ch. Rep. 588.

(*g*) Attorney General v. Hyde Ambl. 751, 1 Br. Ch. Ca. 444 note. S. C.

And where money (*g*) was bequeathed to erect a ſchool-houſe in a parish, and there was a piece of waſte ground belonging to the pariſh, on which an old ſchool-houſe formerly ſtood, yet, as the will did not point to this particular ground, the court would not order the money to be laid out upon it.

That a bequeſt of money to build or repair upon land already in mortmain, is within the ſtatute. See Brodie v. Duke of Chandois, 1 Br. Ch. Rep. 444. note. Attorney-General v. Biſhop of *Cheſter*, *id.* 444 Glubb v. Attorney-General, Ambl. 373. Harris v. Barnard, *id.* 651.

Widmore v. Woodroffe, Ambl. 636.

A deviſe of money to the corporation of *Queen Anne's Bounty*, was held void, becauſe they are bound by their rules to lay out the money in land; and though the crown has power to make new rules, the deviſe could not be ſupported, becauſe it muſt be regulated by the rules in being at the death of the teſtator's deceaſe.

Burn's E.L. tit. *Mortmain.* Gravenor v. Hallum, Ambl. 641.

If a man deviſe his land to truſtees to be *turned into money, and that money laid out in a charity*, it is not good within this act; for it is an intereſt ariſing out of land.

Attorney-General v. Lord *Weymouth*, *id.* 20. Durour v. Motteux, 1 Vez. 3[illegible]

So a deviſe *of a mortgage*, or *of a term of years*, to a charity, is not good; for the words of the ſtatute are, that the lands ſhall not be *conveyed or ſettled, for any eſtate or intereſt whatſoever, or any ways charged or incumbered, in truſt or for the benefit of any charitable uſe.* Attorney-General v. Meyrick, 2 Vez. 44. Attorney-General v. Graves, Ambl. 155. Attorney-General v. Tomkins, *id.* 216. Attorney-General v. Caldwell, *id.* 635. A leaſe from the crown for years, of the right and power of laying chains in the river *Thames*, for mooring ſhips, and of all profits ariſing therefrom, is an intereſt in land, and, therefore, within the ſtatute Negus v. Coulter, Ambl. 367.

A. H. having a conſiderable eſtate in land, and alſo a large perſonal eſtate upon mortgage on lands in *Norfolk*, deviſed a ſum of 7000*l.*, to be laid out after the death of his wife, in the purchaſe of lands in *Ireland*, the rents and profits to be diſtributed among poor perſons in *Ireland*. *E. H.* his widow and executrix, proved his will, and, afterwards, by her will reciting the will of *A. H.*, and that his perſonal eſtate was out upon mortgage in *Norfolk*, ſhe ordered her real eſtate to be ſold, and the 7000*l.* to be paid to the uſes declared by the will of *A. H.*——By the Lords Commiſſioners, *Loughborough*, *Aſhhurſt*, and *Hotham*—the bequeſt to the charity would be good, being to a charity in *Ireland*, if it was not made otherwiſe by the circumſtance of the money being upon mortgage on an eſtate here, which could not be liable to the deviſe to a charity: but it is too late to take that objection on the will of *E. H.*, ſhe admitting by the deviſe to the ſame uſes, that ſhe had perſonal eſtate of the teſtator: ſhe is therefore paying a debt, not giving money that is upon mortgage, but only admitting that ſhe had 7000*l.* perſonal eſtate from him; which, as ſhe was executrix and reſiduary legatee, is admitting a debt to his eſtate. Although the court will not marſhal aſſets for a charity, yet it will make the legatees go upon the mortgage. Campbell v. Earl of *Radnor*, 1 Br. Ch. Rep. 271.

A charitable deviſe for general purpoſes is void within the ſtatute: *ſecùs*, of a deviſe for the benefit of perſons ſuſtaining a certain character, as, children and grand-children. Blandford v. Thackerell, 4 Br. Ch. Rep. 394.

A bequeſt of money, to ariſe by ſale of lands, to be applied in waterworks for the uſe of the inhabitants of a town, is a public charitable uſe and therefore within the ſtatute and void. Jones v. Williams, Ambl. 651.

A bequeſt of money, to be laid out in heritable ſecurities in *Scotland*, is not within the ſtatute. Oliphant v. Hendrie, 1 Br. Ch. Rep. 571.

CHURCH-WARDENS.

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(*Church-wardens*) Burn's E. L. tit. *Church-wardens*. Walter Reynolds' Conſtit. An. 1322. § 6, Sudbury's Conſtit. An. 1416. 2 Johnſon's E. L.

(*Incorporated*) By 9 Geo. 1. c. 7. they are enabled to purchaſe a work-houſe for the poor.

(A) Of the Manner and Right of chooſing Churchwardens.

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(*By the common law*) In ſome places the lord of the manor preſcribeth for the appointment of churchwardens: and this ſhall not be tried in the eccleſiaſtical court, although it be a preſcription of what appertains to a ſpiritual thing. God. 153.

But the canon ſhall take place in the new erected pariſhes in *London* (unleſs the act of parliament, in virtue of which any pariſh was erected, ſhall have ſpecially provided, that the pariſhioners ſhall chooſe both); inaſmuch as *no cuſtom* can be pleaded in ſuch new pariſhes. Gibbs, 215. By 89th canon, ann. 1603, churchwardens are to be choſen by the parſon and pariſhioners jointly, if it may be: if not, the parſon names one, and the pariſhioners are to chooſe another. But this canon is ſaid not to be regarded by the common law Hard. 378. *per* Hale. Carth. 118. 8. P. *per* Holt Ch. Juſt. But *vide* 2 Vent. 41., and the following caſe. There was a cuſtom for the parſon to appoint one churchwarden, and the two old churchwardens the other: but it went no further. The two old churchwardens could not agree; ſo the one preſents *Berwick*, and the other *Catton*. And the court held, that by this diſagreement, the cuſtom was laid out of the caſe; and then they muſt reſort to the canon: under which, *Catton* being duly elected, they decreed for him. Catton v. Barwick, 1 Str. 145.

1 Str. 610. Although the pariſhioners neglect never ſo long to chooſe churchwardens, yet the ordinary hath no power of appointing them.

Mandamus to the archdeacon of *Colcheſter*, to ſwear *Rodney Fane* into the office of churchwarden. He returns, that before the coming of the writ, he received an inhibition from the Biſhop of *London*, with a ſignification that he had taken upon himſelf to act in the premiſes. But by the court—the return is ill. It doth not appear that the town of *Colcheſter* is within the dioceſe of the biſhop who inhibits: beſides, the archdeacon is but a miniſterial officer, and is obliged to do the act, whether it be of any validity or not. And a peremptory *mandamus* was granted. Stutter v. Freſton, 1 Str. 52.

Rex v. White, 2 Ld. Raym. 1379. Rex. v. Harwood *id.* 1405. Regin. v. Guiſe, *id.* 1008. (*a*) 2 Salk. 433.

There hath been ſome diverſity of opinion among the judges, whether it be a good return to a *mandamus* to ſwear a church-warden, that *he was not elected*, inaſmuch as the archdeacon cannot judge either of the election or of the qualities of the perſon elected. But the proper diſtinction, as to this point, Dr. *Burn* thinks is taken in the caſe of *Q.* v. *Twitty* (*a*), *M.* 1 *A. Mandamus* to ſwear a churchwarden, ſuggeſting that he was *duly elected*. The return was, that he was *not duly elected*. It was objected, that this was not a good return. But by *Holt*, C. J. Where the writ is, to ſwear one *duly elected*, there a return that he was *not duly elected*, is a good return for it is an anſwer to the writ: but where it is to ſwear one *choſen* churchwarden, there a return that he was *not duly choſen*, is naught, becauſe it is out of the writ and evaſive.

Hubbard v. Sir Henry Penrice, 2 Str. 1246.

To a *mandamus* to ſwear the plaintiff churchwarden of *Heſton* in *Middleſex*, the defendant returned, that he was not duly elected. In the courſe of the trial, the queſtion was, Where the common right of chooſing churchwardens reſts? The plaintiff inſiſted, it was in the pariſhioners at large, to both the churchwardens, and would therefore have left it upon the defendant to ſhew a cuſtom or right in the parſon to name one. The defendant on the contrary inſiſted, that of common right it was in the parſon and pariſhioners, and therefore it lay upon the plaintiff to prove a cuſtom in the pariſhioners to chooſe both. And of this opinion was *Lee*, C. J., that though there are ſome dictums to the contrary, yet they had not been regarded. The plaintiff, therefore, went on to prove a cuſtom to chooſe both by the pariſhioners, but failed in it; it appearing that though the parſon had generally left it to the pariſhioners, yet he had ſometimes interfered. *Lee*, C. J. likewiſe held, that a curate ſtood in the place of the parſon, for the purpoſe of nominating one churchwarden.

A *mandamus*

A *mandamus* was directed to the commiſſary of the conſiſtorial and epiſ- Rex v. Dr.
opal court of the Biſhop of *Wincheſter* for the parts of *Surry*, to admit Harris,
nd ſwear *Henry Griffith* and *Thomas Garner* churchwardens of the 3 Burr.
ariſh of *Saint Olave, Southwark*. And a like *mandamus* was alſo di- 1 Bl. Rep.
ected to him to admit and ſwear another ſet of churchwardens into the 433. S. C.
ame office. The commiſſary returned, that a cauſe was depending before
im, in which it was diſputed, which of the two ſets of churchwardens had
een duly elected, and till that is determined, he cannot admit either one
et or the other.—By Lord *Mansfield* and the court—The return is bad:
he commiſſary cannot try the right. He ought to obey both writs, and it
of no prejudice to either party.—It was propoſed by the court, and con-
nted to by the parties, to try the right on a feigned iſſue; the execution
f the peremptory *mandamus* to be ſuſpended till after the trial, and then the
eremptory *mandamus* to go to ſwear in thoſe that ſhould prevail on the
rial.

To a libel in the eccleſiaſtical court for not taking upon him the office of Caſtle v.
hapel-warden, the defendant pleads, that it is a donative, and thereupon Richardſon
oves for a prohibition. Upon debate, it was denied; the whole court 2 Str. 715.
eing of opinion, that though there was a difference as to the incumbent,
t as to the pariſh officers, there was none; for they are the officers of the
ariſh, and not the patron of the donative.

(B) Of their Intereſt and Power over the Things belonging to the Church.

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(*The Churchwardens*) 2 P. Wms. 125. Where an obligation is made to them and their ſucceſ-
s, and they die, their executors ſhall have the action, and not their ſucceſſors. Vin. tit. *Church-*
rdens, D.

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(*It is ſaid*) Nor can any ornaments be ſet up in the church without his conſent. 1 Str. 576.
t it muſt be exerciſed according to a prudent and legal diſcretion, which the court of the arches
th a right to look into, and correct. 2 Str. 1080.

(C) Of their Power and Duty in making Rates in Matters relating to the Church.

(*But if the Churchwardens*) But it is remarkable, that the ſtatute, or writ, *circumſpecte agatis*, 13
. 1. ſtat. 4. § 2, which ſeems the foundation of this eccleſiaſtical juriſdiction, is expreſs, "*in*
ut caſibus alia pœna non poteſt infligi, quam pecuniaria." If the queſtion concerning the rate de-
d on the bounds of the pariſh, that matter muſt be decided at common law. Deg. 172.

(E) Of their Accounts; and herein of Actions brought by, or againſt them, and the Remedies they have when their Time is expired.

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(*If the Churchwardens*) They cannot commence a ſuit in their own names after their year is
. Dent v. Prudence and Bond, 2 Str. 852.
ee too, Nicholſon v. Maſters, Vin. Abr. tit. *Churchwardens*, C. P. 9. *Radnor* Pariſh in *Wales*,
p. 10.

It is ſaid, the ſpiritual court hath no juriſdiction to order a rate to reim- Dawſon v.
ſe the preceding churchwardens, and a prohibition was granted after ſen- Wilkinſon,
ce, becauſe upon the face of the order it appeared the eccleſiaſtical court Ca. Temp.
Hardw. 381

had no jurisdiction: And by the whole court of King's Bench—There cannot be a rate made to reimburse the churchwardens; because they are not obliged to lay the money out of their own pockets.

(*If A. was Churchwarden*) In such case he may have a prohibition. Nutkins v. Robinson, Bunb. 247. So where they have passed their accounts at the vestry. Snowden v. Herring, 289. Wainwright v. Bagshaw, 2 Str. 974. The spiritual court may compel the churchwardens to bring in their accounts, but hath no jurisdiction to settle them. If they presume to decide upon them, a prohibition will be granted, even after sentence allowing the accounts, and an appeal to the arches. Adams v. Rush, 2 Str. 1133. Leman v. Goulty, 3 Term Rep. 3.

Turner v. Baynes, 2H. Bl. 559.

Churchwardens *de facto* may maintain an action against a former churchwarden for money received by him for the use of the parish, though the validity of the election of the plaintiffs to the office be doubtful, and though they be not the immediate successors of the defendant.

COMMITMENTS.

(B) By Whom.

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(*It is certain*) Crofton's case, Vaugh. 142. Sid. 78. Fitz-patrick's case, Salk. 103. The right of one or more lords to commit out of council, is extremely questionable; and indeed seems to have been denied in the case of the Seven Bishops, both by court and counsel on each side. St. Tr. 310, 311. The earliest instances that occur in our law-books, of commitments by a secretary of state, are in 2 Leon. 175 Hellyard's case; and 1 Leon. 70, 71. Howell's case; the former in Tr. 29. El., and the latter in Mich. 29 and 30 Eliz. These were both by Sir Francis Walsingham, who is described as one of the principal secretaries of the lady the queen, but with the addition of and, &c. in the first; in the last expressly of the words, "and one of the priry council;" so that he seemeth rather to have acted in that character, than as secretary. However, Melvin's case, in the 4th of Car. 1., the next instance to be met with, the addition here mentioned is dropped, and the commitment is said to be simply by the *Lord Conway secretary of state*. There is no doubt, but that the power here asserted in this officer, was erroneous in its commencement, as hath been very satisfactorily proved by Lord Camden, in his argument in the case of Entick v. Carrington, 11 St. Tr. 316.: but there is also no doubt, as his Lordship observed, but that he now in the full *legal* exercise of it: because there hath been not only a clear practice of it, at least since the Revolution, confirmed by a variety of precedents; but it hath been recognized and confirmed by several cases directly on the point. Rex. v. Kendall and Roe, 5 Mod. 78. Skin. S. C. Ld. Raym. 65. S. C. 1 Salk. 347. S. C. 4 St. Tr. 559. S. C. The Queen v. Derby, Fort. 140. Rex v. Earbury, 2 Barnard. 293. 346. Yaxley's case, Skin. 596. Carth. 391. William Wyndham's case, 3 Vin. Abr. tit. *Bail.* H. a. 6. p. 7. Str. 2. S. C. Rex v. Lord Shaftsdale and Lord Dupplin, *ibid.* p. 8. Rex v. Harvey, *ibid.* p. 9. Rex v. Florence Hensey, 1 Bl. 642. Rex v. Wilkes, 2 Wilf. 150. 11 St. Tr. 302. S. C. Sayre v. Earl of Rochford, 2 Bl. Rep. 1165.

(C) To what Prison.

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(*Since this statute*) By 6 Geo. 1. c 19., justices of the peace within their respective jurisdictions may commit vagrants, and other criminals charged with small offences, either to the common gaol, or house of correction, as they shall think proper.

By 23 *Geo.* 2. *c.* 26. *s.* 11. and 24 *Geo.* 2. *c.* 55., If an offender against whom a warrant shall be issued by a justice of peace of one county shall escape into another, he may be apprehended by having the warrant indorsed by any justice of the county into which he shall so escape,

bailed in that county, if he be bailable; if not, or he cannot there find bail, he ſhall be carried back into the firſt county, and there committed or bailed.

(E) What ought to be the Form of the Commitment.

(*But note,*) But a commitment for treaſon generally is good. 2 Wilſ. 158. Page 381

(*It is Safe*) Str. 2, 3. Vin. Abr. tit. *Bail*, H. a. p. 7. 2 Wilſ. 158. 11 St. Tr. 304.

A commitment of one for carrying goods without an univerſity licence, "until he gives ſecurity to carry no more, and to obſerve the ſtatutes of the univerſity," is bad. Rex v. Barnes, 2 Str. 917.

So is a commitment generally to priſon, not ſpecifying what gaol, or directed to any particular gaoler. Rex v. Smith, 2 Str. 934.

(*All's a Commitment*) In the firſt caſe, the commitment muſt be until diſcharged according to law: in the laſt, until he comply.

(*So where on Bracey*) Bracey's caſe, Salk. 348. Ld. Raym. 99. S. C. 5 Mod. 308. S. C. Comb 390. S. C. Hollingſhead's caſe, 1 Salk. 351. S. P. Rex v. Nathan, 2 Str. 880. S. P. Miller's caſe, 2 Bl. Rep. 881. 3 Wilſ. 420. S. C.

So a commitment of a man as a rogue and vagabond under 17 *Geo.* 2. *c.* 5. *ſ.* 7., for running away and leaving his wife and children *to be maintained* by the pariſh, there to remain until he ſhall be diſcharged according to the laws and cuſtoms of this realm, was holden to be bad, becauſe it did not contain a direct allegation that the wife and children *were chargeable*, and becauſe the commitment directed by the ſtatute is for a *limited* time, whereas this was indefinite. Rex v. Hall, 3 Burr, 1636.

The legiſlature having given magiſtrates a power of examining a pauper touching his ſettlement, it ſeemeth that they muſt neceſſarily have as incidental to ſuch power, a power of committing to priſon in caſe of his refuſal to anſwer their queſtions: if ſo, a commitment, "until he ſhall anſwer," is good. Rex v. Jackſon, 1 Term Rep. 653.

A commitment under 9 *Geo. c.* 22. for ſetting fire to a *parcel* of unthreſhed corn, is bad, as not deſcribing any offence within the act. So, is a commitment under the 7 *Geo.* 2. *c.* 21. "for having with force and arms made an aſſault on the proſecutor with intent feloniouſly to ſteal, take, and carry away from the perſon, *&c.*": the words of this laſt act being "if any perſon ſhall make an aſſault with an offenſive weapon, or by menaces or in a forcible manner demand money, *&c.* from any other perſon, with a felonious intent to rob ſuch perſon, he ſhall be guilty of felony." Rex v. Judd, 2 TermRep 255. Rex v. Remnant, 5 TermRep 169.

A commitment in execution by a magiſtrate ought to ſtate that the party was *convicted*: if it only ſet forth that he was *charged* on oath with the offence, it is inſufficient.

COMMON.

(A) Of the ſeveral Kinds of Common.

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(*Common Appendant*) But this may be reconciled: for, an appendancy cannot be without preſcription, the former always implies the latter; and, therefore, if one pleads common appendant, it is unneceſſary to add the uſual form of preſcribing. Hargrave's note, 2 Co. Litt. 122 a.

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(*Common Appurtenant*) It may be claimed by *grant*, as well as by preſcription. Sacherville v. Porter, Cro. Car. 482. F. N. B. 180. N.

(*He that Claims*) Common cannot be claimed by reaſon of inhabitancy in an ancient meſſuage in a vill. Gateward's caſe, 6 Co. 60. Cro. Ja. 152. S. C. Hob. 86. S. C. cited.
And ſee *acc.* Scholes v. Hargreaves, 5 Term Rep. 46.
See Mr. J. Buller's obſervation on theſe caſes, 5 Term Rep. 49.

(B) Of the Intereſt of him who is Owner of the Soil.

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(*Alſo it ſeems by*) North v. Cox, Vaugh. 251. 1 Lev. 253. S. C. Potter v. North, 1 Ventr. 383. 1 Saund. 350. S. C. 1 Lev. 268. S. C. Hopkins v. Robinſon, 1 Mod. 74. 2 Lev. 2. S. C. 2 Keb. 757. 842. 1 Ventr. 123. 163. S. C. Pollex 13. S. C.

Bateſon v. Green, 5 Term Rep. 411.

The right of commoners in a common may be ſubſervient to the right of the lord in the ſoil; ſo that the lord may dig clay-pits there, or impower others to do ſo, without leaving ſufficient herbage in the common if ſuch a right can be proved to have been always exerciſed by him.

Folkard v. Hemmett, Sittings after *Eaſter* Term, 1776, C. B.

So, he may with the conſent of the homage, grant part of the ſoil of the common for building, if he hath immemorially exerciſed ſuch right.

5 Term Rep. 417. n.

Clarkſon v. Woodhouſe 5 Term Rep. 412. n.

So, a cuſtom, that the owners of ancient meſſuages, &c. within a manor have had aſſigned to them by the moſs-reeve certain portions of the common to be holden by them in ſeveralty for digging turves, &c. called moſs dales, and have incloſed and approved ſuch moſs dales, (after clearing them of turves,) and holden them ſo incloſed in ſeveralty, diſcharged from all right of common, is good.

(C) Of the Commoner's Intereſt in the Soil. And herein of the Remedies the Law gives him.

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(*If there be a*) 4 Burr. 2430. cited by the court and admitted.
See Lord Mansfield's obſervations on this caſe, 4 Burr. 2429, 2430.

(*e*) *If (ſ) I have*) Woodſon v. Newton, 2 Str. 777. S. P. Rackham v. Jeſup, 3 Will. S. P.

(*The Writ of*) *Vide* Fitzh. tit. *Admeaſurement*, pl. 12. 16.

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(*One Commoner*) 4 Burr. 2426. 1 Bl. Rep. 673. S. C. And *after Admeaſurement*, a commoner may diſtrain the ſupernumerary cattle of a fellow-commoner, 3 Wilſ. 287. If *A.*, being poſſeſſed of land in a common field, and having a right of common over the whole field, and ſeveral other perſons having a like right of common, enter into an agreement not to exerciſe their reſpective rights for a certain term of years, and each party covenant to that effect; if, during that term, the cattle of one of the perſons, party to ſuch agreement, come upon the land of *A.*, *A.* may diſtrain them; for this agreement is an extinguiſhment of the common *pro tempore*; and therefore, with regard to *A.*, the commoner is a ſtranger. Whiteman v. King, 2 H. Bl. 4. Freem. 273. S. C. *Vide* 4 Burr. 2431. His relief is either by writ of admeaſurement, or by action on the caſe. F. N. B. 125.

(*If in an Action*) To an action on the caſe by a commoner for digging pits, &c. whereby, &c. the defendant pleaded, that he was lord of the ſoil, and that he had digged for coals, doing as little damage as poſſible to the herbage, and averred, that he had left a ſufficiency of common: the plaintiff demurred, and ſhewed for cauſe, that the plea amounted to the general iſſue; and ſo thought the court. Goe v. Cother, 1 Sid. 136. Treſpaſs by the lord of a manor for deſtroying his peat, and filling up the holes out of which it was digged; the defendant juſtifies under a right of common over the waſte appendant, &c., and that the plaintiff had digged this peat in ſome parts of the common, and laid it up in others, whereby the defendant was hindered from enjoying his common *in tam amplo modo*, &c.; the plaintiff replies, *de injuriâ ſuâ propriâ abſque aliâ cauſâ*: the plaintiff cannot, upon this iſſue, give in evidence, that there was a ſufficiency of common left. D'Ayrolles v. Howard, 3 Burr. 1385.

(*But in an action*) But againſt a ſtranger, or a fellow-commoner, he need not. Atkinſon v. Treſdale, 3 Wilſ. 278.

For every feeding by the cattle of a ſtranger, perhaps, an action will not lie; but the commoner muſt ſhew that *proficuum communiæ ſuæ per totum id tempus amiſit*, or, that he could not have his common in ſo beneficial manner as before. It is not neceſſary that he ſhould have loſt his common, but only the profits of it: he need not, therefore, ſhew that he turned on any cattle at the time when the injury complained of was committed. Mary's caſe, 9 Co. 113. Wells v. Watling, 2 Bl. Rep. 1233.

If the lord of the manor make a hedge round the common, or do any act that entirely excludes the commoner from exerciſing his right, the latter may do whatever is neceſſary to let himſelf into the common: but, if the commoner can get at the common and enjoy it to a certain extent, and his right be merely abridged by the act of the lord, in that caſe his remedy is by an action on the caſe, or by an aſſize, and he cannot aſſert his right by any act of his own. If therefore his right be abridged by piney-boroughs, he cannot touch the ſoil to fill them up: ſo, if trees be planted to an exceſs, he cannot cut them down. Cooper v. Marſhall, 2 Wilſ. 51. 1 Burr. 259. S. C. Sadgrove v. Kirby, 6 Term Rep. 483.

(D) Of Approvement and Incloſure.

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(*And where any*) By ſtat. 6 Geo. 1. c. 16., the remedy provided by this act, is extended to the owners of trees, &c. cut down, ſpoiled, &c. either by day or by night.

By ſtat. 29 *Geo.* 2. c. 36. Owners of common, with the conſent of the majority in number and value of the commoners; majority of the commoners, with the conſent of the owners; any perſons, with the conſent and grant of the owners and majority of commoners, may incloſe and hold ſeveralty, for the growth and preſervation of timber and underwood, any part of the commons, for ſuch time, in ſuch manner, and upon ſuch conditions as ſhall be agreed by them reſpectively; ſuch agreement to be in writing, and ſigned by the parties, and enrolled by the clerk of the peace within three months after the execution of it; and to be binding upon § 3. § 4.

upon all perſons whomſoever, if not appealed againſt to the juſtices at ſeſſions within ſix months after its enrolment.

§ 7. 6. If wood is deſtroyed, the offender may be puniſhed according to 1 & 6 *Geo.* 1.; but if not convicted within ſix months, ſatisfaction ſhall be made by the adjoining pariſhes, as for dikes and hedges overthrown by

§ 8. the ſtatute *Weſtm.* 2. Perſons cutting, &c. wood upon commonable grounds ſhall be puniſhed in like manner.

By ſtat. 31 *Geo.* 2 *c.* 41. it is provided, That if any recompence be agreed to be given for ſuch incloſure, it ſhall be made to the perſons intereſted in the right of common, in proportion to their reſpective intereſts; and not to the overſeers of the poor, as was directed by § 2. of the pro-

§ 2. ceeding act: and the powers given to owners by that act may be exerciſed

§ 3. by tenants for life, or years, during their reſpective intereſts, with a proviſo that nothing done by them ſhall have effect after the determination of their eſtates.

§ 1. By ſtat. 13 *G.* 3. *c.* 81. it is enacted, That all tillage or arable lands lying in common fields, ſhall be fenced, cultivated, and improved in ſuch manner, and kept and continued in ſuch courſe of huſbandry, and cultivated under ſuch rules, as three-fourths in number and value of the occupiers, with the conſent of the owners and rector, impropriator or vicar, owner, or their leſſee, ſhall by writing under their hands direct and appoint

§ 2. which rules ſhall not be binding for any longer term than ſix years, or two rounds, according to the ancient and eſtabliſhed courſe of the parish.

§ 7. They may too poſtpone the opening of ſuch common field lands for ſuch reaſonable time as they ſhall agree upon, and ſettle how long they ſhall continue open, and what number of cattle each commoner ſhall turn on

§ 8. Cottagers however, or commoners without land, are not to be excluded from their uſual right of common, unleſs they have agreed in writing upon

§ 9. ſome compoſition for it by an annual payment. But if the commoners agree not to depaſture the lands in common at the uſual times, and also what ſhall be deemed by a majority of ſuch cottagers, as ſhall not have agreed to compound for their right of common, an equivalent common be enjoyed excluſively by them, ſuch cottagers ſhall uſe their right of common only over thoſe parts of the common field lands which ſhall

§ 10. ſo allotted them. Perſons having a ſeparate ſheep walk, or paſture for

§ 15. cattle, are not to be deprived of their right without their conſent.—Lords of manors, with conſent of three-fourths of the commoners, may ſet out one twelfth part of any common or waſte within ſuch manor, the rent to be applied in draining, fencing, or otherwiſe improving the reſt

§ 18. and two-thirds of the commoners, with conſent of the lords of the manor may appoint the time when common paſtures ſhall be broken and depaſtured

§ 19. and when the ſame ſhall be ſhut and unſtocked; reſerving however a proportion for ſuch as may diſſent.

Moor, 579. If the majority of commoners agree upon a by-law for ſtopping a tree being a nuiſance to the common, it ſhall bind all the commoners, though there be no cuſtom to ſupport it.

Shakeſpear v. Peppin, 6 Term Rep. 741. The lord of a manor, or his grantee, may incloſe and approve part of common againſt tenants having common of paſture, notwithſtanding they have alſo ſome other right on the common, as a right to dig for ſand, if he leave ſufficient common of paſture.

CONDITIO

CONDITIONS.

(F) To whom it ſhall be ſaid to extend to be bound by it.

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(*If a gift*) See *acc.* Sir W. Moore's caſe, 26 El. C. B. Hal. MSS. n. 4. 13th ed. Co. Lit. *ſupra.*

(H) What ſhall be ſaid a Condition, and not a Limitation; and how they differ.

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(*If A. deviſes*) Words *of an expreſs condition* ſhall not ordinarily be conſtrued as a *limitation:* but here an eſtate is to remain over for breach of a condition, which is by expreſs words a *condition*, it ought to be intended as a limitation, *per* Holt. 11 Mod. 61. Page and Hayward, 2 Salk. 570. S. C.

A. deviſed lands to his ſecond ſon, *upon condition that he or his heirs ſhould pay and ſatisfy to the teſtator's ſix grandchildren* (*the children of the deviſee*) *the ſum of* 90*l.*, *to be equally divided among them, with a clauſe of entry and diſtreſs in default of payment of all or part.*—This is not a mere condition (*a*), but a conditional limitation, there being an expreſs limitation over to the legatees in caſe of non-payment, who were to enter and hold in the nature of tenants by *elegit*.

Wigg v. Wigg, 1 Atk. 382.

(*a*) A condition, properly ſo called, annexed to an eſtate, differs from that is called a conditional limitation in this, that it is the proper effect of a condition to give ſtate by the breach of it, to the grantor, or thoſe claiming from him the reverſion in the lands; conditional limitation limits the eſtate over to a ſtranger; and in the caſe of a conditional limiſion, the eſtate expires and determines of itſelf, without any act, as entry or claim, to be done made by him who hath the expectant intereſt: whereas in the caſe of a condition properly ſo led, advantage muſt be taken of the breach of it, by the activity of the grantor, his heirs or ſigns. 2 Wooddeſ. 143, 4. *Conditional limitations* ſo far partake of the nature of conditions, as y abridge or defeat the eſtates previouſly limited; and they are ſo far limitations, as, upon the ntingency taking place, the eſtate paſſeth to a ſtranger. Co. Lit. 202. b, n. 1. 13th edit.

For the diſtinction between a *condition in deed* and a *limitation*, denominated by *Littleton* a condition in law, ſee 2 *Bl. Comm.* 155. *Fearne Cont.* 194. 400.

(I) Of Conditions precedent and ſubſequent.

(*Conditions precedent*) Co. Lit. 218. Francis's Max. Eq. 44. If one party covenants to do one thing, the other *doing* another, it is a mutual covenant, and not a condition precedent. Boone v. Eyre, 2 Bl. Rep. 1312. But where mutual covenants go to the whole of the conſideration on both ſides, they are mutual conditions, the one precedent to the other. Duke of St. *Alban's* v. Shore, 1 H. Bl. Rep. 270. There are no preciſe technical words required in a deed to make a covenant a condition *precedent* or *ſubſequent*; neither doth it depend on the circumſtance, whether the clauſe is placed prior or poſterior in the deed, ſo that it operates as a proviſo or covenant. Or the ſame words have been conſtrued to operate as either the one or the other, according to the nature of the tranſaction. Hotham v. *E. I.* Company, 1 Term Rep. 645.

(K) Of

(K) Of void Conditions, being againſt Law.

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(*Alſo in equity*) That ſuch bonds are bad at law, was determined by the Houſe of Lords in the great cauſe of Ffytche v. The Biſhop of *London*, May 30th 1783. But ſee 4 Term Rep. 81. 359.

Cro. Eliz. 529. Lee & *Ux* v. Colſhill. 2 And. 55. S. C. adjudged, becauſe the

If *A.* being a cuſtom-houſe officer by patent, makes *B.* his deputy, and covenants *inter alia* to ſurrender the old patent, and procure a new one to *B.* and himſelf before a day, and that if *B.* dies before *A.* that *A.* ſhall pay 300*l.* to the executors of *B.* and gives bond for the performance thereof; admitting theſe covenants void (*a*) *per* 5 *Ed.* 6. *cap.* 16. the whole bond is void, though ſome of the covenants are not void or illegal.

obligation is one entire act and deed of the party. 3 Co. 82 S. C. cited. (*a*) So where a ſheriff takes a bond for a point againſt 23 H. 6. c. 9 and alſo for a juſt debt, the whole bond is void, according to the letter of the ſtatute; for a ſtatute is a ſtrict law; but the common law divides according to common reaſon, and having made that void which is againſt law, lets the reſt ſtand. Hob. 14. Moor, 856 pl. 1175. Godb. 213. 10 Co. 100. Latch. 143. Mod. 35. 2 Brown. 282. Vent. 237. Carter, 230. 2 Wilſ. 351.

Cro. Eliz. 872. Moor, 115. pl. 259. 242. pl. 379. 21 Con. 210. 31 Con. 217 March, 191. Owen, 143. And there ſaid, by Anderſon, that he might as well bind himſelf that he would not go to church. 3 Lev. 241.

As to bonds entered into in reſtraint of trade, it ſeems to have been always admitted, and hath been frequently adjudged, that a bond reſtraining trade in general, as that a perſon ſhall not follow ſuch a trade in any part of the kingdom, is void; the reaſons whereof are, that ſuch bond tends to a monopoly, and is againſt the public good; deprives the party of his means of livelihood; enables maſters to lay hardſhips upon their ſervants, apprentices, &c. tends to oppreſſion; and is attended with immediate and apparent damage to the one ſide, only to free the other from the fear of a diſtant damage that may or may not happen: but it ſeems to be now agreed, that a condition reſtraining trade in a particular place, if done fairly, and upon a good and lawful conſideration, and with no ill intention, is good. Alſo it ſeems to be now ſettled, that there is no (*b*) difference between a bond and a promiſe in theſe caſes *viz.* that a bond ſhould be void, and a promiſe good; but that the true diſtinction in theſe contracts, whether by bond, covenant, or promiſe, is between thoſe entered into upon a juſt, fair, and reaſonable conſideration, and thoſe entered into upon no conſideration, or a vicious one; that the former will be good, the latter void.

(*b*) The difference formerly holden was, that in covenant or promiſe, all being to be recovered in damages, the jury may aſſeſs them in regard to the conſideration; but otherwiſe of a bond; becauſe then the whole ſum muſt be recovered, be the damages or conſideration never ſo ſmall. 3 Lev. 242.

Cro. Jac. 596. Jon. 13. March, 77. 2 Roll. Rep. 201. Jolliffe v. Bride.

And therefore where *A.* and *B.* living in the ſame town, and being both mercers, *A* deſired *B.* to buy his old goods, which *B.* did, at ſuch a price, upon condition, that he would not follow his trade within the ſaid town; this was holden a lawful contract; 1*ſt*, Becauſe it was a voluntary reſtraint, and the rule is *volenti non fit injuria*. 2*dly*, That it was made upon a valuable conſideration, the uſe of his trade being compenſated by the price given him for his old goods. 3*dly*, That the agreement was neither *malum in ſe*, nor *malum prohibitum*. 4*thly*, That a man may bind himſelf not to live in ſuch a place, and by conſequence not to trade there. 5*thly*, That theſe kind of bonds are very frequent in *London*.

10 Mod. 27. 85. 130. 1 P. Wms. 181. S. C. Fort. 296. S. C. Mitchel v. Reynolds.

So, where the condition of a bond was, that whereas *A.* had taken the ſhop of *B.* who was a baker, for the term of ſo many years, and had given *B.* ſo much money for it, the condition of the obligation was ſuch, that if during the term aforeſaid, *B.* ſhould not exerciſe the trade of a baker within the (*a*) pariſh where the ſhop was, that then the bond ſhould be void, otherwiſe to remain in full force; and this was holden a good bond.

(*a*) S

(a) So of a ſtreet, Comb. 122. Cheſman v. Nainby, 2 Str. 739. 3 Br. P. C. 349. S. C. Davis v. Maſon, 5 Term Rep. 118. S. P.

To a bond with condition to indemnify againſt a note; the defendant pleaded that it was given as a conſideration for not appearing to give evidence on a proſecution for perjury: it was adjudged on demurrer, after two arguments in the court of *C. P.*, that the plea was good. Collins v. Blantern, 2 Wilſ. 341.

(L) Of repugnant Conditions.

If the condition of a bond ſtate that the defendant is truly indebted, and that the bond ſhall be void if the obligor do *not* pay, and performance be pleaded on the ground of the literal expreſſion; the plaintiff ſhall have judgment; for when the condition recites a debt, and after lays an obligation not to pay it, it is in that (*b*) repugnant and void. 2 Salk. 463. Wells v. Treguſon, Dougl 384. (*b*) That it is juſt to ſupply miſtakes in conditions of bonds. 2 Show. 16 and *vide* 39 H. 6. 10. Roll. Abr. 419.

(P) Of performing the Condition: And herein.

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(*If A. and B. levy*) After covenant, to ſtand ſeiſed to the uſe of *B* and his heirs, with proviſo of revocation on payment to *B* and his aſſigns; *B.* dies; he may tender to the heir, and revoke. Allen's caſe, Ley. 55. b. Hal. MSS.

If the condition of an obligation be to pay 10*l. per ann.* after the death of the obligee, to the executors of the obligee, for the uſe of his children, and he die without making any executors, the money ſhall be paid to his adminiſtrators. Hetl. 115. Lit Rep. 156.

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(*If a man*) The conuſee of a fine leaſes to the conuſor for 99 years, with condition, if the leſſee pays to the leſſor, his heirs and aſſigns, that the uſes limited to the conuſee and his heirs, by an indenture, ſhould ceaſe: the leſſor dies. Lord Nottingham was of opinion, that the uſes ſhould not ceaſe by payment to the adminiſtrator of the leſſor, becauſe he may be an aſſignee in deed as here. 11th May 1679. Sir Andrew Young. Lord Nottingham's MSS. notes.—Upon a fine, the uſe of land was limited to *A* for 80 years, with a power to *A.* and his aſſigns to make leaſes for three lives, to commence after the determination of that term. *A.* aſſigned over to *B.*; *B.* died, having made his will, and appointed *C.* his executor. *C.* aſſigned over to *D.*; *D.* in purſuance of the power, made a leaſe for life. The queſtion was, whether *D.* was ſuch an aſſignee of *A.* as to have power to make this leaſe; or, whether it ſhould extend only to the immediate aſſignees of *A.*? The doubt in this caſe was the greater, as there had been a deſcent upon an executor. The caſe of Peaſe and Stileman was cited, where it was ſaid, that an executor or adminiſtrator ſhould not, in ſome caſes, be ſaid to be a ſpecial aſſignee. But all the court ſeemed to incline to the contrary, and that *D.* ſhould be called an aſſignee, well enough for the purpoſe of making the leaſes in queſtion, and that ſo ſhould any perſon who came to the eſtate under the firſt leſſee, though there ſhould be twenty meſne aſſignments. And afterwards, in the Michaelmas term following, judgment was given accordingly. Howe v. Whitebanck, 1 Freem. 476. Co. Lit. 210. a. note 1. 13th edit.

But after a breach the defendant cannot plead his being ready to pay; as, where in debt on a bond, conditioned to ſave a pariſh harmleſs concerning a baſtard child, which the defendant was forced to father, he pleads *non damnificat.*; the plaintiffs reply, that the child was ready to ſtarve, and that therefore they put it out to nurſe, which coſt them 4*l.*; defendant rejoins that he was ready to re-pay the money, and ſave the pariſh harmleſs; upon this they demurred, and had judgment becauſe the rejoinder 2 Saund. 80, 1 Sid. 414. 1 Mod. 43. 2 Keb. 612, 619. Richards v. Hodges. See 4 Ann. c. 16. § 12.

joinder is a departure; for the defendant ought to have taken iſſue upon the child's being ready to ſtarve; for if the plaintiffs were once at expence about the child, and were actually damnified, the defendant's being ready to pay the money will not ſave the condition of the bond.

Cro. Jac. 646. adjudged; but a writ of error being brought, the parties compounded.

If an obligation bear date the 1ſt of *May*, and the condition is to pay a ſum of money the 15th day of *May* next enſuing, this ſhall have relation to the day, and not to the month, ſo as to be payable the 15th day of *May* following, and not to the 15th of *May* next come twelve-month, being (*b*) a fortnight after the date.

(*b*) But where being payable the next day, the court held, that it ſhould have relation to the month, Cro. Jac. 677.

Roll. Abr. 422. Price v. Coa. 2 Roll. Abr. 251. S. C.

So, where an obligation was made the 17th day of *November*, and the condition was to pay 5*l.* the 21ſt of *November* following, and 5*l.* the 20th of *December* next after, it was holden, that the firſt 5*l.* ought to be paid the 21ſt day of *November* next enſuing, and that it referred to the day, and not to the month.

Hill. 5 Geo. 2. in *B. R.* Kettle v. Jones.

But it hath been lately adjudged, that a bond dated 12 *May* with condition to pay a certain ſum on the 13th of *May* next following, ſhould have relation to the month, and not to the day; for it is ſaid, the month following as well as the day following, which the preſent month cannot be, and therefore the money not payable before the 13th of *May* come twelve-month; for theſe contracts are to be conſtrued *ſecundum ſubjectam materiam*, and the meaning of the parties.

Co. Lit. 47. 292. b. 3 Co. 22. a. 128 b.

If a man enters into a bill obligatory, for the payment of ſeveral ſums of money at (*a*) ſeveral days, an action of debt will not lie till the laſt day is paſt.

Cro. Jac. 505. Cro. Car. 241. (*a*) If to pay 20*l.* in manner following, *viz.* 10*l.* at one day, and 10*l.* at another day, debt lies not till after the laſt day, becauſe one entire duty; but if a man binds himſelf to pay *J. S.* 10*l.* at one day, and 10*l.* at another day, after the firſt debt lies for 10*l.* becauſe it is in itſelf a ſeveral duty. Owen, 42. [See *acc.* Coates v. Hewit, 1 Wilſ. 80. Rudder v. Price, 1 H. Bl. 547.]—So if *A.* makes a bill to *B.* for the payment of 20*l.* *viz.* 10*l.* &c., and hereby covenants and grants with *B.* that if he makes default in either of the ſaid payments, that he will then pay what of the whole ſhall be unpaid; after default of the firſt day, debt lies for the whole. Leon. 208. adjudged.

Co. Lit. 292. 3 Co. 22. 4 Co. 94. 5 Co. 51. S. P.

So, upon a contract, debt lies not till all the days of payment are paſt; for where there is but (*b*) one contract there can be but one debt, and conſequently but one action of debt for the recovery of it.

(*b*) But if a recognizance be to pay money at five ſeveral days, after the firſt day of payment execution lies for the ſum that then ought to be paid; for it is in the nature of ſeveral judgments. Co. Lit. 292. b. And the law is the ſame of ſuch a covenant or promiſe to pay money, &c.; for as often as the money is not paid according to the covenant and promiſe, ſo often is there a breach of the covenant or promiſe, and conſequently ſo often an action lies. Co. Litt. 292. b.

Hob. 178. Roll. Abr. 785. Saund. 286. S. C. cited.

If a bill of debt be brought againſt an attorney upon three ſeveral obligations, and upon demand of oyer it appears by the condition of one of the obligations, that the day of payment thereof is not yet come; after a verdict for the plaintiff, upon conditions performed, being pleaded, and coſts and damages given, though the plaintiff cannot have judgment for this obligation, of which the day of payment is not yet come; yet upon his releaſe of coſts and damages, he ſhall have judgment for the other obligations.

Mich. 7 G. 2. Webb v. Divile.

If by bond, money be payable by inſtalments, and in ſuch manner, that the non-payment of a particular ſum, at a particular day, makes a forfeiture of the whole bond; and accordingly, for the non-payment of ſuch ſum, there

there is a verdict for the plaintiff, finding it the deed of the party; though in ſtrictneſs the whole bond is forfeited, yet upon the defendant's bringing into court all that the maſter ſhall hold to be due, and letting the verdict ſtand as a ſecurity for future payment, the court will by rule ſtay all further proceedings on the ſaid bond*.

If by the condition of the obligation money be to be paid to the obligee at or before the 29th of *September*, at ſuch a place, it cannot be tendered at the place before the laſt day, unleſs the obligee is there ready to receive it; but if the obligor meet the obligee at a place before the day, he may there tender it, and the obligee ought to receive it. Cro. Eliz. 74. Moor, 122. Hawley, v. Simpſon, adjudged. Co. Lit. 211. Salk. 140. S P.

If an obligation be conditioned to be at *A* at a certain day, there to chooſe two arbitrators, to be joined to two others to be choſen by the obligee, to arbitrate all matters between them, he ought to be there in ſuch a time, that the arbitrators may be choſen and all ended that day; and therefore his pleading, that he was there the laſt inſtant to make his choice, is not ſufficient. Moor, 545. Marſh v. Edmunds, Cro. Eliz. 549. S. C. adjudged that the plea was naught; becauſe he ſhewed not what hour of the day he came, or how long he continued there, nor that his arbitrators were preſent there alſo.

If the condition of an obligation be to pay a ſmall ſum, and no place is limited, he ought to ſeek the obligee wherever he may be found; but if the condition be to deliver twenty quarters of wheat, or twenty load of timber, *&c.* to the obligee, the obligor is not bound to carry the ſame about and ſeek the obligee: but the obligor, before the day, muſt go to the obligee, and know where he will appoint to receive it, and there it muſt be delivered. 21 Ed. 4. 6. b. Co. Lit. 210. b. 3 Leon. 260.

If the condition of an obligation be to pay 10*l.* at *D* ſuch a day, or 10*l.* at *S.* ſuch a day, if he tenders it at *D.* the firſt day, the condition is ſaved. 21 E. 4. 52. Bro. *Condition*, 174.

If the condition of an obligation be, to appear *coram juſticiariis apud Weſtmonaſterium*, he ought to appear in *C. B.*, and not in *B. R.*, for this is not the ſtile of the King's Bench. Roll. Abr. 545. Muſgrave v. Robinſon.

If a man is bound to pay 20*l.* at any time during his life, at a place certain, the obligor cannot tender the money at the place when he will, for then the obligee ſhould be bound to perpetual attendance; and therefore the obligor, in reſpect of the uncertainty of the time, muſt give the obligee notice, that on ſuch a day, at the place limited, he will pay the money; and then the obligee muſt attend there to receive it. Co. Lit. 211. a. Dyer, 354 pl. 32. Latch. 158. 8 Co. 92. b. Where the giving of notice becomes impoſſible by the act of the perſon to whom it was to be given, it ſhall be diſpenſed with. Salk. 214.

By the condition of an obligation, a maſter is bound to make his apprentice free, on requeſt, at the end of ſeven years; and in debt on this obligation the maſter pleads, that *ad finem* of the ſaid ſeven years, or after, till the time of action brought, he was not requeſted; and it was holden, that in this caſe the requeſt was material, being part of the condition; and *Holt* held, that the requeſt here ought to have been on the moſt convenient time of the laſt day of the ſeventh year, and that it would come too late the next day; but *Powell* inclined, that a requeſt in a day or two after the ſeven years would do well. 6 Mod. 227. 259. Fitzhugh v. Dennington. 2 Salk. 585. S. C. adjudged *per totam Curiam*, on a writ of error of a judgment in the marſhal's court for the plaintiff, and the judgment there reverſed. 2 Ld. Raym. 1094. 3 Salk. 309 pl. 1.

If the condition of a bond be to *render a fair, juſt, and perfect account in writing of all ſums received*; if the obligor neglect to *pay over* ſuch ſums, it is a breach of the condition. Backe v. Proctor, Dougl. 382.

The

* *Vide* ſtatute 8 and 9 W. 3. c. 11. § 8.

Taylor v. Bird, 1 Wilf. 280.

The condition of a bond was, that the obligor ſhould leave 200*l.* to the children by his intended wife jointly: the obligor left four children, and by will gave the eldeſt ſon an eſtate in land of more than the value of 50*l.*, and to the other three 50*l.* a-piece, to be paid as they ſhould reſpectively attain their ages of twenty-one. By the court—The giving the three children the ſeveral legacies of 50*l.* each, to be paid at twenty-one, and the landed eſtate to the eldeſt child, is not a performance of the condition: there is a great difference between leaving the children 200*l.* jointly, and giving them ſeveral legacies at twenty-one; it was intended there ſhould be a benefit of ſurvivorſhip, and the land cannot ſurvive: beſides, there is no preſent proviſion for the children, which was plainly intended to be made by the bond; therefore, there muſt be judgment for the plaintiff.

Box v. Day, 1 Wilſ. 59.

Where the condition of a bond was, that the defendant ſhould not marry any other perſon but the plaintiff, and ſhould pay 1200*l.* in caſe ſhe did ſo, or refuſed to marry the plaintiff within a month after her father's death; and the defendant married in her father's life-time; the court ſtrongly inclined to think the bond forfeited, and the money immediately payable.

CONSTABLE.

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Per Lord Kenyon, 6 Term Rep. 232.

IF a diſtrict be ſeparated from the county at large, and made a county of itſelf by charter, the office of conſtable, it ſhould ſeem, by the common law, but certainly by the ſtatute of *Wincheſter* (13 *E.* 1. *ſt.* 2. *c.* 6.), is incident to ſuch a creation.

Note, An additional authority that the office of conſtable was prior to the ſtatute of *Wincheſter*.

(A) How choſen and appointed.

(*Conſtables appear*) That both high and petit conſtables were of earlier date than this ſtatute, is ſatisfactorily proved in the introduction to a little treatiſe, entitled "*The Office of Conſtable*," publiſhed in 1791.

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(*And by the* 13 & 14 *Car.* 2.) The ſeſſions have no right to appoint under this ſtatute, unleſs there hath been a default at the leet. Rex v. Goudge, 2 Str. 1213. See Rex v. Lone, Fitzg. 192. and R. v. Routledge, Dougl. 536. S. P. argued.

(B) Who are obliged to ſerve.

Rex v. Genge, Cowp. 13.

ONE who is reſiant within a *private leet* within the hundred, is not therefore exempt from ſerving the office of conſtable for the hundred: and a cuſtom to elect ſuch an one is good.

Rex v Clarke, 1 Term Rep. 679.

A younger brother of the corporation of the *Trinity-houſe* is not as ſuch exempt from ſerving the office of headborough.

Rex v. Mierre, 5 Burr. 2787.

Perſons naturalized being excluded from taking any civil office of truſt, are thereby rendered ineligible to this office.

6 Mod. 42.

No perſons who keep a publick houſe ought to be conſtables. They are expreſsly prohibited in *Weſtminſter* by ſt. 29 *Geo.* 2, *c.* 25.

(C) Of

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(*By the* 5 *H.* 8. *cap.* 6.) It ſeems that by the equity of this ſtatute, and the ancient cuſtom of the realm, all ſurgeons have been allowed the like privilege. 2 Keb. 578.—The like exemption is given to ſurgeons and barbers, by 18 Geo. 2. c. 15. § 10. for making the ſurgeons and barbers of *London* two diſtinct corporations.

(*By the* 32 *H.* 8. *cap.* 40.) It ſeemeth to have been holden, that the equity of this act doth not extend to other phyſicians not mentioned in it; perhaps for this reaſon, becauſe phyſicians have no ſuch ſpecial cuſtom for their diſcharge, as ſurgeons are ſaid to have. 2 Hawk. P. C. c. 10. § 44.

(*By the* 6 *&* 7 *W.* 3. *cap.* 4.) By 1 W. & M. c. 18. diſſenters appointed to the office of high or petit conſtable, and ſcrupling to take it in regard of the oaths, ſhall and may execute it by deputy. By 10 & 11 W. 3. c. 23. an exemption is granted to the original proprietor or firſt aſſignee of a certificate for proſecuting certain felons to conviction, (called a *Tyburn*-ticket,) if a pariſh, (or as in *London*,) a ward-office within the pariſh or ward in which the felony happened, to be only once uſed. But note: this is no exemption from ſerving the office for a *manor*, nor, as it ſeemeth, for a vill or townſhip. 2 Burr. 1182. By 2 Geo. 3. c. 20. § 86. ſerjeants or privates in the militia are exempted during the time of their ſervice, unleſs they ſhall conſent thereto. By 31 Geo. 2. c. 17. in *Weſtminſter*, perſons aged 63. A college-barber at *Oxford*, though reſident in the city out of college, ſeemeth to be exempted by the privilege of the univerſity, from ſerving this office for the city. R. v. Routledge, Dougl. 531. But the degree of Maſter of Arts, if the graduate be not reſident in the univerſity, affords no exemption. See Hetſon's caſe, Vin. Abr. tit. *Court of King's Bench* (I), pl. 1. *Court-leet* (U), pl. 5. *Conſtable* (B), pl. 3.

(C) Of their Power and Duty in acting without any Warrant from a Juſtice of the Peace.

(*As conſtables were*) They are juſtifiable in arreſting perſons directly charged with felony, although it ſhould afterwards appear that no felony had been committed. Samuel v. Payne, Dougl. 359. And where a felony hath actually been committed, they are juſtified in making an arreſt, provided they act *bonâ fide*, and in purſuit of the offender, upon ſuch information as amounts to a reaſonable and probable ground of ſuſpicion. In this caſe, indeed, a private perſon may arreſt, though not in the former. Ledwith v. Catchpole, Cald. 291.—If they have notice that a burglary hath been committed, it is their duty to purſue the felon immediately, though in the night. Cro. El. 652.

(D) Of their Power and Duty in executing the Warrants of Juſtices of the Peace.

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(*Yet inaſmuch*) 3 Burr. 1259. Cald. 252. 1 Term Rep. 682. (*c*) And the deputy is within the equity of ſt. 7 J. 1. c. 5. Moor, 845. 2 Term Rep. 395. St. 29 Geo. 2. c. 25. § 2.

(*If a warrant*) By 29 G. 2. c. 25. the *Weſtminſter* conſtables are to be appointed out of the different pariſhes for the whole city and liberty. In *London*, alſo, by ancient cuſtom, the conſtables, though appointed in particular wards, of which there are twenty-ſix, have power to ſerve warrants and execute their office throughout the city.

And all private perſons to whom warrants ſhall be directed, and even officers, if they be not ſworn and commonly known, and even theſe, if they act out of their own precincts, muſt ſhew their warrants, if demanded. And it is enacted by 27 *Geo.* 2. *c.* 20., "That in all caſes where "any juſtice of the peace is required or empowered by any ſtatute to iſſue "a warrant of diſtreſs for the levying of any penalty inflicted, or any ſum "of money thereby directed to be paid—the officer executing ſuch war- "rant, if required, ſhall ſhew the ſame to the perſon whoſe goods and "chattels are diſtrained, and ſhall ſuffer a copy thereof to be taken." 2 Hawk P. C. c. 13. § 28. ‖ 2.

(*But*

(*But it ſeems*) A *general* warrant to apprehend all perſons ſuſpected, without naming, or particularly deſcribing any perſon in ſpecial, is illegal and void for its uncertainty; for it is the duty of the magiſtrate, and ought not to be left to the officer, to judge of the ground of ſuſpicion. And a warrant to apprehend all perſons, guilty of a crime therein ſpecified, is no legal warrant: for the point, upon which its authority reſts, is a fact to be decided on a ſubſequent trial; namely, whether the perſon apprehended thereupon be really guilty or not. 4 Bl. Comm. 291. 3 Burr. 1742. 1 Bl. Rep. 562. 11 St. Tr. 307. 321. Comm. Jour. 22 & 25. Apr. 1766.

(*Alſo by the better*) A warrant properly penned, (even though the magiſtrate who iſſues it ſhould exceed his juriſdiction,) will, by ſtat. 24 Geo. 2. c. 44., in all events indemnify the officer who executes the ſame miniſterially 4 Bl. Comm. 291.

And 11 St. Tr. 321. 2 H. H. P. C. 313. 321.

St. 7 Ja. 1. c. 5. St. 21. Ja. 1. c. 12. If a conſtable be ſued for any thing done in the execution of his office, he and all who aſſiſt him may plead the general iſſue, not guilty, and give the ſpecial matter in evidence; and on a verdict for the defendant, or on the plaintiff's becoming nonſuit or diſcontinuing, he ſhall have double coſts. And the action can be laid only in the proper county; for, if upon not guilty pleaded, it appear that the fact was done in another county, the jury ſhall find the defendant not guilty.

No action is to be brought againſt a conſtable, till demand of copy of the warrant, and the ſame hath been refuſed or neglected for the ſpace of *ſix* days after ſuch demand, 24 *Geo.* 2. *c.* 44. *ſ.* 6.

Anon. 1 Str. 446. Money v. Leach, 3 Burr. 1742. Sty. 393. Where the officer is not acting in the execution of his office; or not purſuing the directions of his warrant; theſe acts afford him no protection.

COPARCENERS.

(A) The Nature and Reaſon of ſuch Inheritance.

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(*If one ſeiſed*) Parceners are ſo called, becauſe partition lies between them. Lit. § 241. And none are called parceners by the common law, but females, or the heirs of females. *Id.* § 214. By cuſtom indeed, brothers may be parceners, as by the cuſtom of gavel-kind in *Kent*. *Id.* § 265. But in either caſe, this manner of holding ariſeth only by operation of law, namely, by deſcent: for, if ſiſters purchaſe lands, they are joint-tenants, and not parceners. *Id.* § 254.

(C) Of Partition, when the Things are dividable or entire, and the Manner thereof.

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(*So an adowſon*) But ſee Biſhop of *Saliſbury* v. Phillips, Carth. 505. and 1 Salk. 43.

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(*But there is*) But this doctrine is over-ruled by a late authority. For, upon the death of the Duke of *Ancaſter* and *Keſteven*, July 8, 1779, ſeiſed in fee of the office of *great chamberlain of England*, leaving two ſiſters his co-heireſſes, the judges gave it as their opinion in the Houſe of Lords *that the office belongs to both ſiſters; that the huſband of the eldeſt is not of right entitled to execute it; that both ſiſters may execute it by deputy to be appointed by them; ſuch deputy not being of a degree inferior to that of a knight, and to be approved of by the king.* See Journ. Dom. Proc. 25th May 1781, 2 printed caſes of the ſeveral claimants, and the Parl. Regiſt. for 1780-1, v. 4. 258 to 297.

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(*A. ſeiſed of the*) This caſe is reported in Godb. 17. 1 And. 307. and Mo. 174. Anderſon gives the opinion of the judges, as it was certified in writing to the privy council; but this cer-

ficate takes no notice of the point of *indivisibility*; nor is it one of the questions stated by Anderson to have been referred to the judges.—In Mo. 707. the same case is cited *arguendo*; and there four judges are represented to have been equally divided in opinion as to the first point mentioned by Lord Coke. But, according to Anderson, the difference of opinion was only, whether any remedy was furnished by law for the interest reserved to Lord Montjoy by the proviso. As to this latter point, see 8 Co. 46. Noy, 145. Co. Lit. 13th edit. 165. a. note 1.

(*This part*) *Enitia pars* is called, in old books, *eisnetia*, which is derived of the *French eisne*, for eldest, as much as to say the part of the eldest. Co. Lit. *ib.* Qu. of this; and see the cases *supra*, Cro. Eliz. 18. and note 2 Co. Lit. *ubi supr.* 13th edit.

(*If two houses*) A parol agreement for a partition in part executed, will, it seems, be established in equity. 1 Atk. 542. 1 Vern. 472.

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(*If parceners of*) But see F. N. B. 202. D. 2 Bl. Comm. 291, 2.

(*If two parceners*) In 1 Atk. 541. there is a case, in which Lord Hardwicke is represented to say, that a partition by agreement between two husbands will not bind the inheritance of their wives. But, notwithstanding this high authority, Mr. Hargrave takes this doctrine of Littleton and Coke, that such partition will bind the wives, *unless it be unequal*, to be clear law, and for the cogent reason here given by the latter. See *acc.* F. N. B. 62. F. Co. Lit. 171. a. note 2.

So, if one release to the other with warranty, this hath been holden to be a good partition. 2 Fulb. Paral. fol. 57. b. cites 44 E. 3. F. Abr. tit. *Counterplea de voucher.* 22. 34 E. 1. *Partition*, 17.

So, there may be a partition by judgment, exclusive of that on the writ *de partitione faciendâ*. Morrice's case, 6 Co. 12. b.

(D) Of Partition by the Writ *de Partitione faciendâ*.

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(*There are some*) See this statute, and the subsequent statutes upon this subject, tit. "*Joint-tenants and Tenants in Common*," l. 7.

If the count state that the plaintiff and defendant were seised in fee, and it be found that the defendant hath only an estate-tail, the writ abates. Cro. Eliz. 759.

(E) Of *Hotchpot*, and the Nature and Incidents of this Kind of Partition.

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(*This kind of*) See Co. Lit. 174. b. *contra* as to gift in tail to a daughter not being in frankmarriage.

COPYHOLD.

(I) Of Fines payable by Copyholders: And herein.
4. Remedy for the Fine.
(N) What Persons may surrender.
(O) Of the Power and Authority of the Lord, &c.

(A) Of the Nature of the Tenure, and what shall be deemed Copyhold.

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(*The Original*) He is called tenant at will *secundum consuetudinem manerii*; which words, *secundum consuetudinem manerii*, were not to bound the lord's pleasure in the determination of his will, but meant only, that the tenant, as long as he continued tenant, was to hold the land under those terms and conditions which the custom had established. 1 Str. 452.

(*Lands, Parcel of*) Cro. Car. 229 1 Lutw. 126. 1 Salk. 365. 2 Lutw. 1171. Bl. Law Tracts, vol. i. p. 154. 8vo. edit.
But if not stated, or found, or pleaded to *be demisable by copy of court roll time out of mind*, it cannot be adjudged copyhold. Newman v. Newman, 2 Wils. 125.

2 TermRep 425. *per Cur.* A copyhold cannot be created by operation of law; for it is not a creature of law, but of fact; it must have custom to support it, and cannot be created by any other mode, unless an act of parliament, which might operate as an estoppel to any man to say it had not existed time out of mind.

(B) In what Respect Copyholds partake of the Nature of Freehold Lands.

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(*My Lord Coke*) A custom, therefore, that where there was no son or daughter, the land should descend to the eldest sister, was holden not to entitle, by implication, the eldest niece. For if the custom is not fully explicit, the common law must regulate the course of descent. 1 Term Rep. 466.

Smith v. Triggs, 1 Str. 487. A copyholder *ex parte maternâ* devised to his heir, who died before admission; it was holden, that the estate should descend to the heir on the part of the mother.

2 Wils. 254. Firebrass and Symmes v Pennant. The lord cannot make a grant of a copyhold to *his own wife*; for the grant is immediate, and the wife can only take from the husband by the intervention of a third person.

2 Blackst. Rep. 1148. There may be a *special* occupant of a copyhold, as to *A.* and his heirs during the life of *B.*

Doe v. Martin. 2 Term Rep. 746. Mardiner v. Elliott.

5 Term Rep. 104. Crow v. Baldwere. If a person being tenant in tail of a copyhold, suffer a recovery in the lord's court, the fee acquired by such recovery shall follow the descent of the entail.

(C) What

(C) What Acts of Parliament ſhall be ſaid to extend to Copyhold Eſtates: And herein. Page 459

(*The entailing of Copyholds*) Cro. Car. 42.

(*And in ſome Manors*) Note, the three ways of barring entails of copyholds mentioned in this caſe; namely, recovery, ſurrender, and forfeiture and re-grant.

Reſulting truſts of copyholds, as well as freeholds, are within the ſtatute of frauds. But Lord *Hardwicke* hath been repreſented to ſay, that copyholds are not within the 14 *Geo.* 2. *c.* 20. § 9 relative to eſtates *pur auter vie*. Withers v. Withers, Ambl. 151.

Q. Whether the ſtatute of 27 *Eliz. c.* 4. againſt covinous and fraudulent conveyances extends to copyholds? Cowp. 705.

As to the ſtatutes relative to recuſancy, ſee *ſtat.* 31 *G.* 3. *c.* 32.

The *ſtat.* 14 *G* 2. *c.* 20. § 9. is expreſsly confined to caſes where there is no *ſpecial occupant*. Now, as we have ſeen, there can be *no general occupant* of a copyhold; of conſequence that ſtatute cannot poſſibly extend to copyhold property. See Ambl. 151.

The *ſtat.* 31 *Eliz. c.* 7. of cottages is repealed by that of 15 *G.* 3. *c.* 22.

Though the appointment of a guardian by a father under the *ſtat.* 12 *Car.* 2. *c.* 24. as to the copyhold property of his child, would not be good where the cuſtom of the manor gives the guardianſhip to the lord; yet it ſhould ſeem to be good againſt the guardian in ſoccage, who would be entitled to the cuſtody of the copyholds, if the cuſtom had not veſted the guardianſhip in another. And in both caſes the appointment would be good, perhaps, as to the *perſon* of the child. Watk. n. clxxii. to Gilb. Ten. p. 476-7.

(D) Of ſuch general Cuſtoms as may be ſaid to relate to all Copyhold Eſtates. Page 462

(*A Copyholder may*) It is expreſsly denied by Lord Hardwicke, that a ſurrender can be by attorney out of court. 2 Vez. 679.

In 2 *Veſ.* 679. it is ſaid to have been expreſsly denied by Lord *Hardwicke*, that a ſurrender can be by attorney out of court; yet *quære* as to the ſtatement there given. It is there ſaid, that to ſurrender by attorney out of court would be for an attorney to make an attorney; but this only applies when the ſurrender is made out of court to *tenants* or the *bailiff*, &c. who are as it were attornies or meſne perſons themſelves; and it is acknowledged, that there muſt be a ſpecial cuſtom to ſurrender into their hands by attorney. But it does not apply to ſurrenders made out of court by attorney to the *lord* or *ſteward*; and, indeed, it appears from unqueſtionable authority, that a perſon may ſurrender to the lord or ſteward by attorney out of court *communi jure*.

(E) Of particular Cuſtoms that are good, and peculiar only to ſome Copyholds. Page 463

(*Cuſtom for the Steward*) In the caſe from Leonard, the by-law was by the majority of the tenants.

(*That the Widows*) Salisbury v. Hurd, Cowp. 481.

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(*A Copyholder may*) Cowp. 481. *acc.* And even an unexecuted agreement by him to sell (where of course there was a dying seised) hath, in Chancery, been carried into specifick performance, in total exclusion of the widow's claim. 2 Vez. 631.

Pike v. White, 3 Br. Ch. Rep. 286. A custom in a manor, if there be any such, that copyholds shall not be surrendered to the use of a will, or that being actually so surrendered, they shall not pass thereby, is a void custom.

2 Vez. 303. A custom not to present mortgages till the third court, is good.

Id. ibid. (*a*) So, of one who holds to him and his heirs for lives. Mardiner v. Elliot, 2 Term Rep. 746. Otherwise, perhaps, if he has a power of nominating his successor. *Ibid.* Though a custom for a copyholder for life (*a*) to commit waste would not be good; yet it would for a copyholder in fee to do so. A custom diminishing the value of the lord's estate, is not, therefore, bad.

3 P. Wms. 229. Chaplin v. Chaplin, 2 Atk. 525. Godwin v. Winsmore. It seems to be the better opinion, that the widow of *cestui que trust* of a copyhold estate shall *not* have freebench.

2 P. Wms. 62. Ld. Raym. 1028. 1 Salk. 243. The case of Sir *John Savage* in 3 *Leon.* 208. has been denied to be law.

Page 468 (F) Of granting Copyhold Lands: And herein.

(*Things that lie*) And Sandys and Drury, P. 43 El. B. R. Hall. MSS. Co. Lit. 58. b. n. 9. 13th edit.

And because it did not appear that they had been immemorially granted by copy.

(G) Of Surrenders, Presentments, and Admittances: And herein.

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(*Copyholders cannot*) An action on the case will not lie against the lord if he refuse to admit. Cro. Jac. 368. 2 Bulstr. 337. But the court of King's Bench will compel him by mandamus to admit a surrenderee. 2 Term Rep. 484. though not the heir. *Id.* 197. Relief in this case, it was formerly thought, could be had only in equity.

(*Though regularly*) He hath as complete a title without admittance as with it, against all the world, but the lord. 2 Term Rep. 198. If a copyhold be devised to the heir, his non-admittance is evidence of his election to take by descent, and not by the will. 1 Str. 491.

(*But, if upon*) See *acc.* 3 Term Rep. 162. And if in such case he makes an *absolute* seisure, he cannot support it afterwards as a seisure *quousque*. *Ibid.*—A custom to seise as forfeited, for not claiming to be admitted, doth not bind the heir, if he was beyond sea, *non compos*, or in prison, at the time. 8 Co. 100. Cro. Ja. 226. Godb. 268.—If one of several joint-tenants comes and offers to be admitted, the lord cannot seise *quousque*; for the seisure *quousque* is only till somebody comes to be admitted; and joint-tenants being seised *per my et per tout*, one of them supplies the whole tenure to the lord. Roe v. Hutton, 2 Wilf. 162.

Holdfast v. Clapham, 1 Term Rep. 600. Berry v. Greene, The title to a copyhold relates back from the time of admittance to the surrender against all persons but the lord: and therefore the surrenderee may recover in ejectment against the *surrenderor* on a demise laid between the times of surrender and admittance. Before admittance, however, the surrenderee can maintain no possessory action; for, before that, the estate

is not out of the ſurrenderor; but he holds it as a truſtee for the ſurrenderee. Cro. Eliz. 349. Davy v. Beardſham, 9 Mod. 75. And *qu.* Whether he can maintain an ejectment againſt the lord or a ſtranger?

So, in the caſe of a deviſe of a copyhold, nothing veſts in the deviſee or ſurrenderee, or in the lord before admittance; for, until then, the eſtate is in the ſurrenderor; and therefore, if a ſurrenderee be attainted of felony and executed before admittance, no forfeiture can accrue to the lord. Roe v. Hicks, 2 Wilſ. 13.

It does not appear to be abſolutely ſettled, whether a ſurrender ſhall be ſupplied in favour of a grandchild or not. It was determined in the caſe of *Kettle* and *Townſend* in the Lords, that it ſhould *not* be ſupplied, but the doctrine has been ſtrongly controverted. See 1 P. Wms. 61 Watts v. Bullas. Preced. Chanc. 477. Furſaker & Robinſon. 1 Vez. 121. Allen v. Poulter. 3 Bro. Chan. Rep. 231. Chapman & Gibſon.

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Though an equity in copyholds may be deviſed without a ſurrender, yet that equity muſt be ſuch as would have been deviſable if of freehold property. If the equity be in tail, the entail muſt firſt be docked. 1 H. Blackſt 461. Roe v. Lowe, and Watk. n. lxxxii. to Gilb. Ten. 428.

A deviſe of copyholds to a charitable uſe ſeems to be within the ſtatute 9 *Geo.* 2. *c.* 36. Attorney-General v. Lord Weymouth & *al.* in Canc. Hil. 16 G. 2. MS.

(*Although copyholds*) By ſpecial cuſtom a deviſe of a copyhold may take effect without ſurrender. Lit. Rep. 26. *arguend.* cites Wiot's caſe, P. 35 Eliz. C. B.

(*In favour of Purchaſers:*) It will alſo ſupply againſt the aſſignees and creditors of the party, if he becomes bankrupt. Taylor v. Wheeler, 2 Vern. 565.

(*But if a Man*) But where a general deviſe of real eſtate was preceded by a direction to pay debts; and the teſtator left no real eſtate, but his copyholds, Lord Hardwicke ordered a defective ſurrender of the copyhold to be ſupplied in favour of the creditors. Tudor v. Anſon, 2 Vez. 582. By the law of courts of equity, as now received, the want of a ſurrender will be ſupplied in favour of creditors, *ſo far only* as may appear *neceſſary* for the payment of debts; and, conſequently, while any freehold eſtate remains applicable to that purpoſe, the want of the ſurrender of the copyhold ſhall not be ſupplied, notwithſtanding the expreſs intention of the teſtator to charge the copyhold rateably with, or in preference to the freehold. Drake v. Robinſon, 1 P. Wms. 443. Haſlewood v. Pope, 3 P. Wms. 322. Mallabar v. Mallabar, Ca. tem. Talb. 78. Hellier v. Tarrant, *id.* 3d edit. 188. note. Coombes v. Gibſon, 1 Br. Ch. Rep. 273. Lindopp v. Eberall, 3 Br. Ch. Rep. 188. Bixby v. Eley, 2 Br. Ch. Rep. 325.

(*Equity will Supply*) So, in favour of a wife. 1 Vez. 228. 2 Vez. 164. And this, though her intereſt be limited, and it cannot be extended to the deviſees over. Marſton v. Gowan, 3 Br. Ch. Rep. 170. But it is not material whether the heir be totally *diſinherited by his father*, ſo that he hath ſome proviſion. Hawkins v. Leigh, 1 Atk. 387. Chapman v. Gibſon, 3 Br. Ch. Rep. 170. Pyke v. White, *id* 286. Nor is it material (although formerly doubted, as in Roſs v. Roſs, 1 Eq. Caſ. Abr. 124), whether the younger children are otherwiſe provided for, or not. Kettle v. Townſhend, 1 Salk. 187. Carter v. Carter, Moſ. 370. Cook v. Arnham, 3 P. Wms. 283. and Ca. temp. Talb. 35. S. C. Tudor v. Anſon, 2 Vez. 582. Pyke v. White, *ubi ſupra*, ſo, with reſpect to the wife. Briſcoe v. Cartwright, Gilb. Eq. Rep. 121. Smith v. Baker, 1 Atk. 386. But if the heir at law be *not* a *child* of the teſtator, &c. although *wholly unprovided for*, the defect ſhall be ſupplied in favour of the wife. Chapman v. Gibſon, 3 Br. Ch. Rep. 170.— If only part of the copyholds deviſed be ſurrendered, equity will ſupply the defect in favour of a younger child as to the reſidue, if it be manifeſtly the intention of the teſtator that they ſhould paſs. Banks v. Denſhaw, 3 Atk. 586. *Secùs*, if there are words in the will reſtrictive of the deviſe to the part ſurrendered. Barker v. Barker, cited *ibid.*

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(*Not will Equity*) See *acc.* 2 Vez. 582. 3 Atk. 508. 1 Wilſ. 161.

(4. *If Copyhold Lands*) Macey v. Shurmer, 1 Atk. 390. Tuſſnell v. Page, 2 Atk. 37. and Barnard. Ch. Rep. 9. Car v. Elliſon, 3 Atk. 73. Allen v. Poulton, 1 Vez. 121. Macnamara v. Jones, 1 Br. Ch. Rep. 481.

(*A Feme Covert*) And this, it ſeemeth, without any particular cuſtom. 1 H. Bl. 344. "A "cuſtom for a feme covert to ſurrender her lands without the aſſent of her huſband, is bad." This was the point which the court of Common Pleas profeſſed to determine in the caſe of Stevens v. Tyrrell, 2 Wilſ. 1. But the caſe ſeems to warrant no more than an opinion, that a ſurrender by a feme covert, in which the huſband neither joins nor aſſents, cannot be good. And even this opinion is conſiderably ſhaken by the reaſoning of Lord Loughborough, C. J. in the caſe of Compton v. Collinſon, 1 H. Bl. 342-8. The point in the caſe of Compton v. Collinſon, was, whether a married woman living apart from her huſband, under articles of ſeparation, by which he covenanted that ſhe ſhould enjoy to her own uſe all ſuch eſtates as ſhould come to her during the coverture, and that he would join in all neceſſary conveyances, and in ſurrendering the copyholds to ſuch uſes as ſhe ſhould appoint; could ſurrender the copyholds without the huſband joining, and without a ſpecial cuſtom for that purpoſe? And the court was of opinion that ſhe could; for that the wife is tenant of the copyhold, and not the huſband; that the eſtate can be forfeited or ſurrendered only by her acts, not by his: that the authority which he acquires by his marital rights to direct and control her acts, was, by his covenant in the preſent inſtance, annulled, or at leaſt, ſuſpended; and there was then no impediment to the validity of an act paſſed in the court of the manor, between her and the lord.

(*A Copyholder ſurrenders*) 2 Term Rep. 484. S. P.

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(*If there be Barbn*) So, during the life of a widow who is admitted to her free-bench, the heir may incur a forfeiture of his eſtate by being attainted of felony. 1 Leon. 1.

A ſurrender by an heir apparent in the lifetime of his anceſtor, whom he ſurvives, will not eſtop his heir from claiming againſt the ſurrenderee. 3 Term Rep. 365.

(*A Copyholder may*) It was adjudged in the Common Pleas, that the ſurrender was void, and that judgment afterwards affirmed by the court of King's Bench. Sir Thomas Jones, 153. and 1 Show. 156. 1 Ventr. 359. Skin. 28. Freem. 245. S. C. but no deciſion.

(H) Of the Operation of the Surrender in paſſing the Eſtate: And herein.

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(*A Copyhold is granted*) That a ſurrender of a copyhold to uſes is not to be conſtrued with the ſame ſtrictneſs as a common law conveyance, was expreſsly determined by two judges againſt Holt, C. J. in the caſe of Fiſher v. Wigg, 1 P. Wms. 14. 1 Ld. Raym. 622. 2 Vez. 257.; but ſee Idle v. Cooke, 1 P. Wms. 70. The diſtinction however, hath been recognized in later caſes. Rigden v. Valliere, 2 Vez. 257. Goodtitle v. Stokes, 1 Wilſ. 341.

(I) Of Fines payable by Copyholders: And herein.

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(*A Fine may be due*) It is due, it ſeems, without any ſpecial cuſtom. Dougl. 729. But Lord C. B. Gilbert queſtions whether it be due without a particular cuſtom, upon the alteration of the lord by death. Gilb. Ten. 275. The executor of a copyholder, for a long term of years, is compellable to be admitted, and to pay a fine. Earl of Bath v. Abney, 1 Burr. 260. The great point of this caſe was, whether the fine became due *on the change of the tenant*, or *on change of the eſtate* only.

Duke of Somerſet v. France, 2 St. 654. Fort. 451.

Where by the cuſtom of a manor, general fines are due on the death of the laſt admitting lord; huſband, tenant for life under a marriage-ſettlement, is entitled to a fine upon the death of his wife, the laſt admitting lady.

(*If a Copyholder in fee*) In Ventr. 260. it is reſolved, that the lord may aſſeſs one fine for the particular eſtate, and another for the remainder. And in the ſame caſe, 1 Mod. 120. Holt, C. J. ſaith, "If a fine be aſſeſſed for the whole eſtate, there is an end of the buſineſs; but if a "fine be aſſeſſed only for a particular eſtate, the lord ought to have another."

1 P. Wms. 21. 1 Ld. Raym. 631.

But tenants in common ſhall be ſeverally admitted, and pay ſeveral fines.

Drury v. Mann, 1 Atk. 95.

The lord is entitled to a fine from the aſſignees of a bankrupt; to avoid which, it was recommended by Lord *Hardwicke* to except copyholds out of

of the deed of aſſignment, that when a purchaſer ſhould be found, the commiſſioners might aſſign to him in the firſt inſtance.

Though if one joint-tenant die, the ſurvivor ſhall have all without any new admittance or fine; yet it is otherwiſe as to co-parceners and tenants in common. Calth. 64. Co. Copyh. ſ. 56. Watk. n. clxxiv. to Gilb. Ten. 478.

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(*No Fine is due,*) In ſome manors no fine is due upon the admiſſion of the heir. 3 Term Rep. 162. *A fortiori*, not upon a mere covenant by the copyholder to ſurrender, though ſuch covenant be preſented by the homage. Rex v. Lord of the Manor of *Hendon*, 2 Term Rep. 484.

As the lord may aſſeſs a fine out of the manor, ſo alſo may he make it payable out of the manor. Yaxley v. Rainer, 1 Ld Raym. 44.

(*Fines (e) uncertain*) A bill in equity cannot be brought by a ſingle copyholder to be relieved againſt an exceſſive fine, in regard the fine inſiſted on to be exceſſive, ought to be tried by a jury. But Lord Chancellor King admitted, that a bill might lie in order to ſettle a general fine to be paid by all the copyhold tenants of a manor, to prevent a multiplicity of ſuits. Cowper v. Clerk, 3 P. Wms. 156.

The court and jurors ſhall be judges of the fine without ſuit in Chancery. Moor, 623. But the modern practice is to reſort to equity. Dougl. 726-7.

(*Two years value*) The lord cannot at this day ſet a fine at more than *two years value* upon an admittance on an alienation. *Per Cur.* 2 Wilſ. 401. And two years improved value, without any deduction, for the land-tax, is now fixed as the ſum aſſeſſable for an arbitrary fine. Grant v. Aſtle, Dougl. 727.

(*A cuſtom to pay*) That the fine was to be according to the *improved* value was ruled by Lord Hardwicke, C. J. at *niſi prius*. Halton v. Haſſel, 2 Str. 1042.

It ſeems to be now ſettled, that in caſes where the lord is compellable to admit, and the heirs of the perſon admitted are alſo ſubject to fines on the devolution of the eſtate, a fine muſt not exceed two years improved value of the lands without deducting land-tax, *&c.* except quit-rents. But, where the admiſſion is not compulſory, as in voluntary grants; or in caſes of copyholds for lives where there is no right of renewal; or where in caſes of inheritance the fine is only payable on the admiſſion of the *purchaſer*, whoſe heirs are *not* finable; an arbitrary fine will *not* be reſtricted, but may exceed the two years value. See Watk. n. ciii & civ. to Gilb. Ten. 443, 444. and Anſtr. 659. Wharton v. King.

4. Remedy for the Fine.

If a copyholder refuſe payment of a fine, debt lies againſt him. And it will lie at the ſuit of the lord's executor. 1 Lutw. 597. Cliff. 244. 3 Lev. 261.

General *indebitatus aſſumpſit* will alſo lie. But in *aſſumpſit* for the recovery of an arbitrable fine, the plaintiff muſt prove that the ſum ſtated in his count to have been aſſeſſed, amounts to two years value of the eſtate, becauſe he cannot recover a leſs ſum than that laid in the declaration. Whitfield v. Hunt, Dougl. 727. n. Grant v. Aſtle, *id.* 731. n. *Id. ibid.*

If the action be for ſeveral fines, the declaration may ſtate generally, that the defendant was indebted to the plaintiff in ſuch a ſum, (*viz.* the amount of all the fines due,) for reaſonable fines due and payable to him. But if, in ſuch caſe, any count ſtate *one* fine, although the others ſtate *ſeveral*, and there are entire damages, and judgment for the plaintiff, it is error.

And

Evelyn v. Chichester, 3 Burr. 1717.

And assumpsit will lie for a fine assessed on the admission of an infant, as it seemed to *Yates*, J., *whilst he is an infant*; but certainly after he comes of age, and continues to enjoy the estate.

(K) Of the Extinguishment of the Copyhold: And herein,

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(*The severance*) 4 Co. 24. b. Cro. Eliz. 103. 252. 2 Leon. 208.

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(*So if copyholders*) By a grant of a manor with an exception of the wastes, the wastes are severed from the manor, though the copyholder continues to have a right of common thereon by immemorial custom. And after a grant of the soil of those wastes to trustees for the use of the copyholders in free socage, the lands, when inclosed, will be freehold, and not copyhold. Revell v. Johnson, 2 Term Rep. 415.

1 Salk. 366. per Holt, C. J.

Where a copyholder claims common in the wastes of a manor, it properly and strictly belongs to his estate, and if he enfranchise his copyhold, in that case his common is lost; but where he claims it out of the manor, it belongs to the land, and not to the estate, and if he enfranchise the estate, the common continues.

3 P. Wms. 9. Dunn & Green. 1 Bro. Chan. Rep. 515. 458. Parker

It seems now to be settled, that by the acceptance of a feoffment or other conveyance of the freehold by a copyholder seised in tail, the entail will be destroyed even as to the issue.

Wynne v. Cookes. 2 Vez. jun. 524. Chaloner v. Marshall. And see 1 Vern. 393. v. Turner.

Supra.

The case of *Melwich* and *Luther* relative to the power of a grantee of the freehold of the copyholds of a manor to hold courts does not seem to be law.

(L) Of Forfeiture; And herein,

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(*If the jury*) It is holden by Lord Coke, that a presentment is necessary to make a forfeiture in those cases, where the lord cannot be presumed to have notice of himself, as if the tenant commit felony. But it is said, *per Cur. alibi*, that presentment is not of necessity, but only for the Lord's better instruction, and he may take notice himself, if he will. And indeed the reason given by Coke is of no cogency, *viz.* that because the lord cannot by intendment have notice of them himself, that therefore he shall have no advantage of them without presentment; for if he can take notice of them, why should he not, since presentment is not that which gives title, but only lets him know what he hath a title to. However, it is safe to get such things presented; and if there be a custom for it, it must be pursued. Gilb. Ten. 231.

1 Roll. Abr. 507. 3 Lev. 309. Co. Ent. 647.

The non-payment of a reasonable fine, upon demand, is a cause of forfeiture. *Secùs*, if it be unreasonable; or it be doubtful whether it be reasonable; or whether it be due or not; or if there were no express refusal; or, though there were such, if it be paid within the limited time.

Gilb. Ten. 255. & Watk. n. cxviii. p. 451.

The making a bargain and sale, though it be enrolled, does not seem to be a cause of forfeiture of a copyhold.

Harg. n. (3) to Co. Litt. 59. a.

Nor the executing a deed of feoffment with a letter of attorney to deliver seisin; for it does not appear to be a forfeiture until livery be actually given.

(*f*

(*If a copyholder*) Lit. Rep. 267-8. Hetl. 8. S. C. cites the opinion of Popham, that turning it into hop ground is not waste. Gilb. Ten. 221.

Buller, J. thought the lord cannot dig for mines on the copyholder's lands. 2 Term Rep. 707.

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(*The lord of the*) 1 Ld. Raym. 551. Com. Rep. 71. 12 Mod. 378. S. C. determined by a majority of a single lord.

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(*If a copyholder commits*) If there be a transmutation of possession by a feoffment or fine, it divests the lord's right, because it gains a fee-simple to the person to whom it is made or levied. In that case, therefore, and in that case only, the succeeding lord may take advantage of the forfeiture, because the act of forfeiture destroys the estate. Doe v. Hellier, 3 Term Rep. 173.

The stat. 9 *Geo.* 2. *c.* 29. is expressly confined to infants and femes covert taking *by descent or by surrender to the use of a last will.*

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(*If he that is*) Any acts equally solemn will amount to a dispensation; as presentment by the homage of the death of the tenant who committed the forfeiture, proclamations for the heir to come in and be admitted. And *qu.* Whether the statute of limitations will not operate as a bar to the lord's right of entry after twenty years? 3 Term Rep. 171, 2, 3.

(N) What Persons may Surrender.

AN infant trustee or mortgagee may surrender by order of a court of equity, by virtue of the stat. 7 *Ann. cap.* 19. See 7 Term Rep. 103. Doe v. Morgan.

(O) Of the Power and Authority of the Lord, &c.

THE case of *Melwich* and *Luther*, in which it was said, that the grantee of the freehold of the copyholds of a manor may hold a customary court and make grants by copy, does not seem to be law. Cro. Eliz. 103, 104. 443.

CORONERS. Page 491

CORONERS are of three kinds, *viz.* 1. *Virtute officii.* 2. *Virtute cartæ sive commissionis.* 3. *Virtute electionis.* 2 H. H. P. C. 53.

1. The coroner *virtute officii* is the chief justice of the King's Bench, (*e*), who by virtue of his office is chief coroner of *England*. And though no man who is killed in open rebellion can forfeit lands or goods, for he cannot be attainted after his death; yet, it is said (*f*), that if the chief justice of the King's Bench, as supreme coroner, upon view of the body of one killed in rebellion, makes a record of it, and returns it into the King's Bench, he shall forfeit his lands and goods. But Lord *Coke* is mistaken as to the forfeiture of lands: goods indeed may be forfeited by such a record.

(*e*) The other judges of this court are sovereign coroners. 4 Inst. 173. (*f*) 4 Co. 57.

2. Coroners *virtute cartæ sive commissionis*, are where by a grant to a lord or a corporation, they have power to make or be coroners within their franchise.

franchiſe. Thus, the mayor of *London* is, by charter, coroner of *London*; the biſhop of *Ely* has, by charter of *H.* 7., power to make coroners within the iſle of *Ely*; and Queen *Catherine* had the hundred of *Cobridge* granted to her by the king in 35 *H.* 8., with power to nominate coroners. And in ſtat. 28 *E.* 3. *c.* 6., which confirms the election of coroners to the counties, there is a ſaving to the king and others, who ought to make coroners within their franchiſes.

The admiralty claim juriſdiction upon arms of the ſea *infra corp. com.*; but this, atmoſt, is only a concurrent juriſdiction

There are two great precincts too, that by the king's grants have power of granting or having coroners, *viz.* the juriſdiction of the admiralty, and the verge; the former, for inquiſitions of death on the high ſeas; the latter, within the verge. The coroner of the admiralty is appointed by the lord high admiral: the appointment of coroner of the verge is ſettled in perpetuity in the lord ſteward, or lord great maſter of the king's houſe for the time being.

with the county coroners. 2 Str. 1097.

3. Coroners *virtute electionis*, are thoſe who by ſtat. *Weſt.* 1. *c.* 10. and ſtat. 28 *E.* 3. *c.* 6. are eligible by the county in the county court by the king's writ *de coronatore eligendo.*

(B) In what Places he hath Juriſdiction.

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(*A Coroner hath*) It is ſaid, that this is not part of the ſea. Fitz. Coron. 399. 4 Inſt. 140. 2 Roll Abr. 169. An information was granted againſt a captain of a man of war lying in *Portſmouth* harbour, for refuſing to let the coroner of *Portſmouth* come on board to hold an inqueſt on the body of a perſon who had deſtroyed himſelf in the cabin. R v. Solgard, 2 Str. 1097. Andr. 231.

(C) Of his Authority and Duty in taking Inquiſitions.

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(*It is clearly* (*c*) *agreed*) If the coroner take his inquiſition on view of the body, after long putrefaction, it is in the diſcretion of the court of K. B. whether they will receive it or not. R. v. Cauſey, Hil. 3 Geo. 1.

(*If a Dead Body*) It is indictable as a miſdemeſnour to bury the body before, or without ſending for the coroner. 1 Salk. 377. 7 Mod. 10.

(*Alſo it hath been*) But this he cannot do without the leave of the King's Bench, Str. 167. the granting of which is diſcretionary in the judges, according to the time and circumſtances. 1 Salk. 377. 1 Str. 22. 533.

1 Burr. 17. If the coroner neglects to take an inquiſition, it may be done by juſtices of gaol-delivery, oyer and terminer, or of the peace: but it muſt be done openly: if it be done ſecretly, it may be quaſhed.

(*According to* (*d*) *ſome*) In *Northumberland* he may, by cuſtom, inquire of other felonies. 33 H. 6, 27. But, without cuſtom he hath no authority to take any inquiſition other than on death. 2 H. H. P. C. 65.

(D) Of Traverſing and Quaſhing ſuch Inquiſitions.

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(*Alſo, it is Strongly*) The court will not oblige the coroner to return the depoſitions he hath taken upon an inquiſition of *ſelo de ſe*, if there be nothing depending before them to make it neceſſary. 2 Str. 1073.

(F) Where

(F) Where the Act of one Coroner shall be as effectual as if done by them all.

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(*Wherever Coroners*) One coroner may execute the writ, as in case of an exigent: but if there more coroners than one for the county, the return must be in the name of all. 2 H. H. P. 56.

(H) Of discharging him, and for what Misdemesnours punished.

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(*If any Coroner*) As it is an office of freehold, the court of Chancery will not suffer this writ issue, but on affidavit that the defendant hath been served with notice of the petition for it. Atk. 184.

(*If a Coroner be remiss*) If he imposes an improper inquisition upon the jury, he will be committed. 1 Str. 69.

CORPORATIONS.

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(E) How Corporations differ from natural Persons.

6. Of the Qualifications requisite to Members and Officers of Corporations.
7. Of the concurrence required in Corporate Acts.
8. Of the Regularity of their Proceedings.
9. Of the Election and Amotion of the Members.

(F) How they are visited.

(A) Of the Nature and different Kinds of Corporations.

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(*Of Corporations*) The use of the institution of a sole corporation is pointed out by Sir W. Blackstone, in 1 Comm. 469, 470. But his successor in the Vinerian chair thinks, "that it might have been better to have given sole corporations some other name. For, except the incapacity of purchasing in mortmain, very few points of corporation law are applicable to them. The power of making valid bye-laws, the right of electing new, and of removing old members, and the necessity of a common seal, as well as other matters, have little or no relation, except to corporations aggregate." 1 Wooddes. Syst. 471, 2.

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(*Of Lay Corporations*) The corporations of the universities of this country are lay corporations. Burr. 1647. 1 Bl. Rep. 547.

(B) By whom, and in what Manner created.

(*The King, by*) 1 Bl. Com. 472, 3.

(*One*

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(*One Corporation may*) But the city of *London* may make a fraternity or fellowship, the members of which may aſſert their claim of privileges under the preſcriptive right of the mayor and commonalty to erect ſuch a company. Fazakerley v. Wiltſhire, 1 Str. 462.

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(C) Of the Names of Corporations: And herein,

(*Alſo, the King may*) See *ante*. Knight v. Mayor, &c. of Wells, 1 Ld. Raym. 80. 1 Lutw. 508. S. C.—But with reſpect to the extinction of the old name by a new charter, Holt, C. J. took this diſtinction; where the new charter alters the conſtitution of the corporation, and new models it, there they ſhall loſe their old name; but if the conſtitution as to all its integral parts remains the ſame, though the new charter give them a new name, the old one remains. As, if a mayor be added, or a mayor and maſters be made mayor and aldermen, or an abbot and convent a dean and chapter; there they loſe their old name, becauſe new integral parts of the corporation are added. But if the bailiffs and burgeſſes *villæ de Gippo*, accept a charter conſtituting them balliffs and burgeſſes *villæ Gipwici*, and giving them farther privileges, this is a new name only, for the old corporation remains in its integral parts. Regina v. Bailiffs, &c. of Ipſwich, 1 Ld. Raym. 1239. 2 Salk. 433. S. C.

Maſter, &c. of Suſſex and Sidney College v. Davenport, 1 Wilſ. 184.

If a bond be given to *A. B.* (maſter) and the fellows and ſcholars of Suſſex and Sidney college, to be paid, *&c.*, to the maſter, fellows and ſcholars; this is a bond to the maſter, *&c.*, in their corporate capacity, and not to the maſter, whoſe name is mentioned in the beginning of the bond, in his natural capacity.

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(*There is a difference*) But ſee 1 Leon. 307. Dy. 86. a. in marg. and *infra*.

Turvill v. Aynſworth 2 Str. 787. 2Ld. Raym. 1515. Rex v. Croke, Cowp. 26.

However, in legal proceedings, any variation from the true name of a corporation is fatal, even though the corporation be not a party to the proceedings. As where in an action on a South-ſea contract, the plaintiff declared it was for ſtock in the company trading *ad maria Auſtralia, Anglice vocat*, the South-ſea company. Again, an act of parliament gave power to the juſtices of the county of Surry, at their quarter ſeſſions, on the application of "the mayor, aldermen, and commons of the city of London "in common council aſſembled," to iſſue a precept to the ſheriff to ſummon a jury to inquire into the value of certain eſtates: an order was made by the juſtices at their quarter ſeſſions, ſtating, that on the application of "the mayor, and commonalty, and citizens," they iſſued a precept, &c. this order being removed by *certiorari* into the King's Bench, it was objected, that it ſtated the application to have been made by *the mayor, commonalty and citizens*, inſtead of the *mayor, aldermen, and commons*, according to the directions of the act. The court allowed the objection, ſaying that the bodies deſcribed in theſe different terms were diſtinct, the one being a ſelect body, the other the corporation at large, and that they could not go into the examination of any fact tending to reconcile ſuch diſtinction, or to ſhew that in truth the former were the proper perſons.

(D) What things are incident to a Corporation.

1 Bl Com. 475. Dav. 44. 48.

So, corporations have as incident to them a common ſeal. For a corporation, being an inviſible body, cannot manifeſt its intention by any perſonal act or oral diſcourſe: it therefore acts and ſpeaks only by its common ſeal. For though the particular members may expreſs their private conſents to any act by words, or ſigning their names, yet this does not bind the corporation;

ration; it is the fixing of the ſeal, and that only, (*b*) which unites the veral aſſents of the individuals, who compoſe the community, and makes e joint aſſent of the whole.

(*b*) The agreement of the major part of a corporation

ing entered in the corporation-books, though not under the corporate ſeal, will be decreed in uity. Maxwell v. Dulwich College, 14th July 1783, cited in Fonbl. Eq. Tr. 296. But ſee ar. Taylor v. Dulwich College, 1 P. Wms. 655.

(E) How Corporations differ from natural Perſons: And herein.

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(*Although a Corporation*) Here it may be obſerved, that corporations, in the character of *owners* ccupiers of houſes or lands, are ſubject to the ſame burthens, to which ndividuals are ſubject in e ſame character. They are *inhabitants* within the purview of the ſtatute of 22 H. 8. c. 5. for e repair of bridges. 2 Inſt. 703. They are liable to be rated to the poor within the 43 El. c. in reſpect of lands whereof they are ſeiſed in fee for their own profit. Rex v. Gardner, Cowp. 2. They are rateable to the repairs of a church in reſpect of their corporate lands. Thursfield Jones, Sir T. Jones, 187. So, they may be bound excluſively to the repair of a highway, or of ridge, or creek, by reaſon of the tenure of certain lands: ſo, they may be compelled to do ſo force of a general preſcription, that they ought and have been uſed to do ſo from time immeorial, without an alle gation that they uſed to do ſo, in reſpect of the tenure of certain lands, or any other conſideration; becauſe a corporation aggregate, in judgment of law, never die, and erefore if they were ever bound to ſuch a duty, they muſt continue to be always ſo; neither is any plea that they have always done it out of charity; for what they have always done, they all be preſumed to have been always bound to do. 2 Inſt. 700. 1 Hawk. P. C. c. 76. § 8. Mayor Lynn v. Turner, Cowp. 87.

(*But a dean*) So, *e converſo*, a bond or contract entered into by the body in the abſence of the ead, will not bind; and upon this principle, if a bond be extorted from a mayor and commonalty the impriſonment of the mayor, the corporation may plead that impriſonment in avoidance of e bond, for during the impriſonment, the corporation may be conſidered as without a head. 21 4. 12 Cowp. 224. 226.

(*A Corporation cannot*) Gilb. Uſes and Truſts, 5. 170. Jenk. 195. Pl. Com. 102. 538. That by the ſtrict rules of the common law; for corporations are in point of fact frequently made uſtees for charitable uſes, and are compelled in equity to perform the truſts. But the doctrine the text ſtill holds with reſpect to the king. Gilb. *ubi ſupra*.

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(*Corporations aggregate muſt*) 1 H. Bl. 209. If they have neither lands nor goods, there is no ay to make them appear, either in a court of law or equity; for it is a rule, that for a publick ncern, the ſheriff cannot diſtrain any individual member of a corporation. Thursfield v Jones, kin. 27. 1 Ventr. 351. Style, 367. *contr.* all cited Cowp. 85. But in an extraordinary caſe, here they have no property, and will not appear, and where, conſequently, a court of equity can ve no relief, the plaintiff may apply to the Houſe of Lords, who will make a ſpecifick order for lief. 1 Ch. Ca. 204. 2 Vern 396. S. C. cited.

(*A Corporation Aggregate cannot diſtrain*) Cannot ſue as a common informer. 2 Str. 1241. marg. he ſummons to appear muſt be ſerved on the mayor, or other chief officer, and that is ſufficient. r. Ch. 131. 1 Ch. Ca. 206.

It is holden that a corporation aggregate cannot be ſummoned into the eccleſiaſtical courts: they may, however, be made ameſnable to thoſe ourts: for in the court Chriſtian they are cited by their proper names, hough in their *politick* capacity; and if they ſtand out, they muſt lie by the eels in their *natural* capacity. 10 C. 32. a. Skin. 27.

A corporation which has a head cannot ſue or be ſued without it, beauſe without it the corporation is incomplete. 22 Aſſ p 67. Bro. Corpor p. 43.

A ſole corporation, having two capacities, a natural and a corporate, uſt always ſhew in what right he ſues (*a*): but an aggregate corporation aving only a corporate capacity, a ſuit in their corporate name can be only (*a*) Plowd. 102, 3. Dy. 102. 2 Lev. 68.

only in that capacity; and therefore, it is not neceſſary that a mayor and commonalty ſhould allege ſeiſin in right of the corporation (*b*), or a warden and ſcholars, ſeiſin in right of their college (*c*).

(*b*) 1 Leon. 153.
(*c*) Cro. El. 232. 1 Anderſ. 272. Hob. 211. 2 Ld. Raym. 1535.

In an action of whatſoever kind, brought by a corporation, it is unneceſſary to ſhew how they were incorporated; but on the general plea pleaded by the defendant, it is ſaid, they muſt prove that they are a corporation.

Dutch Weſt India Company v. Henriques VanMoyſes 2 Ld. Raym. 1535. 1 Str. 612.

An action may be ſupported in this country by a foreign corporation in their corporate name and capacity; and in pleading it is not neceſſary that they ſhould ſet forth the proper names of the perſons who compoſe the corporation, or ſhew how they were incorporated; though on the general plea being pleaded, they muſt prove that by the law of the foreign country they were effectually created a corporation.

Pitts v. Gaincc, 1 Ld. Raym. 558. 1 Salk. 10.

But in juſtifying a treſpaſs committed in the aſſertion of a franchiſe or privilege of a corporation, it is frequently neceſſary to ſhew not only the exiſtence of a corporation, but the manner in which it claims to be ſo, whether by charter, preſcription, or act of parliament.

Anon. 1 Vern. 117. Wych v. Meal, 3 P. Wms. 310.

In equity, corporations aggregate anſwer under their common ſeal, and not upon oath: as therefore it is not very likely that they will diſcover any thing to their prejudice, it is uſual for plaintiffs to make the clerk or treaſurer, or ſome of the principal members in their natural capacity, co-defendants with the corporation. This practice appears to have commenced in the time of *Charles* the Second, and was afterwards expreſsly recogniſed by Lord *Talbot*.

Moodamay v. Morton, 1 Br. Ch. Rep. 471.

When a perſon has reaſon to ſuſpect that he has ſuſtained an injury by perſons acting under the authority of a corporation, but cannot aſcertain how far they are concerned, he may file a bill againſt them and their ſecretary, or other officer, for a diſcovery, before he brings an action at law, ſuggeſting that he intends to bring one, but cannot do it, without the diſcovery prayed; becauſe as the ſuit againſt a corporation is by original, the diſcovery may be neceſſary before he can ſue out his writ. But if the diſcovery of any of the matters called for would be prejudicial to the corporation, and not be neceſſary to the plaintiff's caſe, the officer needs not diſcover theſe parts.

R. v. Dr. Wyndham, Cowp. 377.

If the majority of the members of a corporation are ready to put in their anſwer, and the head who has the cuſtody of the common ſeal, refuſes to affix it, a court of equity will ſtay the proceſs againſt the corporation, till an application can be made to the court of King's Bench for a mandamus to compel him, which that court will grant.

Horne v. Joy, 1 Ventr. 47. 1 Mod. 18.

Neither can they, without deed, appoint one to ſeiſe goods as forfeited to the uſe of the corporation.

2 Keb. 567. cited 3 P. Wms. 424.

13 H. 8. 12. Bro. Corp. 83.

Nor can they, without deed, preſent a clerk to a living.

Rex v. Bigg, 3 P. Wms. 419.

The bank of *England*, or any ſimilar corporation, may without deed, empower their ſervant to make promiſſory notes, or bills of exchange, in their name: and this is the uſual practice with the bank.

6. Of the Qualifications requiſite for Members or Officers of Corporations.

Rex v. Morris. Carth 448.

A quaker, who has ſerved an apprenticeſhip of ſeven years, is entitled to be admitted to the freedom of a corporation as well as any other perſon

his ſolemn affirmation, by virtue of 7 & 8 *W.* 3. *c.* 34. is equivalent to ing the uſual oaths; for that clauſe of the ſtatute which provides that no ker, by virtue of that act, ſhall have any office or place of profit in the vernment, does not extend to the freedom of a corporation. 1 Ld. Raym. 337. 5 Mod 402.

Though it be true that where an infant is *actually* mayor, or other chief cer of the corporation, this ſhall not avoid the acts of the corporation h reſpect to ſtrangers; becauſe theſe acts are not the acts of the particu- perſons, but of the body corporate; yet it ſeems that where neither the viſions of the charter, nor the uſage of the corporation, *expreſsly* autho- the election of an infant into a corporate office, he is not capable of ng elected. 5 Co. 27. Rex v. Carter, Cowp. 220. Rex v. White, Ca. Temp. Hardw. 8.

Reſidence within a corporate town is not neceſſarily a previous qualifica- n for the freedom of the corporation, and the freedom, when once ob- ned, is not forfeited by non-reſidence: but by the conſtitution of the cor- ration, whether by preſcription, or the *expreſs* words of the charter, reſi- nce *may* be requiſite as a previous qualification (*b*): and, where that is e caſe, the court of King's Bench will grant leave to file an information, the nature of *quo warranto*, againſt the governing part of the corporation, admitting perſons non-reſident. (*b*) 1 Barnardiſt. 138. 1 Salk. 374. 1 Ld. Raym. 426. Carth. 503.

Where a man is already a member of a corporation, reſidence is not a ecedent qualification to his being choſen to a corporate office, unleſs ex- eſsly required by the conſtitution of the borough; but though reſidence be t required at the time of the election, an abſent perſon muſt not be choſen lluſively for any ſiniſter purpoſe, and if he be, the election will be abſo- ely void. The corporation of *Cambridge*, on the charter-day for the elec- n of a mayor, elected a perſon who was an officer in the army juſt gone to *rth America*, and without the leaſt probability of his returning till long er the year would be expired: the electors were ſufficiently appriſed of e fact, at the time of the election, and ſoon afterwards had expreſs no- e given them of it, but refuſed to proceed to a new election; and it ap- ared they had elected this abſentee, for the purpoſe that the preceding ayor might hold over, which it was pretended he might do by ancient ge, and by virtue of a charter of *Charles* the Second. The court of King's nch held that this was merely a colour to avoid any election at all: that e electors had choſen this perſon becauſe they knew it was impoſſible for m to execute the office, and that the election was abſolutely void. Cowp. 539. Rex v. Mayor, &c. of Cambridge, 4 Burr. 2008.

By the proviſions of a charter, reſidence may be required as a previous alification for ſome offices and not for others. Rex v. Heath, 1 Barnardiſt. 416.

See further on this head, tit. "*Offices and Officers*" (E) (K).

7. Of the Concurrence required in corporate Acts.

Where no ſpecial proviſion is made by the conſtitution of a corporation, e whole are bound by the acts, not only of the major part (*a*), but of the jor part of thoſe who are preſent at a regular corporate meeting, whether e number preſent be a majority of the whole body or not (*b*). So, though particular conſtitution require the *preſence* of a majority of the *whole* num- r, yet the *concurrence* and *conſent* of a majority of the whole is not neceſ- y; it is ſufficient that a majority of the number *preſent* concur (*c*). So, here a number leſs than the majority of the whole, are by a particular con- 1 Kyd on Corp. 402. (*a*) to Mod. 75. 12 Mod. 232. (*b*) Cowp. 249. (*c*) 2 Burr. 1019.

ſtitution

ſtitution competent to do a corporate act, the act of a majority or that ſma
number is equivalent to the act of the majority of the whole: thus, by
conſtitution of the city of *London*, forty are ſufficient to form a court
common council, though the number of common councilmen greatly exce
the double of that number, and a *majority* of the forty, if no more be pre
bind the whole corporation. So, where it appeared that king *Edward*
Sixth, by charter, incorporated twelve perſons by name, to elect a chap
for the church of *Kirton*, in *Lincolnſhire*; and by a diſtinct clauſe, *there*
the twelve were to chooſe a chaplain to officiate in the church of *Sandf*
within the pariſh of *Kirton*, with the conſent and approbation of the ma
part of the inhabitants of *Sandford*; on a vacancy, two of the three choſe
chaplain, with the conſent of the major part of the inhabitants of *Sandf*
the third diſſented: the queſtion whether this was a valid election, co
before Lord Chancellor *Hardwicke*, he is reported to have expreſſed him
thus:—"It cannot be diſputed, that wherever a certain number are inc
porated, a major part of them may do any corporate act; ſo, if all be ſ
moned, and *part* appear, a major part of thoſe that *appear* may do a cor
rate act, though nothing be mentioned in the charter of the major part. T
is the common conſtruction of charters, and I am of opinion, that the th
are a corporation for the purpoſe for which they are appointed, and that
major part of them may do any corporate act: this was a corporate act,
the choice too was confined, and conſequently, it was not neceſſary that
the three ſhould join."

Attorney-General v. Day, 2 Atk.

Where a charter requires an act to be done by the *major* part of a de
body, no corporate aſſembly can be compoſed of leſs than a majority of
definite body, when complete; and conſequently, when the number is
duced *below* that majority, the power of acting is at end. But in ſuch c
if the number be indefinite, the words *major part* have no operation,
any number of the body, duly aſſembled, however ſmall, is ſufficient to
a corporate aſſembly.

Rex v. Newſham, Say. Rep. 211. Rex v. Grimes, 5 Burr. 2598. Rex v. Varlo, Cowp. 248.

Rex. v. Monday, *id.* 530. Rex v. Bellringer, 4 Term Rep. 810. Rex v. Miller, 6 Term Rep.

With reſpect to the head of the corporation, there was this differe
between a corporation aggregate of one perſon capable and many incapa
and a corporation aggregate of many perſons capable, that in the former,
in the caſe of abbot and convent there muſt have been the concurrence
the major part, and of the head beſides, becauſe the abbot only acted
the conſent of the major part of the reſt; but in the latter, as in the c
of maſter and fellows, or mayor and commonalty, the head is but a mem
of the acting part, in the ſame manner as any other individual; and the
fore, without a particular uſage, or the expreſs proviſion of a charter,
has no caſting voice.

Rex v. Blythe, 5 Mod. 404. 421. Reg. v. Sutton, 10 Mod. 74. Cotton v. Davies, 1 Str. 53.

Where it appeared that an officer was removable by bailiffs and burge
or the greater part of them, "of whom the bailiffs to be two," and it
ſaid in the return to a mandamus, that he was removed by the bailiffs
burgeſſes, the bailiffs being then preſent, the court held, that if the act
conſent of the bailiffs had been required in this caſe, their conſent ſhould
intended, either as actually given, or as included in that of the major pa
but they held that it was not required; for that, as in all corporate acts,
act of the majority is the act of the whole, ſo the bailiffs being the head
the corporation, nothing could be done without their *preſence*, though it
not been expreſsly required, and its being ſo required did not render th
concurrence neceſſary.

2 Ld Raym. 1236. 2 Salk. 434.

Wh

Where the head office of a corporation is veſted in more than one perſon, in the caſe of two bailiffs, the *preſence* of both is abſolutely neceſſary, beuſe both fill but one office. 1 Kyd on Corp. 428.

Where the proviſions of a charter direct that the new mayor ſhall be orn *before* his predeceſſor, the *preſence* only of the latter is not ſufficient: ere muſt alſo be his *aſſent*; at leaſt nothing muſt appear from which his ſſent is manifeſt. Rex v. Ellis, 2 Str. 994.

8. Of the Regularity of their Proceedings.

Where corporate acts are to be done, not on a charter day, and by a ſe- body, there muſt be a ſummons of every member, except ſuch as have ſolutely deſerted the town. Ca Temp. Hardw. 151

And where there different aſſemblies in a corporation with diſtinct owers, and all the members of the ſmaller aſſembly are members of the ore numerous; if the more numerous aſſembly be ſummoned to meet to xerciſe the powers lodged in them, thoſe who are members of the ſmaller ſembly cannot ſeparate from the reſt, and exerciſe their diſtinct powers: t there muſt be a ſummons for that purpoſe of the ſmaller aſſembly by ſelf.

The corporation of the city of Carliſle conſiſted of a mayor, aldermen, iliffs, and capital citizens, who together formed the common council, and d the power of electing capital citizens; the power of amotion was in the ayor and aldermen only, or the major part of them. The common coun- l met for the purpoſe of tranſacting the buſineſs of that aſſembly; and the ayor and aldermen made an order for the amotion of one Poulter, a ca- tal burgeſs, for a cauſe which was allowed to be legal. The court held, at the removal in this caſe was not regular, and that there ought to have en ſummons for the mayor and aldermen to meet in their diſtinct ca- city. Rex v. Mayor of Carliſle, 1 Str. 385. Machell v. Nevinſon, 2 Ld. Raym. 1355. S. P.

It hath been ſaid in ſome books, that if all the members of the corpora- on be preſent by accident, or in conſequence of a ſummons to attend on e particular buſineſs, acts relating to *any* buſineſs done by unanimous con- nt will be good. But this is a point which hath never been ſolemnly judged. Per Lord Parker, in Rex v. Strangeways, Hil. 1 Geo. 1. cited by Ld.

adwicke, Ca. temp. Hardw. 151. 1 Barnard. 80. Muſgrave v. Mayor of Appleby, 1 Str. 4. 2 Ld. Raym. 1358. See Kyd Corp. 434., &c.

Where a ſummons is neceſſary, it is not ſufficient that the uſual and ge- eral orders be given to the ſummoning officer; the latter muſt actually do very thing he poſſibly can to ſummon all the members of the ſelect dy. Rex v. Mayor, &c. of Shrewſbury Ca. temp. Hardw. 147

It has been ſaid, that though the aſſembly of a ſelect number held *not* on a arter-day, be irregular, unleſs every member within reach of ſummons, e actually ſummoned, yet that in the ſummons it is not neceſſary to ſpecify y particular act. However well-founded this may be, as applied to the rdinary buſineſs of the corporation, it ſeems that, in the caſe of an amotion f a corporator, a *general* ſummons to every member is not ſufficient; but at it is neceſſary to mention, that it is intended to conſider the queſtion of emoving the particular perſon; perhaps even that will not be ſufficient, but may be neceſſary to ſtate the *cauſe* of his intended amotion. This, how- ver, does not appear to be fully ſettled, for in the caſes where the amotion *Per* Eyre, J. 1 Str. 386. Rex v. Mayor, &c. of Liverpool, 2 Burr. 723. Rex v. Mayor, &c. of Doncaſter, *id.* 738.

of

of members has been held irregular for want of *proper* ſummons, the determination has generally proceeded on the circumſtance of there having been no ſummons at all.

5 Burr. 2601. But no ſummons is neceſſary where a member is not reſident within the town.

Rex v. Mayor, &c. and Rex v. Little, &c. Freemen of Saltaſh, 5 Burr. 2682. It is laid down as a general rule, that where there is a *uſual* method of exercise, that cannot be diſpenſed with, though there be an actual ſummons to all the members, unleſs indeed every ſingle member be preſent at the meeting, and conſent to wave it.

James Bagg's caſe, 11 Co. 99. a. Glyde's caſe, 4 Mod. 33. 37. Where it is intended to remove any one of the members or officers of a corporation, it is, in general, abſolutely neceſſary, not only that he ſhould be ſummoned generally to attend; but he muſt have a particular ſummons to attend and anſwer the particular charge alleged againſt him; for it would be highly unjuſt, upon a general ſummons, to remove a man for particular offences, which he may have had no opportunity of preparing to anſwer.

Rex v. Chalke, 1 Ld. Raym. 225. 1 Salk. 42. But there may be particular circumſtances, under which the ſummons may be diſpenſed with. Thus, ſays *Holt*, C. J. "a man ought not to be diſfranchiſed until he has been heard in his defence, on notice and preparation, and notice is only neceſſary for that purpoſe. Therefore, if a man be charged *in plenis comitiis*, and ordered to prepare by ſuch a time, this will be good, though there be no actual ſummons, becauſe if the party be heard it is ſufficient."

Serjeant Whitaker's caſe, 2 Ld. Raym. 1240. 2 Salk. 435. If a party be charged with a particular offence in one aſſembly, and ordered to prepare for his defence, he certainly cannot complain of want of notice; but it ſeems very doubtful whether his being charged and anſwering in the *ſame* aſſembly will cure the want of notice.

See 1 Kyd. Corp. 445, 6, 7, 8, 9.

(*a*) Comb. 198. 270. 1 Show. 259. 364. Reg. v. Trubody, 2 Ld. Raym. 1275. cited. in Dougl. 152. 157. Where a perſon is removable for non-reſidence, there is no neceſſity to ſummon him before he is removed, becauſe he has abdicated the town, and is out of the reach of ſummons (*a*). But if he be removable for non-attendance at the corporate aſſemblies, he muſt have had perſonal notice to attend, and that his preſence was neceſſary; for the *uſual* notice of the intended meeting will not be ſufficient, unleſs that *uſual* notice be perſonal (*b*).

Vid. Sty. 151. 446. Palm. 451. 1 Sid. 14. 2 Sid. 97. Forteſc. 205. (*b*) Rex v. Richardſon, 1. Burr. 517. 520. 540.

1 Ld. Raym. 426. 1 Kyd. Corp. 450. A man *may* be conſtituted a burgeſs, or appointed to an office, by deed under the common ſeal, and *then* he ought to be diſcharged in the ſame manner: but where the party is conſtituted or appointed by election, no thing more is required than an entry in the books of the corporation; and he may be diſcharged by an order entered in the ſame manner.

1 Ld. Raym. 563. 2 Salk. 423. So, where an office is granted by deed, the *reſignation* or *ſurrender* ought alſo to be by deed; but where an officer is appointed by election, the corporation may accept his reſignation or ſurrender by parol before them: "a man indeed," ſays *Holt*, "a man ſpeak at large, and ſay he will be no longer alderman, *&c.* that ſignifies nothing: but if he come in an open aſſembly of the corporation, and there reſign his office, declaring that he will not continue in it any longer, and deſire them to accept his reſignation, and they accept it and elect another in his room, this is a good reſignation."

With reſpect to the preſiding officer, it is to be obſerved, that, where ſtrangers are not intereſted, all *voluntary* acts not *neceſſary* to carry on the buſineſs of the corporation, done by an uſurper or a mayor *de facto*, or under the authority of either, ſeem to be void: and that ſome *neceſſary* acts are void in both caſes. For though in the caſe of *The King v. Liſle*, the court dwelt upon the circumſtance of the election of the defendant, not being a *neceſſary* act, yet it appears from ſubſequent caſes, that the circumſtance of the act being *neceſſary* is not alone ſufficient to make it good. 2 Str. 1090. Andr. 163. 1 KydCorp. 454.

In the *King* and *Hebden*, the defendant made a title to the office of bailiff of *Scarborough*, from an election under the bailiff-ſhip of *Batty* and *Armſtrong*, and on iſſue joined whether theſe were bailiffs or not, a record of a judgment of ouſter againſt them was read in evidence; and on a motion for a new trial, it was holden, that it was properly admitted; and the ſame evidence was ſaid to have been lately admitted in a trial at bar, in a caſe relating to the corporation of Orford. 2 Str. 1109. Andr. 388.

In the caſe of the *King* and *Grimes*, a queſtion having been made, whether the *ſpecial verdict* found on the information againſt *John Leigh*, for uſurping the office of mayor, and the judgment given thereupon againſt him, were evidence in the preſent caſe againſt *Grimes* for uſurping the office of capital burgeſs; and to what degree it ought to be allowed; the court held it to be admiſſible, but not concluſive, and, in fact, gave judgment againſt him, on the ground that *Leigh*, who had preſided at his election, was not a rightful mayor. In the firſt of theſe caſes, if not in both, the election was an act *neceſſary* to the preſervation of the corporation. 5 Burr. 2601.

Where the mayor's preſence is neceſſary at a corporate aſſembly, his departure before a buſineſs, regularly begun, be concluded, will not invalidate that particular buſineſs, but the aſſembly cannot proceed to any thing elſe. 1 Barnard. 385.

9. Of the Election and Amotion of their Members.

There cannot properly be any election to an office which is not actually vacant, for though it may be a practice in ſome caſes to chooſe a perſon before-hand, which may be called an inceptive election, and on the death of the predeceſſor, to admit the perſon before nominated, which completes the election; yet ſuch an inceptive election is not binding on the electors; and when the vacancy really happens, they may elect another. Skin. 45. 2 KydCorp. 5.

If the election of a particular officer be, by ancient charter, veſted in one body, a ſubſequent one cannot of itſelf alter the mode of election; but if the ſubſequent charter be accepted by the corporation at large, or if they acquieſce under it, and act in conformity to it, which is evidence of acceptance, the latter mode of election is valid. 2 KydCorp. 6.

By a charter of Henry 4, it was granted, that the mayor, aldermen, and citizens of *Norwich*, might elect two to be ſheriffs of that city: *Charles* the ſecond, in the 18th year of his reign, by his charter granted, that the mayor and aldermen might elect one ſheriff, and the citizens the other.—The ſubſequent elections were made according to the proviſions of the latter charter, and were held good by the opinion of two juſtices againſt one. Skin. 574.

The privilege of election may be in one body, and the privilege of approbation in another: thus, the privilege of election to the office of alderman in London and in *Norwich* is in the ward, and that of approbation in the mayor and aldermen; but if the mayor and aldermen reject, without reaſon, one choſen by the ward, a peremptory *mandamus* will be granted to admit him. 2 Salk. 436

Reg. v. Boscawen, P. 13. Ann. B. R. Rex v. Withers, P. 8. G. 2. B. R. cited in 2 Burr. 1020. Cowp. 537. Taylor v. the Mayor of Bath, M. 15 G. 2. B. R. cited in Cowp. 537.

Where the perſon elected is unqualified, and the electors at the time have notice of the want of qualification, their votes to him are thrown away, and the perſon who has the next greater number to the qualified perſon, is to be conſidered as duly elected.

Oldknow v. Wainwright, 2 Burr. 1017. See the caſe of the King v. Monday, Cowp. 530., and 2 Kyd. Corp. 17, &c.

Where a candidate is propoſed in a corporate meeting duly aſſembled, and a majority of the perſons aſſembled proteſt againſt any election, and do not propoſe any other candidate, the minority may elect the candidate propoſed.

Machell v. Nevinſon, 2 Ld. Raym. 1355. Newling v. Francis, 3 Term Rep. 189.

Where the time and manner of election are not fixed by charter or preſcription, it is competent to a corporation to make regulations reſpecting them.

Tidderley's caſe, 1 Sid. 14. Lord Bruce's caſe 2 Str. 819. Rex v. Richardſon, 1 Burr. 517.

It ſeems now to be acknowledged, notwithſtanding the opinion of Lord *Coke* (*a*) and others, that every corporation aggregate hath, as incident to it, a power of removing its members for reaſonable cauſe.

(*a*) James Bagg's caſe, 11 Co. 99 a. Yates's caſe, Sty. 47. Rex v. Mayor of Coventry, 1 Ld. Raym. 392. Rex v. Mayor, &c. of Doncaſter, 2 Ld. Raym. 1566.

2 Kyd Corp. 56. Dougl. 149. Haddock's caſe, Sir Thomas Raym. 435.

But this power, like every other incidental power, is incident to the corporation at large, and cannot be exerciſed by any ſelect body, unleſs given it by charter, or claimed by preſcription, or in conſequence of a by-law made by the body at large. And it is laid down as a general principle that where by cuſtom a particular body has acquired that power, and a ſubſequent charter in ſome reſpects new models the conſtitution of the corporation, but retains the particular body, without reſtraining its cuſtomary power of diſfranchiſement, the power ſtill continues in the particular body.

2 Kyd Corp. 57. Rex v. Taylor, 3 Salk. 231.

This power, whether poſſeſſed as incident to the corporation at large or veſted in a particular body, muſt appear to be exerciſed at a regular meeting holden in a corporate character, or at leaſt holden in the character by virtue of which they are empowered to amove: thus, where it appeared by the return to a *mandamus* that the common council had the power of amotion, and it was alleged as a fact, that the party complaining was removed by thirty of the common councilmen, in the council chamber aſſembled, the court held this to be inſufficient; becauſe it did not appear "that the thirty common councilmen were *then and there* aſſembled as a common council, as they might be there to feaſt, or for other purpoſes not connected with their corporate character."

Braithwaite's caſe 1 Ventr. 19.

A *mandamus* having been directed to the mayor, bailiffs, and burgeſſes of the town of *Northampton*, commanding them to reſtore one *Braithwaite* to the place of common councilman; they returned, that by letters patent of incorporation, power was given them of holding a common council, conſiſting of a mayor, two bailiffs, and forty-eight burgeſſes; that the power of removing any common councilman from his place upon juſt cauſe, was given to the mayor, bailiffs, and *ſuch* burgeſſes as had been mayors; that

Braithwaite

Braithwaite had been a common councilman, and committed ſeveral offences, which were particularly expreſſed; and that the *common council* aſſembled together and procured *Braithwaite* to be ſummoned, but that he did not appear to anſwer; on which he was removed from his office and place in the common council, "*by the mayor and burgeſſes*, by the authority, and according to the charter aforeſaid."

It was objected, that this amotion was not according to the authority given by the charter; for that it was ſaid to be by the mayor and burgeſſes, ſo that it might have been by the mayor and *all* the burgeſſes, many of whom might not have been mayors, whereas the charter confined the power to the mayor and *ſuch* of the burgeſſes as *had* been mayors; but the objection was over-ruled, on the ground, that it muſt be intended that *all* the burgeſſes were preſent, and agreed to the amotion; and that as it was alleged to be by the mayor and burgeſſes *according* to the charter, the diſſent of the burgeſſes who were qualified, was not to be preſumed.

This power of amotion, when poſſeſſed as incident to the corporation at large, cannot be exerciſed without reaſonable cauſe; nor can it be *ſo* exerciſed either by the corporation at large, or by a ſelect body, whether given by charter or claimed by preſcription, if it be given or claimed only in general terms; but if a charter, by expreſs words, empower either the corporation at large, or a ſelect body, to remove an officer at pleaſure, or empower them to chooſe him *during* pleaſure, they may in either caſe remove him without cauſe. So, a corporation by preſcription may, by cuſtom, have the power of removing an officer at pleaſure: but, in the return to a *mandamus*, commanding them to reſtore an officer ſo removed, it will not be ſufficient to ſtate "that they are a corporation by preſcription, and that the king, by letters patent, reciting that they had a cuſtom to remove at pleaſure, confirmed *that* with other cuſtoms;" they muſt allege the cuſtom in poſitive terms, and not ſimply by way of recital in the letters patent.

2 Kyd Corp. 58. Dy. 332. in marg.

Sir T. Jones, 52. Sir T. Raym. 188. 1 Ventr. 77. 82. Rex v. Mayor, &c. of Coventry 1 Ld. Raym. 391.

So, if an officer, either by the proviſion of a charter, or by cuſtom, be eligible in the alternative for life, or during pleaſure, and he be choſen to continue during pleaſure, he may, at any time, be removed without cauſe: and where an officer is removable at pleaſure, or choſen to continue *during* pleaſure, the election of another is a determination of his office, without any formal removal, or notice of the intention to remove him. So, if the mayor for the time being have power to elect a town-clerk, it follows of courſe, that he may remove the former town-clerk at his pleaſure.

Pepis's caſe, 2 Show. 69. 1 Ventr. 342. Rex v. Mayor, &c. of Canterbury, 1 Str. 674. 2 Keb. 641. 1 Sid. 15.

But where an officer is removeable at pleaſure, the corporation in their return to a *mandamus*, commanding them to reſtore him, ought to rely ſolely on that circumſtance; for they cannot take advantage of it, if they return a cauſe, and that cauſe be not ſufficient; becauſe it will then appear, that, at the time they removed him, they did not mean to proceed on their power to remove him at will.

2 Ld. Raym. 1240.

A common freeman cannot be deprived of his freedom at the *pleaſure* of the corporation at large, or of any ſelect body, whether that power be claimed by charter or preſcription.

Warren's caſe, Cro. Ja. 540.

The caſe of a common councilman is, in ſeveral books, diſtinguiſhed, in this reſpect, from that of an alderman; it being frequently holden that a power of removal is good as to the former, and void as to the latter.

Ibid. 2 Roll. Rep. 112. Sir T. Raym. 188. 1 Ventr. 77. 82. Rex v. Mayor, &c. of Coventry, 1 Ld. Raym. 391. Rex v. Burgum Andover, *id.* 710.

2 Kyd. Corp. 62. Dougl. 133. To the power of amotion, or disfranchisement, the power of holding a corporate meeting for that purpose is necessarily incident, whether the former be in a select body, or in the corporation at large; and therefore it is not necessary that the latter should be expressly given by charter or claimed by custom.

2 Kyd. *ubi supr.* Dougl. 80. The cause for which a member of a corporation is disfranchised, or an officer removed, must be something which has arisen subsequently to the admission of the one to the enjoyment of his franchise, or of the other to the exercise of his office: the power of disfranchisement or amotion cannot be exercised for a defect of original qualification; that can only be questioned by a prosecution by information in the nature of *quo warranto*.

Ca. temp. Hardw. 154. 1 Burr. 538. The offences for which a corporator may be disfranchised, or a corporate officer removed, have been distributed into three distinct classes.

First, Such as relate merely to his corporate or official character, and amount to breaches of the condition tacitly or expressly annexed to his franchise or office.

Secondly, Such as have no immediate relation to his corporate or official character, but are in themselves of so *infamous* a nature, as to render the offender unfit to enjoy *any* public franchise; such as perjury, forgery, *&c.*

And, thirdly, offences of a *mixed* nature, being not only against the corporate or official duty, but also indictable at common law.

2 KydCorp. 63. 11 Co. 99. a. 1 Ld. Raym. 226. To burn or deface the charters or evidences of the corporation; or raze or corrupt the books, are offences against the corporate duty of a corporator, for which he may be removed; but in the case of a razure of books, the party must appear to have acted maliciously, and to the detriment of the corporation, for it might happen that the entry, as it stood was wrong, and that he only made it as it ought to be.

Sir Thomas Raym. 438. Ca. Temp. Hard. 156. Sty. 477. So, if he make a riot in disturbance of an election of a mayor or other officer, or endeavour to hinder one of the aldermen from attending the common council, or hinder others who have a right to attend, from going thither to do the business of the corporation; so, if he continue in court and make orders, after the court is adjourned.

2 KydCorp. 64. Rex v. Taylor, 3 Salk. 231. Circumstances which have no immediate relation to the corporate may be a sufficient cause to remove a man from an office of magistracy, provided they be such as render him incapable or unfit to execute the office; such as habitual drunkenness in an alderman, though if a man were drunk by accident, that would not be sufficient cause to remove.

3 Salk. 229. So, it has been holden to be a sufficient cause to remove a man from the place of alderman, that he is poor and cannot pay the taxes, though such a cause would certainly not be sufficient to deprive a man of his freedom.

Clegg's case 2 Burr. 732. Bankruptcy, and not having obtained his certificate, is not alone sufficient cause for removing a man from the office of common councilman, though some *one* or *more* of the *consequences* of bankruptcy may even become so.

2 Roll. Rep. 21. Old age is not a sufficient cause to deprive an alderman of his office.

1 Burr. 540. See Dougl. 177. Non-attendance at the courts of the corporation is not sufficient cause of removal, when the presence of the party is not *necessary*, and no part of the business is obstructed by his absence, though his absence be wilful, notwithstanding he may have due notice to attend.

Non-re

Non-reſidence within a borough cannot be a ſufficient cauſe to diſfranchiſe a freeman; becauſe he has his freedom for his own benefit, and his reſidence is of little conſequence to the corporation at large. 2 KydCorp. 73. City of Exeter v. Glide,

But a *total* deſertion of the borough, by an alderman with his family, is a good cauſe to remove him from the office, becauſe he is thereby rendered incapable of doing his duty to the corporation: but it is not a cauſe to diſfranchiſe him, becauſe, though he ceaſe to be an alderman, he may ſtill continue a freeman. Nor is it every temporary abſence, that will be good cauſe for removing an alderman; he may have ſome reaſonable cauſe of abſence, as ſickneſs, or going to the Bath for the recovery of his health, or being employed in the ſervice of the king: he may leave a ſervant in the houſe, which is a proof of his intention to return, and makes him virtually an inhabitant; and, if he return before his actual amotion, that may cure the defect of his abſence, however long continued. It has been holden, that it was not a good cauſe to remove an alderman, that he had left the borough for four months *with his whole family*. The length of time which the party hath been reſident, ſeems to be immaterial, provided the reſidence hath been *bonâ fide*, and, in general, wherever non-reſidence is aſſigned as a cauſe for the removal of an alderman, or officer of ſimilar denomination, it muſt appear that reſidence is required by the conſtitution of the corporation, or that the buſineſs of the corporation has been obſtructed by the non-reſidence of the party removed. 4 Mod. 36. Rex v. Truebody, 2 Ld. Raym. 275. Rex v. Lyme Regis, Dougl. 149. Rex v. Mayor of Leiceſter 4 Burr. 2087. Rex v. John Sargent, 5 Ter. Rep. 466. Dougl. 182. 174.

Wherever non-reſidence is a cauſe of amotion, it does not render the office *ipſo facto* void, but only voidable; and there muſt be an actual amotion before any proceedings can be had againſt the party for an uſurpation. Vaughan v. Lewis, Carth. 227. Rex v. Ponſonby,

Say. 245. 5 Br. P. C. 287 Rex v Heaven, 2 Term Rep. 772.

It is no cauſe of removal, that a corporator has uſed opprobrious or indecent language to the mayor, or other principal magiſtrates of the corporation, as if he call the mayor a knave, or ſay, that he has done that in the execution of his office, which he cannot anſwer; though the words be in conſequence of an admonition from the mayor, for a malicious act to another burgeſs; as where a burgeſs being churchwarden preſented one of the burgeſſes maliciouſly, without cauſe, for being abſent from the perambulation; for which being rebuked by the mayor, he ſaid contemptuouſly, *I care not for Mr. Mayor, nor for any of the burgeſſes*: nor does it ſeem a good cauſe of amotion that a man has written a libel on the mayor, or on another member of the corporation. It may, in ſome of theſe caſes, be proper to commit the offender till he find ſureties for his good behaviour; for ſome of the offences may be a foundation for an action at the ſuit of the party injured; but they can be no cauſe of diſfranchiſement: ſo, neither can it be a good cauſe of diſfranchiſement or amotion, that the conduct of the party is troubleſome or diſpleaſing to the body at large. 2 KydCorp. James Baggs's caſe, 11 Co. 96. Clerk's caſe, Cro. Ja. 506. Per Holt, C. J. Forteſc. 275. 11 Co. 94.

So, a *cuſtom* to diſfranchiſe for contemptuous words is void, even in the city of *London*, whoſe cuſtoms are confirmed by act of parliament, for that confirmation cannot extend to unreaſonable cuſtoms, which this clearly is. 2 Salk. 426. 2 Ld. Raym. 777. Clark's caſe, 1 Ventr. 327. *Vid.* Sir Thomas

1 Ventr. 302. a. *dictum* of Twiſden, J. to the contrary. See further on this point, Clarke's caſe, Carth. 173.

Though

1 Mod. 148. Forteſc. 202. 2 Ld Raym. 1334 1 Str. 557.

Though the power of conferring degrees, and of degrading, in the univerſities, is in the vice-chancellor, maſters and ſcholars, aſſembled in a body; yet they cannot degrade without reaſonable cauſe; and it was decided in the caſe of Dr *Bentley*, that a contempt to the vice-chancellor, as a judge, was not a ſufficient cauſe to degrade.

11 Co. 98. b.

If a man threaten, or endeavour either by himſelf or in combination with others, to do a thing againſt the truſt of his freedom, and to the prejudice of the publick good of the city or borough, but do not put it in execution: as if he threaten the ruin of their charter or privileges, or diſſuade the payment of cuſtoms due; this may be a good cauſe to puniſh him as before mentioned, but not to diſfranchiſe him.

2 Ld. Raym. 1564. 4 Burr. 1999.

Miſconduct in *one* corporate office is not a cauſe to amove the offender from *another*; thus, if a capital burgeſs be appointed chamberlain of the corporation, and miſconduct himſelf in *that* office, this is not a good cauſe to deprive him of the office of capital burgeſs.

1 Ld. Raym. 226. (*a*) 1 Sid. 282. (*b*) Com. Dig. Franchiſe, F. 33. F. 33. ſays Semb. *contr.* Raym. 446. (*c*) 2 Ld. Raym. 1566. 2 Kyd Corp. 88.

Though an offence may ſeem to have ſome relation to the corporation, or the corporate character of the offender, yet, if the corporation have another remedy, it is no cauſe of diſfranchiſement: thus, the miſemployment or non-payment of money, belonging to the corporation, is no ſufficient cauſe, the corporation having a remedy by action; nor, a refuſal to pay his proportion of the expence of renewing the charter (*a*); nor a refuſal by a liveryman, to make the uſual payments for ſupport of the company (*b*); nor general diſobedience to the laws and orders of the corporation; nor, as it would ſeem, the breach of any particular bye-law (*c*).

Style, 479. Lane's caſe, 2 Ld. Raym. 1304. 11 Mod. 270. Forteſ. 275. Ca. temp. Hardw. 155. 1 Burr. 359.

For offences which have no immediate relation to the corporate office, but which the loſs of credit renders a ground of forfeiture, the corporation cannot diſfranchiſe or remove, without a previous conviction at common law; for in ſuch caſes the corporation cannot try the truth or falſehood of the accuſation: it is for this reaſon, that it is no cauſe to remove or diſfranchiſe a man, that he is *indicted* of felony, perjury, forgery, libelling, or other infamous crime, becauſe he may be acquitted of the charge.

Rex v. Yates, Style 477. Rex v. Mayor, &c. of Derby, Ca. temp. Hardw. 153. and the caſes there cited. Rex v. Richardſon 1 Burr. 538. Rex v. Corporation of Doncaſter, 2 Burr. 738.

With reſpect to thoſe offences which are of a mixed nature, as being not only againſt the oath and duty of the corporator, but alſo matters indictable at common law, it ſeems to be exceedingly doubtful whether for theſe the corporator can be removed without a previous conviction. The difficulty ariſeth from the poſſibility of a difference of determination by two different juriſdictions, as the party may be removed by the corporation for the ſame fact, of which he may afterwards be acquitted on a trial by jury. The queſtion hath been often diſcuſſed, but hath never received a final deciſion.

Sawyer's arg. Q. *Warranto*, 22. cited 1 Burr. 525. (*d*) 1 Burr. 530.

It hath been aſſerted, that, after conviction, the king might, by writ iſſuing out of the court where the conviction remains, or out of Chancery, command the corporation to diſcharge the party convicted; but this doctrine has been juſtly diſregarded (*d*).

In

In some instances, too, the crown has reserved to itself the power of removing at pleasure all or any of the principal officers of the corporation; but whatever may be said as to the invalidity of such a reservation, as being repugnant to the purpose of the charter, such a power cannot certainly be exercised to such an extent as to destroy the whole body at once, and render the election of other officers impossible. Rex v. Amery, 2 Term Rep. 516.

(F) How they are visited.

SPIRITUAL corporations are visited in ecclesiastical matters (*a*) by the ordinary: eleemosynary corporations are subject to the visitation of the founder, his heirs, or assigns; and other civil corporations to that of the king in his court of King's Bench. In respect of schools endowed, where no special visitor (*b*) is appointed by the founder, and (perhaps it may be added) where his heirs are unknown or do not choose to act, it is provided by the statute of charitable uses that they may be visited by commissioners appointed under the great seal. 1 Bl. Com. 480.

(*a*) And the ordinary may in his general visitation, by virtue of his general visitatorial power, deprive a canon or prebendary for incontinency or other offences described in the statutes; and this, of his own authority without observing all the preliminary forms the statutes may appoint. The King v. Bishop of Chester, 1 Wilf. 206. 1 Bl. Rep. 22. But a bishop, as visitor of the dean and chapter, seems to have no jurisdiction to determine between the members on the subject of their corporate property. Rex v. Episc. Dunelm. 1 Burr. 567. It is clear, that he cannot by virtue of such power fill up a vacancy in the stalls of the cathedral by lapse. Bishop of Chichester v. Harwood, 1 Term Rep. 650. And whether he can, as visitor, decide in matters of election to such stalls, is a question which hath not yet received a general solution. *Id. ibid.*

(*b*) 1 Wooddes. 474, 5.

It is only over eleemosynary foundations that the visitatorial power, properly so called, extends. For this power, as now understood, is final and conclusive, exercisable voluntarily, in a summary mode, and without appeal. And as the court of King's Bench cannot interfere till called upon, and its judgments are liable to be reversed by writs of error, it seems to want two of the essential marks of visitorship. 1 Wooddes. 474. 1 Bl. Com. 481.

This kind of power appears to be of very early date, mention being made of it in the beginning of the reign of *Edward* the 3d. It was not introduced by any canons or ecclesiastical constitutions, but is an appointment of the law, and ariseth from the property which the founder had in the lands appropriated for the support of the charity. Hence, it is in the power of the founder to vest it in any person and his heirs, or in a sole corporation and his successors; but if he appoint no one to exercise it, it will descend to his own heirs. 8 E. 3. 69, 70. 8 Ass. pl. 29. 31. 1 Vez. 472. 2 Term Rep. 352. If it be given to the Bishop of *P.*, not by his christian name, the grant is to him in his politick capacity, and it is not necessary to mention his successors. Bentley v. Bishop of Ely, 2 Str. 913. Fitzg. 308.

If the founder dies without making any appointment of a visitor, and without heirs, it will in that case devolve upon the king to be exercised by the great seal. Rex v. Master, &c. of Catherine Hall, 4 Term Rep. 233.

Where the persons, for whose benefit a charity is established, are not themselves incorporated, but trustees or governors are appointed, as in the case of Sutton's hospital, the governors have a kind of visitatorial power with respect to the objects of the charity; but where no visitor is expressly appointed, 2 Kyd, 187, 10 Co. 31. a. Eden v. Foster, 2 P. Wms. 325.

Attorney-General v. Lock, 3 Atk. 164

appointed, and the legal eſtate of the endowment is veſted in the governors, the latter, as to the management of the revenues, are ſubject to the juriſdiction of the court of Chancery.

Attorney-General v. Middleton, 2 Vez. 327.

2 Kyd, 195. 6. Fitzg. 108. 307. 3 Atk 663. 1 Vez. 78. 2 Vez. 328. 1 Burr. 200.

As the power of appointing a viſitor is entirely in the founder, he may delegate it either generally or ſpecially; if he appoint a general viſitor, without any reſtraint, the perſon ſo appointed hath all incidental powers. But a perſon conſtituted viſitor in general terms, may be reſtrained in particular inſtances. So, the founder may appoint a *ſpecial* viſitor for a *particular* purpoſe, and no farther. So, he may make a *general* viſitor, and yet appoint an inferior *particular* power, to be executed by another perſon, who will then be a *ſpecial* viſitor. Thus, the viſitation of the corporation at large may be in one perſon; and that of one of the members, as of the head, may be in another: and if the founder of a college appoint a viſitor of the head ſpecially, the general power of viſitation remains in the founder and his heirs. The manner too in which the viſitatorial power ſhall be exerciſed, whether general or ſpecial, may be preſcribed by the founder.

Vid. ubi ſupr.

No technical or ſet form of words is neceſſary for the appointment of a viſitor. "*Viſitator ſit Epiſcopus Elienſis*," is an appointment of a general and perpetual viſitor. But a perſon may be a general or ſpecial viſitor without any expreſs appointment, by conſtruction and implication from various branches of the ſtatutes.

Appleford's caſe, 1 Mod. 82. Carth. 92. Lev. 23. 65.

The ſentence of a viſitor, on ſubjects within his juriſdiction, is final and concluſive, and the king's courts cannot in any form of proceeding review it.

Raym. 56. 94. 100. 1 Sid. 94. 152. 346. Philips v. Bury, Skin. 447. 2 Term Rep. 346. Rex v. Epiſc. Elienſ. 5 Term Rep. 475.

3 Atk. 674.

Nor will the king's courts anticipate the judgment of a viſitor, or take away his juriſdiction, if the caſe in which they are called upon to interfere appears to be within the ſcope of the general viſitatorial power.

Rex v. Alſop, 2 Show. 170. Skin. 13.

In a return to a mandamus directed to a college, it is ſufficient to ſtate in general terms, that ſuch a perſon is viſitor; for as viſitor, he has power to determine all matters that come as grievances before him, unleſs he be particularly reſtrained by the ſtatutes, and ſuch reſtraint will not be preſumed. Nor is it material whether the grievance complained of happened in the time of the preſent viſitor, or in that of his predeceſſor, and therefore it is not neceſſary to ſhew that in the return.

Rex v. Whaley, 2 Str. 1139.

The queſtion, whether there be a viſitor or not, may be ſometimes decided on affidavits: but if a mandamus has been granted, commanding the party to whom it is directed to admit a perſon to a fellowſhip, on an affidavit of his election, the court will not ſuperſede the writ on affidavits that there is a viſitor, but will put the defendant to make a return; becauſe where the point is determined on affidavits againſt the party complaining he has no opportunity to do himſelf juſtice by an action.

Attorney-General v. Talbot, 1 Vez. 78.

Ingrafted fellowſhips in colleges, where the founders of them make no ſtatutes for their regulation, are ſubject to the general laws of the college and, conſequently, to the viſitor's juriſdiction.

Green v. Rutherforth, *id.* 475. St. John's College v. Toddington, 1 Burr. 159.

Ex parte Daviſon, cited in

As independent members of colleges are mere boarders, and have no corporate rights, it follows, that they are not ſubject to the viſitor's juriſdiction

diction, and cannot obtain redreſs for any grievance by appealing to him. Neither indeed can they in matters of diſcipline obtain redreſs in a court of law. Cowp. 319. Rex v. Grundon, Cowp. 315.

It ſeems rather doubtful whether a perſon who is not yet actually a member of an eleemoſynary corporation, but who claims a right to become one, be a proper ſubject of viſitatorial juriſdiction. Rex et Reg. v. St. John's College, 4 Mod. 260. Comb. 238

If it be queſtioned whether any viſitatorial power exiſts in the perſon applied to in that character, this muſt be ſettled by the court of King's Bench. 1 Burr. 158.

So, if a viſitor ſhould aſſume the power of making new ſtatutes, ſuch uſurpation would be reſtrained by the court of King's Bench. Green v. Rutherforth, 1 Vez. 472. 1 Burr. 201.

If the performance of a truſt is to be decreed, a court of equity muſt be reſorted to, for a viſitor is incompetent to do complete juſtice. So, if a college agree with a ſtranger to grant him a leaſe, and refuſe to perform the agreement, the remedy is by bill in equity for a ſpecifick performance, and not by appeal to the viſitor. 1 Vez. 473. Rex v. Windham, Cowp. 378.

If the ſtatutes of a college give to the ſame perſon who is viſitor the power of appointing to an office one out of two perſons returned to him by the college, he has that appointment not as viſitor, but by virtue of ſuch expreſs proviſion, and therefore muſt make choice of one of the perſons returned to him: if he aſſume the appointment of any other perſon, the court of King's Bench will interpoſe. Rex v. Epiſc. Eliens, 2 Term Rep. 290.

And the ſame common law judicature will interpoſe, if the viſitor be a party. Thus, where a mandamus was directed to the Biſhop of *Cheſter*, as warden of *Mancheſter* college, requiring him to admit a chaplain, and he made return, that he was viſitor of the ſociety; it was holden, that though a mandamus will not lie where there is a viſitor free from objection, yet here the two offices being in the ſame perſon, there is a temporary ſuſpenſion and the King's Bench muſt exert its authority. Rex v. Epiſc. Ceſtr. 2 Str. 797. In the year after this determination, an act was paſſed, to veſt in the crown the viſitatorial power over Mancheſter-college, whenever the wardenſhip ſhould be holden in *commendam* with the biſhoprick of Cheſter. St. 2 Geo. 2. c. 29. See too, 4 Term Rep. 244.

In the caſe of Dr. *Bentley*, maſter of *Trinity-college* in *Cambridge*, who was cited before the biſhop of *Ely*, as viſitor over the ſociety, to anſwer ſixty-four articles charged to be violations of the ſtatutes; the King's Bench granted a prohibition, becauſe the biſhop in his citation had not ſet forth his genuine authority. But the Houſe of Lords, on a writ of error, reverſed the former judgment, and went into the conſideration of the ſeveral articles, and, as to ſome, confirmed the prohibition, and, as to others, allowed the biſhop to proceed. It was indeed inſiſted, that the king was general viſitor (*a*) and the biſhop ſpecial viſitor only; but the King's Bench was of a different opinion; and, in this reſpect, their judgement ſeems unimpeached. Bentley v. Biſhop of Ely, 2 Str. 912. Fitzg. 107. 305. 4 Br. P. C. 1 Wooddeſ. 481.

(*a*) Yet it ſeems as yet unſettled who is general viſitor of that ſeminary. 1 Wooddeſ. 481.

Where the publick laws of the land are diſobeyed, the court of King's Bench will interfere, notwithſtanding there be a viſitor, for his province is confined to the private ſtatutes and domeſtick regulations. Rex et Reg. v. St. John's College, 4 Mod. 233.

If

Rex v. Epiſc. Lincoln. 2 Term Rep. 338. n. Rex v. Epiſc. Elienſ. 5 Term Rep. 475.

If a viſitor refuſe to receive and hear an appeal, the court of King's Bench will grant a mandamus to compel him.

Brideoak's caſe, H. 11 Ann, cited in 1 Wilſ. 209. 1 Bl. Rep. 25. 58.

But where the viſitor has actually executed a ſentence of expulſion, though he may appear to have exceeded his juriſdiction, a mandamus will not lie to reſtore the party expelled, for that would be to command the viſitor to reverſe his own ſentence.

(*b*) *Per* Lee, C. J. 1 Wilſ. 209. (*c*) 1 Vez. 470.

The party, however, againſt whom the ſentence has been executed, may have a remedy by ejectment (*b*); or he may, it is ſaid, have an action for damages againſt the viſitor (*c*).

2 Kyd, 282. Dr. Walker's caſe, Ca. temp. Hardw. 212 Rex v. Epiſc. Elienſ. Andr. 176.

When the viſitor has pronounced a ſentence, which by the ſtatutes of the college a particular officer is to put in execution, the court of King's Bench will not compel that particular officer by mandamus, to do his duty; becauſe that would be to interfere with the privilege of the viſitor, who has power to compel the proper perſon to execute the ſentence: but it ſeems doubtful, whether, if the viſitor himſelf refuſe to compel the execution of the ſentence, the court will grant a mandamus directed to him for that purpoſe.

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(F) Of the Diſſolution of Corporations.

1 Roll. Abr. 514. Co. Lit. 264. Reg. v. Bailives de Bewdley, 1 P. Wms. 207. 10 Mod. 346 (*a*) 3 Burr. 1866.

BUT where a corporation conſiſts of ſeveral diſtinct integral parts, if one of theſe parts become extinct, whether by the death of the perſons of whom it is compoſed, or by any other means, the whole corporation is diſſolved. This indeed was doubted in the caſe of *Colcheſter* v. *Seaber* (*a*); but a later adjudication (*b*) hath ſettled, "that when an integral part of a corporation is gone, and the corporation hath no power of reſtoring it, or of doing any corporate act, the corporation is ſo far diſſolved, that the crown may grant a new charter to a different ſet of men."

In this caſe, which occurred in 1766, it appeared, that in 1740 there were judgments of ouſter againſt all the perſons then claiming in fact to be mayor and aldermen of the corporation: that thoſe perſons were all dead before the year 1763: that from 1740 to 1763 no perſon took upon himſelf to be, or claimed to be, mayor or alderman; and that in 1763 the charter under which they acted when the caſe occurred, was granted and accepted. The queſtion immediately before the court was, whether the preſent corporation could maintain an action on a bond given to the old corporation in the year 1735? which was determined in the affirmative; for that the charter of 1763 reſtored the corporation to all its former rights and franchiſes, and ſubjected it to all its former obligations. (*b*) Rex v. Paſmore. 3 Term Rep. 199.

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(*If the members*) In ſuch caſe the corporation is diſſolved without any legal proceeding: but for a forfeiture it is not diſſolved without a judgment in a court of law to enforce it. "A *ſcire facias* is proper," ſays Mr. Juſtice Aſhhurſt, "where there is a legal exiſting body capable of acting, but who have been guilty of an abuſe of the power entruſted to them; for as a delinquency is imputed to them, they ought not to be condemned unheard: but that does not apply to the caſe of a non-exiſting body. A *quo warranto* is neceſſary where there is a body corporate *de facto*, who take upon themſelves to act as a body corporate, but who, from ſome defect in their conſtitution, cannot legally exerciſe the powers they affect to uſe."—If, in a proſecution againſt a corporation, the judgment be for the defendants, the form of it is, "that the liberties be allowed." Co. Entr. 535. b; if it be for the crown, and the parties have continued poſſeſſion of the franchiſe by wrong from the beginning, the judgment is, "that they be ouſted;" but if they once had title, and loſe it, the judgment is, "that the liberty be ſeiſed into the king's hands." Ye. 192. Co. Entr. t. *quo warranto*. The prior judgment of ſeiſure is called a judgment "*quouſque*"

his judgment, it hath been thought, would diſſolve the corporation, if the parties did not come and avoid it the ſame, or at the fartheſt, the next term, and that there was no uſe in a final judgment, but to ſhew that the king will take advantage of the forfeiture, which he may declare by the grant of a new charter. Rex v. Amery, 2 Term Rep. 515. But this opinion was overruled in the Houſe of Lords, where it was determined, that the effect of this judgment was merely to lay the king's hands on the franchiſe of being a corporation, ſo that the corporation could not uſe its liberties, and the action of its vital powers was ſuſpended; that in that ſituation the king might appoint a cuſtos; and might introduce a new corporation by charter, to whom he might commit the cuſtody; but that the old corporation were entitled to redeem their liberties, and remove the king's hands, upon which the power of the new corporation muſt neceſſarily ceaſe, and the letters-patent to them become void. *Vide* the judgment in Rex v. Amery in the Houſe of Lords, in the account of that caſe in two volumes quarto, and 2 Kyd. 496., &c.—With reſpect to the form of a final judgment, it was determined in Sir James Smith's caſe, that the corporation of *London* was not diſſolved by the judgment as recited in the act of 2 W. & M. ſt. 1. c. 8. which was, "that the liberty, franchiſe, and privilege of the city of *London*, *being* a body politick, &c. ſhould be ſeiſed." For the word *of* being omitted before the word *being*, the judgment was not againſt the corporate exiſtence of the city, but againſt the franchiſes it enjoyed: and Holt ſaid, "that a corporation might ſubſiſt after its franchiſes were taken away; for that thoſe were not eſſential to it, but only a privilege appertaining to it; that the eſſence of a corporation was to make bye-laws, and govern their members, which a corporation might do, though their franchiſes were ſeiſed." 4 Mod. 52. Skin. 310. Carth. 217. 1 Show. 263.

(*If lands*) Mo. 283. *acc.* *Vide tamen* 20. Jac. C. B. Johnſon v. Morris, that the lands ſhall be heat. Hall. MSS., which alſo cites 21 E. 4. 1., and 21 H. 7. 9. And the caſe of Johnſon v. Norway in Winch. 37., which ſeems to be the ſame as that cited by Lord Hale, is againſt the author, though it is not mentioned in Winch, that the judges finally decided the point. See alſo 1 Inſt. Lord Coke, the caſe of Southwell v. Wade, in 1 Ro. Abr. 816. A. p. 1., and S. C. in Poph. 205.—Co. Lit. 13th ed. 13. b. n. 2.

Where the conſtitution of a corporation is ſettled by act of parliament, cannot be altered by the acceptance of a charter from the crown. Rex v. Miller, 6 Term Rep. 268.

A charter may give a power of election to a leſs number than the majority of a definite body; and in a preſcriptive corporation a uſage to this effect is evidence of ſuch a charter; ſo that in either caſe a perſon is well elected by a majority of the ſubſiſting members, as diſtinguiſhed from a majority of the full body. Rex v. Hoyte, 6 Term Rep. 430.

COSTS.

(K) Of Coſts in a feigned Iſſue.

(a) Of the firſt Introduction of, and giving the Plaintiff Coſts *de incremento*.

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(*There were*) Although coſts were never given at common law, *eo nomine*, yet in reality they were always included in the quantum of damages, in thoſe actions where damages were given; even now, coſts for the plaintiff are always entered on the roll as increaſe of damages by the poſt; the form of which entry may poſſibly have ariſen from the abovementioned practice. 3 Comm. 399. And it is ſaid by Lord Chief Baron Gilbert, that the juſtices in eyre were paid at their *iters*, before the ſtatute of Glouceſter, to aſſeſs the coſts of the plaintiff, where he prevailed, at a reaſonable ſum, excluſive of, and unblended with the damages which he recovered; and that this cuſtom prevailed till the introduction of the modern juſtices of aſſiſe and *niſi prius*; which time it became neceſſary, that the coſts ſhould be taxed by the court above, and not by the judges on their circuits. Gilb. Hiſt. C. P. 266.

(*By*

(*By the statute*) This distinction, with respect to the plaintiff's right to costs, between cases where damages are originally given by a statute subsequent to this act, and those where damages might have been recovered at common law, is impugned by Lord Coke himself, who saith, "This clause doth extend to give costs, where damages are given, to any demandant or plaintiff "in any action by any statute made *after* this parliament." 2 Inst. 289. And though it was recognised by three justices against Willes, C. J. in the case of Witham v. Hill, 2 Wilf. 91. Barnes, 151. and by Aston, J. in the case of Wilkinson v. Allott, Cowp. 367. yet it seemeth not to be law at present, "for the statute of Glouceſter is a remedial act, and, consequently, ought "to have a favourable interpretation." *Per* Lord Loughborough, 1 H. Bl. 13. Costs, therefore, have been allowed in actions against the hundred upon the statute of 9 Geo. 1. c. 22. for setting fire to the plaintiff's house. Jackson v. Inhabitants of Calesworth, 1 Term Rep. 71. See too Greetham v. the Hundred of Theale, 3 Burr. 1723. Bull. N. P. 331. And it hath been repeatedly decided, that in an action of debt upon any statute, by the party grieved, for a certain penalty, the plaintiff shall have his costs, although the act on which the action is founded give no costs. 1 Roll. Abr. 516. pl. 5. 574. pl. 1. Cro. Car. 559. 1 Salk. 206. 1 Ld. Raym. 172. 2 Term Rep. 154. Ward v. Snell, 1 H. Bl. 10.

(*And this was done*) The statute of Glouceſter doth not extend to give damages upon the traverse of an inquisition, although damages may be found thereon for the prosecutor: for to recover costs under this statute, there must be a plaintiff or defendant, demandant or tenant, Ca. temp. Hardw. 355. 2 Str. 1069.

(B) In what Cases the Plaintiff shall have no more Costs than Damages; And herein,

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(*The intent*) No instance of a certificate upon this statute is to be met with in the books, earlier than about the middle of the reign of George the Second. Gilb. Eq. Rep. 196. 3 Wilf. 325.

White v. Smith, C. B. P. 17 G. 2. cited in 2 Str. 1232. and 1 Wilf. 94.

In an action for taking and carrying away sand and gravel upon *Hounslow Heath* the plaintiff recovered a verdict with damages under 40*s.*, and Lord Chief Justice *Willes* who tried the cause, having certified, under this statute, that the damages found by the jury, were the real damages to be recovered, the court held it to be a case within the act, and refused to allow any more costs than damages.

Walker v. Robinson, 1 Wilf. 94. 2 Str. 1232.

So, in an action of trespass for assaulting the plaintiff, stopping his wagon, and taking away his cart-rope, the defendant justified the taking of the rope as a distress for toll, due to the corporation of *Doncaster* under whom he was collector, and likewise stated a demand and refusal previous to the making of the distress; the replication traversed any demand of the toll before the taking of the distress, and issue being joined thereon, the plaintiff obtained a verdict, at the trial, with one shilling and sixpence damages. The judge who tried the cause, certified under the statute. The plaintiff obtained a rule to shew cause why he should not have full costs, upon the grounds that an *asportavit* was laid in the declaration and there was special pleading, either of which circumstances, it was alleged, had been always holden insufficient to carry full costs; but after argument, the rule was discharged.

Howard v. Chelhire, Say. Rep. 250.

In an action of trespass, a case was reserved for the opinion of the court stating, that the action was brought for taking a distress; that the defendant justified as agent to General *Choldmondley*, by virtue of a reservation in a lease of land from the general to the plaintiff; and that issue having been joined upon a traverse of the agency of the defendant, a verdict was found for the plaintiff with one penny damages, and that the judge, who tried the cause, had certified pursuant to the statute 43 *El. c.* 6. *Dam* and *Foster*, the only judges in court, held, that the issue being collate

to the plaintiff's intereſt in the land demiſed, the plaintiff could have no more coſts than damages.

Where a plea of tender was found againſt the defendant, yet, as the plaintiff did not recover damages to the amount of forty ſhillings, it was holden that there might be a certificate under the ſtatute. Bartlett v. Robbins, 2 Wilſ. 258.

A notion formerly prevailed, that the ſtatute empowered the judges to certify only in thoſe actions which are within the juriſdiction of the county, and other inferior courts: but it hath been holden in a late determination, that the words of the ſtatute comprehend *all* perſonal actions (not being for any title to lands, or for any battery); even actions *vi et armis*, which cannot be brought in the county court. Dand v. Sexton, 3 Term Rep. 37.

A certificate upon this ſtatute, may be granted after the trial of the cauſe. Holland v. Gore, Say. Coſts, 18.

(*This ſtatute*) There is this difference between the ſtatutes of 43 Eliz. and 22 and 23 Car. 2, that the former, by certificate deprives the plaintiff of full coſts; the latter, by certificate entitles him to full coſts. 1 Wilſ. 95.

A fortiori then, if in an action of treſpaſs *quare domum fregit et bona aſportavit*, the defendant be acquitted as to breaking the houſe, and found guilty only of taking away the goods, the plaintiff ſhall have full coſts, of whatever amount the damages may be; for the acquittal as to the treſpaſs upon the freehold, reduces it to a queſtion of mere perſonal property, which is not within the ſtatute of 22 & 23 *Car.* 2. Anon. 1 Freem. 394.

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(*So in treſpaſs for chaſing*) But from later reſolutions, it ſhould ſeem, that the aſportation ſhould be an abſolute and entire removal of the property from the land of the owner, and not a partial conveyance of it to another part of the premiſes. Franklin v. Jolland, B. R. H. 8 W. 3. cited in 1 Str. 634. Anon. 1 Str. 633. Gilb. Eq. Rep. 198. However, if what is laid in the declaration as an *aſportavit* amount to nothing more than a deſcription of the mode in which the injury to the land was effected, and is laid as part of the ſame act, a certificate, although the plaintiff obtains a general verdict, is requiſite to entitle him to full coſts, unleſs the damages ſhould be found to the amount of forty ſhillings. Clegg v. Molyneux, Dougl. 780.

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(*Alſo if there be*) Bunb. 208. Gilb. Eq. Rep. 199.

(*It is further*) But it is otherwiſe, if the way under which the defendant juſtifies, be defined by metes and bounds in the plea, and the plaintiff reply *extra viam*; for here no doubt can ariſe concerning the extent and locality of the way, ſince theſe circumſtances are admitted and agreed by the pleadings; and therefore a certificate from the judge, that the freehold or title was in queſtion, is neceſſary to entitle the plaintiff to full coſts, in caſe the jury find damages under forty ſhillings. Cockerill v. Allanſon, B. R. Tr. 22 Geo. 3. Hullock, 86. Bull. Ni. Pr. 330.

But if in treſpaſs *quare clauſum fregit*, the defendant plead a juſtification, and thereupon the plaintiff make a new aſſignment to which there is a plea of not guilty; in ſuch caſe, if the plaintiff do not recover damages to the amount of 40*s*., and there be no certificate, there ſhall be no more coſts than damages; for a new aſſignment is equivalent to a new declaration; and where the defendant pleads only not guilty to it, there is in reality no ſpecial pleading in the caſe. Ibbotſon v. Brown, Barnes, 124. 129. Lloyd v. Day, *id.* 149.

So, if in ſuch action, the defendant plead two pleas, not-guilty and a juſtification, and a verdict be found for the plaintiff on the former, with damages under 40*s*., and a verdict for the defendant on the latter, there cannot be full coſts without a certificate, becauſe the iſſue joined on the ſpecial plea, being found for the defendant, the caſe is exactly the ſame as if only the general iſſue had been pleaded. 2 Ventr. 180. 195.

(*If an action*) Roop v. Scritch, 4 Mod. 379 Archbiſhop of Canterbury v. Fuller. 1 Ld. Raym. 395. but in Gavel v. Scudamore, 2 Lev. 124. this is doubted, where the cauſe is removed by the defendant.

Milburne v. Read, 3 Wilſ. 325.

Although this ſtatute ſpeaks generally of "*all actions of treſpaſs*," and Lord C. J. *Willes* was of opinion that every wilful treſpaſs was within it, yet there is no inſtance of a certificate upon it, except in actions of treſpaſs *quare clauſum fregit*.

3 Bl. Com. 214. 1 Term Rep. 636.

Every treſpaſs is wilful within the meaning of this act, where the defendant has notice, and is forewarned not to come upon the land; as every treſpaſs is malicious, where the intent of the defendant plainly appears to be to haraſs and diſtreſs the plaintiff.

6 Vin. Abr. tit. *Coſts*, 332.

And it was holden by *Eyre*, J. at *Eſſex* Lent Aſſizes, 1719, that where a treſpaſs was *wilful*, a judge would certify, though *no malice proved*; which was ſaid to be the practice.

Ford v. Parr, 2 Wilſ. 21.

A certificate under this act muſt be made by the judge in open court; if made out of court, it is void.

Reynold v. Edwards, 6 Term Rep. 11.

If it appear on the trial, that the treſpaſs, however ſmall, was committed *after notice*, and the jury give leſs than forty ſhillings damages, the judge is bound under the ſtat. of 8 & 9 *W.* 3. *c.* 11. § 4. to certify that the treſpaſs was wilful and malicious, in order to entitle the plaintiff to his full coſts.

Adlam v. Greenaway, 6 Term Rep. 281.

If in treſpaſs for throwing ſtones, *&c.* at the plaintiff's window belonging to his dwelling-houſe, and breaking the glaſs, *&c.* the plaintiff recover leſs than forty ſhillings, he is not entitled to any more coſts than damages, unleſs the judge certify that the title to the houſe came in queſtion.

Doe v. Davis, *Id.* 593.

So, in an action of treſpaſs for meſne profits; for this action is founded wholly upon title.

Redridge v. Palmer, 2 H. Bl. 2. Comer v. Baker, *Id.* 341.

Where, in an action of treſpaſs *quare clauſum fregit*, a ſpecial plea is pleaded, and the iſſue is found for the plaintiff, he is entitled to full coſts, though the damages be under forty ſhillings, and the judge do not certify.

(*By the* 21 *Jac.* 1.) This ſtatute is a direct repeal of that of Glouceſter *quoad* actions of ſlander; for in theſe if the damages do not amount to 40*l.*, coſts *de incremento* are taken away by expreſs and poſitive words. Gilb. Eq. Rep. 196.

(*So if for*) Blizard v. Barnes, *Id.* 307. S. P. Carter v. Fiſh, 1 Str. 645. S. P.

Turner v. Horton, Barnes, 132. Surman v. Shelleto, 3 Burr. 1688. Collier v. Gaillard, 2 Bl. Rep. 1062.

It is indeed now ſettled, beyond controverſy, that where the words are actionable in themſelves, without the ſpecial damage, the plaintiff can have no more coſts than damages, where the latter are under 40*s.* But where the words are not actionable in themſelves, but the action is maintainable only with reſpect to the ſpecial damage, then it is a caſe at large and without the ſtatute; and, *if any* damages are recovered, the plaintiff will be entitled to full coſts.

Littlewood v. Smith, 1 Ld. Raym. 181. But if in an action for ſlander commenced ori-

It hath been holden, that this ſtatute of 21 *Ja.* 1. *c.* 16. notwithſtanding the comprehenſive words which the legiſlature hath uſed in it doth not extend to courts baron, and other inferior courts; for as damages cannot be given in thoſe courts to the amount of 40*s.* it would be impoſſible to tax coſts *de incremento* in any action of ſlander beyond that ſum.

…ginally in an inferior court, and afterwards removed into one of the courts at Weſtminſter, the plaintiff recover under 40*s.*, he ſhall have no more coſts than damages. Anon. C. B. T. 12 Ann. 1 Com. Dig. 546. *Vide* Latch 2. 58.

A plea of juſtification will not take the caſe out of this ſtatute. 2 Wilſ. 258. *per* Clive, J. Dovor v. Robinſon, Barnes, 128.

If upon a writ of enquiry, the damages be aſſeſſed under 40*s.* and the coſts be taxed above that ſum, and judgment be entered up accordingly, the judgment will be reverſed *in toto*. Lampen v. Hatch, 2 Str. 934.

In an action of *ſcandalum magnatum*, no coſts are recoverable, however large the damages may be. 2 Show, 506.

Neither is an action for criminal converſation with the plaintiff's wife within this ſtatute, for the criminal converſation is the giſt of the action, and not the aſſault. Batchelor v. Bigg, 3 Wilſ. 319. 2 Bl. Rep. 854.

Again, in an action of treſpaſs, the plaintiff declared for an aſſault and battery upon himſelf, and alſo for ſtriking his horſe, by which he was leſſened in value; the defendant pleaded not guilty, and there was a general verdict for the plaintiff with 20*s.* damages, but no certificate from the judge. The plaintiff moved for full coſts on account of the ſpecial matter ſtated relative to the horſe, which, on conſideration, were refuſed by the court. Clarke v. Othery, 1 Str. 624.

But where the declaration charged the defendant with *an aſſault, battery, and wounding, and with obſtructing the plaintiff in getting his coals, taking them away, treading and trampling upon them, breaking and ſpoiling the ſtandard and roller of the plaintiff, and taking away his goods and chattels*, and a general verdict was found for the plaintiff upon the whole charge, except the taking away of the goods and chattels; it was holden, that he was entitled to full coſts, notwithſtanding the damages were under 40*s.*, and the judge had not certified an aſſault and battery to have been proved: for there was a ſpoliation in this caſe diſtinctly ſtated, upon which the plaintiff might have brought his ſeparate action, and have recovered full coſts without a certificate. Milburne v. Read, cited in 3 Wilſ. 322.

It hath been reſolved, that there ſhall be no more coſts than damages, (ſhould the latter be under 40*s.*,) without a certificate, in an action for aſſault and battery, and *for tearing or injuring the plaintiff's clothes*, if the *tearing* or other injury be *charged in the declaration*, or *found by the jury* to have been *in conſequence* of the beating. Hampſon v. Adlhead, Say. Rep. 91. Bull. *Ni Pri.* 329. Cotterill v. Tolly, 1 Term Rep. 655.

But it ſeems to have been once thought, that where in ſuch an action *for tearing or damaging of the clothes* is laid in the declaration *as a diſtinct and ſubſtantive fact*, and not *as a conſequence of the beating*, even though ſuch charge ſhould be contained in the ſame count with the injury to the plaintiff's perſon, a certificate is not neceſſary to entitle the plaintiff to full coſts. However, it is now ſettled (*a*) that if the *tearing* of the clothes appear to have been at the ſame time with the injury to the perſon, the court will conſider it as part of the ſame tranſaction, and allow the plaintiff no more coſts than damages, notwithſtanding the declaration may not allege the former injury as conſequential to the latter. Carruthers v. Lamb, Barnes, 120. Cotterill v. Tolly, 1 Term Rep. 655. (*a*) Mears v. Greenaway, 1 H. Bl. 291. Atkinſon v. Jackſon, *id.* 295.

Lockwood v. Stannard, 5 Term Rep. 482.

Where the defendant pleads a juſtification to the aſſault and battery, as *aſſault demeſne*, there is no need of a certificate to entitle the plaintiff to full Richards v. Turner, Bull. *Ni. Pri.* 330.

full costs, for the justification is an admission of the battery, and is tantamount to a certificate of its having been proved. But if the defendant justify, and the plaintiff make a new assignment, to which the general issue is pleaded, he will have no more costs than damages without a certificate. Neither will he, if the defendant justify the assault only.

Page v. Creed, 3 Term Rep. 391.

Smith v. Edge, 6 Term Rep. 562.

If to an action for an assault and battery the defendant plead the general issue and a justification to the whole, and the plaintiff obtain a verdict with damages under forty shillings, he is entitled to full costs, the battery being admitted on the record.

(C) Where the Costs shall be doubled or trebled.

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(*It seems agreed*) 1 Ld. Raym. 20. Gilb. Hist. C. P. 267. Cowp. 365.

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(*In an action*) Sands v. Child, 3 Lev. 355. Smith v. Dunce, 2 Str. 1048.

Smith v. Wallis, 1 Term Rep. 252.

The 28th *sect.* of 25 *Geo.* 3 *c.* 50., respecting duties upon game-certificates, directs, "that if any person shall at any time be sued, molested, "or prosecuted, for any thing by him done or executed in pursuance of "that act, or of any clause matter, or thing therein contained, such "person may plead the general issue, *&c.* and if the plaintiff be nonsuited, "or the defendant obtain a verdict, such defendant shall be awarded "his treble costs." This clause, it hath been determined, only extends to give treble costs to those persons, who are sued for something done in the execution of the act, not to those who are sued for penalties under it; and therefore, a person prosecuted under the act for shooting without a certificate, is not entitled to treble costs upon obtaining a verdict.

Rex v. Poland, 1 Str. 49.

Where treble costs are to be recovered against a prosecutor for matter not appearing upon the *postea*, the court will, upon motion, allow a suggestion of the special matter to be made on the record.

Sands v. Child, 3 Lev. 355. Lawson v. Story, Carth. 321.

Where a person is entitled to double or treble costs, not only those assessed by the jury, but also those adjudged *de incremento* by the court shall be doubled or trebled.

Smith v. Dunce, 2 Str. 1048. 2 Tidd's Pr. 674, 5.

But double or treble costs are not to be understood to mean, according to their literal import, twice or thrice the amount of single costs. When a statute gives double costs, they are calculated thus: 1. The common costs, and then half the common costs. 2. If treble costs, 1. the common costs; 2. half of these; and then half of the latter.

Shepherd v. Mackreth, 2 H. Bl. 284.

The court of Exchequer-chamber is bound to allow double costs to the defendant in error, on the affirmance of a judgment of the court of King's Bench.

(D) Of awarding the Defendant his Costs.

BY the 24 *H.* 8. *c.* 8. plaintiffs, suing to the use of the king in any action whatsoever, are exempted from the payment of costs, when they are nonsuited, or a verdict passeth against them.

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(*Alſo by the ſtatute*) Nor ſhall the defendant have coſts where there is a plea in abatement, which the plaintiff admits to be true, and enters a *nil capiat per breve*. Greenhill v. Shepherd, 12 Mod. 145. Allen v. Maxey, Barnes 120. Pocklington v. Peck, 1 Str. 638. But *qu.* where there is a motion to quaſh the writ before plea pleaded? Huer v. Whitebread, Caſ Pr. C. P. 74. Pr. Reg. 78. Poole v. Broadfield, Barnes 431. If iſſue be taken on a plea in abatement, and the plaintiff be afterwards nonſuited, the defendant is entitled to coſts; for if the iſſue had been found for the plaintiff, it would have been peremptory, and he would have had coſts. Aſplin v. Conſtable, 1 Ca. Pr. C. P. 35.

If the defendant remove proceedings from a county-court by *recordari facias loquelam* into one of the ſuperior courts, and ſign judgment of *non-pros* for the non-appearance of the plaintiff, he ſhall have coſts. Davies v. James, 1 Term Rep. 371. It was moved on the ſtatute for ſetting off mutual debts, that no coſts ſhould be allowed the defendant, becauſe he had not obtained a verdict, there being only an indorſement that 13*l.* was due to the plaintiff for rent, and that on balancing the account, there appeared due to the defendant 13*s.*; but the court declared, that the indorſement was equally a verdict to entitle the defendant to his coſts, as a verdict in other caſes. Geale v. Chapman, Ca. Pr. C. P. 65. It ſeems, that the defendant ſhould be allowed all ſuch coſts upon a nonſuit, as have been incurred in taking the neceſſary meaſures for his defence in the action. Rex v. Midlam, 3 Burr. 1720. Davila v. Herring, 1 Str. 300.

(*By the* 8 & 9 *W.* 3.) This act does not extend to *treſpaſs upon the caſe for a tort*. Dibben v. Cooke, 2 Str. 1005. trover. Poole v. Boulton, Barnes 139. replevin. Ingle v. Wordſworth, 3 Burr. 1284. 1 Bl. Rep. 355. or an information. Reg v. Danvers, 1 Salk. 194. for torts are joint and ſeveral, ſo that one defendant may be acquitted, and the other found guilty. *Sed vide*, as to actions upon contracts, for contracts are joint, and one of two defendants cannot have a verdict without a demonſtration that there was no cauſe of a joint action againſt both; therefore, where one of two defendants in an action of *aſſumpſit* had ſuffered judgement by default, and the other obtained a verdict, the latter, it was holden, was entitled to coſts. Shrubb v. Barrett, 2 H. Bl. 28 ——Where the coſts payable to one defendant ſhall be deducted out of thoſe payable by the others, ſee Schoole v. Noble, 1 H. Bl. 23. Mordecai v. Nutting, Barnes, 145.

If the defendant pay into court a ſum under forty ſhillings, which the plaintiff accepts; he is not therefore liable to coſts, as ſuing for a ſum under forty ſhillings. Cadwallader v. Batley, Anſtr. 627.

It is only where there is judgment in favour of the defendant, that judgment for coſts can be given. The ſtat. of *W.* 3. gives him coſts, and the 4th *Ja.* 1. *c.* 3. ſays expreſsly, that where the plaintiff, "if judgment "ſhould be given for him, would be entitled to coſts," (for which there never can be a judgment for him, it muſt be for the debt and damages, to which coſts are added,) the defendant, if he prevails, takes his judgment for the coſts. *Per* Lord Loughborough, 2 Vez. jun. 316.

(E) What Perſons are entitled to, or exempted from paying Coſts: And herein,

(*An executor*) Yet it is ſaid to have been determined in a late caſe, by the court of Common Pleas, that no coſts ſhall be allowed on a judgment of aſſets *in futuro*, on a plea of *plene adminiſtravit*. Imp. Pr. C. P. 2 Ed. 374. Imp. Pr. K. B. 3 Ed. 275. Marg. If a bankrupt executor plead a falſe plea in an action commenced againſt him, between the iſſuing of the commiſſion, and the obtaining of his certificate, by a creditor of his teſtator, he is liable to be taken in execution for the coſts. Howard v. Jemmet, 3 Burr. 1368. 1 Bl. Rep. 400. Where an executor pleads *non aſſumpſit*, and a ſpecialty debt ſufficient to cover the aſſets, the court will permit him to withdraw the former plea, upon payment of the coſts occaſioned by that plea only. Dearne v. Grimp, 2 Bl. Rep. 1275.

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(*But if an executor*) This caſe of Eaves v. Mocato is denied to be law in Andr. 359. and 5 Term Rep. 234. In the caſe of Goldthwayte v. Petrie, reported in this laſt book, the action was by huſband and wife, as executrix for money had and received after the teſtator's death to the uſe of the wife, as executrix, and there being a verdict for the defendant, the court held him entitled to coſts.

Cockerill and Wife Executrix v. Kynaſton, 4 Term Rep. 277. Goldthwayte and Wife Executrix v. Petrie, 5 Term Rep. 234.

The queſtion, in what caſes a perſon ſuing as executor or adminiſtrator, ſhall be exempt from coſts, is embarraſſed with a variety of deciſions ſo contradictory, that it is impoſſible to reconcile them: its ſolution, however, ſeems now to turn upon this diſtinction, namely, whether it be neceſſary, or not, for him to ſue in his repreſentative character: if it be neceſſary, he ſhall not be liable to the payment of coſts: if it be not neceſſary, he ſtands preciſely in the ſituation of any other plaintiff, without any claim to exemption from the character he has aſſumed.

Knight v. Ducheſs Hamilton, Bunb. 44.

Although an executor proceed to trial, after the payment of money into court, and recover a verdict for a leſs ſum, yet he is not liable to pay any coſts.

Gregg's caſe, 2 Salk. 596. Bryan v. Holloway, Barnes, 279

It was formerly holden, that money could not be paid into court in an action by an executor or adminiſtrator, becauſe the executor or adminiſtrator is not liable to coſts. But it is now ſettled (*b*) that money may be paid into court in ſuch caſe, for the effect of it is not to make the executor *pay*, but only *loſe* his ſubſequent coſts.

(*b*) Crutchfield v. Scott. 2 Str. 796.

Martin v. Norfolk, 1 H Bl 528.

Where the plaintiff is executor or adminiſtrator, he is not liable to coſts under 5 *Geo.* 2. *c.* 30. § 7. though the defendant plead the general plea of bankruptcy, and obtain a verdict.

Howard v. Radburn, Barnes, 130. *Per Cur.* *acc.* 4 Burr. 1928.

Neither does he pay coſts under the 14 *Geo.* 2. *c.* 17. upon a judgment againſt him, as in the caſe of a nonſuit, for not proceeding to trial according to the courſe of the court in which the cauſe is inſtituted.

7 Mod. 98. 118. 1 Salk. 314. 2 Ld. Raym 806.

But an executor or adminiſtrator ſhall pay coſts for not proceeding to trial purſuant to his notice, if it be through his own default.

1 Str. 33. 3 Burr. 1305. 1585. Ogle v. Moffat, Barnes 133.

Nunez v. Modigliani, 1 H Bl 217.

So, he hath been made to pay coſts for withdrawing his record before trial.

Hullock on Coſts, 193. Eccleſton v. Clipſam, 2 Keb. 385. Baynham v. Matthews, 2 Str. 871. Fitzg. 130. Bird v.

It does not appear to be eſtabliſhed, whether or not an executor or adminiſtrator is liable to pay coſts upon diſcontinuing his ſuit; but though no general rule can be extracted from the caſes upon this ſubject, which are contradictory, yet upon principle and the reaſoning of the court in the caſes referred to in the margin, it ſeems, that where the neceſſity of diſcontinuing is occaſioned by the laches or default of the executor himſelf, the condition of paying coſts will, generally, be annexed to the rule to diſcontinue.

Smith, 2 Kel. 70. 2 Barnard. 154. Haydon v. Norton, Caſ. Pr. C. P. 79. Harris v. Jones, 2 Burr. 1451. 1 Bl Rep. 451. Bull. Ni. Pri. 332. Bennet v. Coker, 4 Burr. 1927. Say. on coſts, 96. Hugh v. Lloyd, Burt. Pr. Excheq. 156.

Lumley v. Nicholls, Caſ. Pr. C. P. 14. Page 519

An executor ſhall pay coſts upon being nonproſſed for want of a replication, or for not declaring in due time, becauſe guilty of a default.

Hawes v Saunders, 3 Burr. 1584.

This act extends to other actions againſt officers.

By 43 *El.* *c.* 2. § 19. (entitled *an act for the relief of the poor,*) if in any action of treſpaſs or other ſuit to be brought againſt any perſon for making any diſtreſs or ſale, or doing any other thing under the authority of

of that act, there ſhall be a verdict for the defendant, or a nonſuit of the plaintiff after appearance, the defendant ſhall recover treble damages with his coſts alſo, and that to be aſſeſſed by the ſame jury, or writ to inquire of the damages, as the ſame ſhall require.

ſeers beſides treſpaſs. Okely v. Salter, Yelv. 176. But the coſts

ſhall not be trebled, only the damages. Noy, 137. S C. If the jury who try the iſſue aſſeſs only ſingle damages, or if they omit to aſſeſs any damages at all, the court will, on a verdict for the defendant, or nonſuit for the plaintiff, ſupply the omiſſion by awarding a writ of enquiry of damages. As a ground, however, for this, a ſuggeſtion muſt be entered on the *poſtea* that the defendant was an overſeer of the poor, &c., and that the injury complained of was an act done in the execution of his office. Such a ſuggeſtion indeed is not neceſſary, where the defendant's title to treble damages appears on the record; as, where in replevin, he avows as overſeer of the poor, &c. Carth. 362. 1 Salk. 205. 5 Mod. 76. 118. Skin. 595. 1 Ld. Raym. 59. 2 Str. 1021. Ca. temp. Hardw. 138. Say. Rep. 214. 2 Bl. Rep 921. 3 Wilſ. 442.

(*By the ſtatute* 7 *Jac.*) See further with reſpect to juſtices of the peace and conſtables, 24 G. 2. c. 44., and with reſpect to officers of the exciſe or cuſtoms, 20 Geo. 3. c. 70. § 34. and 24 G. 3. ſeſſ. 2. c. 47. § 35.

Willet v. Tidey. Carth. 188. 1 Show, 214. 12 Mod 6. S. C.

Grindley v. Holloway, Dougl. 307. They may upon a ſpecial verdict, where it appears by the facts found, that the defendant was acting by virtue of his office. Rann v. Pickens, B. R. M. 23 Geo. 3. Dougl. 308. n. If the plaintiff diſcontinue, the court will, upon an affidavit, that the act for which the defendant was ſued, was done by virtue of his office, make a rule upon the maſter for the taxation of double coſts Devenish v. Mertins, 2 Str. 974. If judgment goes by default, the defendant may enter a ſuggeſtion on the roll. Ca temp. Hardw. 138-9.

In caſes, under theſe acts, where it doth not appear on the face of the record, that the defendant is entitled to double or treble coſts, (as, where he pleads the general iſſue,) and there is no particular mode appointed for the recovery of the coſts, the proper mode, after a nonſuit or verdict for the defendant, is to apply to the court upon an affidavit of the facts, for leave to enter a ſuggeſtion on the roll. 1 Str. 49. Ca. temp. Hardw. 125. *Id.* 138. 2 Str. 1021. Say. Rep. 214. 3 Wilſ. 442. Skin. 556.

Where the defendant is entitled to double coſts under theſe acts, the coſts *de incremento*, as well as thoſe aſſeſſed by the jury, ſhall be doubled.

(*It ſeems agreed*) But on a *bonâ fide* compoſition of a penal action by leave of the court, the plaintiff may be allowed a reaſonable ſum for his coſts. And, on motion, the defendant may pay the penalty into court with coſts. Wood *qui tam* v. Johnſon, 2 Bl. Rep. 1157. Walker v. King, Buſl. Ni. Pri. 197.

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(*But by the* 18 *Eliz.*) This ſtatute extends to all actions by common informers, whether ſuch actions may be grounded on ſtatutes made prior, or ſubſequent to it. Law. q t. v. Worrall, 2 Wilſ. 177.

(*In the conſtruction*) But proſecutors *qui tam* are looked upon as common informers; and ſhall pay coſts. Salk. 30 Cowp. 366. And where the defendant obtains a verdict in a *qui tam* information, he ſhall have coſts, although he himſelf removed the information from the ſeſſions into the court of King's Bench. *Qui tam* by the Town of Dover v. Hodgſon, 1 Wilſ. 139.

(*All it hath*) Garland q. t. v. Burton, 2 Str. 1103.

And it is ſaid, that the entry of a *noli proſequi* by the plaintiff, in a popular action, comes within this ſtatute. 2 Cr. Pr. 469. n.

(*By the* 18 *Eliz. there is*) But this muſt appear upon the record, elſe they will be taken as common informers, and affidavits to the contrary will not be admitted. 2 Ld. Raym. 1333. Buſl. Ni. Pri. 334. 4 Ed.

A pauper, in the eye of the law, is one who will ſwear that he is not worth 5*l.* (*a*) after all his debts are paid, excluſive of his wearing apparel, and the ſubject matter of the action. Such a perſon may, upon petition, and affidavit of his poverty, ſupported by a certificate of his cauſe of action, be 3 Com. Dig. 388. Imp. Pr. K. B. 3 Ed. 496. Imp. Pr. C. P. 2 Ed.

566. (a) 10*l.* according to 1 Lill. Pr. Reg. 851. Tidd's Pr. 661. 3 Burr. 1388. (b) Andr. 306. Ca. temp Hardw. 254. 3 Wilf. 24. But by order in the Exchequer 1717, the pauper, admitted after the commencement of the ſuit, is to give ſecurity to pay the coſts before admittance. 3 Com. Dig. 389. (c) Stat. 5 W. & M. c. 21. § 14.—An admiſſion to ſue *in forma pauperis* in the court of Chancery is not binding on the officers in the King's Bench: and therefore on an iſſue out of Chancery to be tried in B. R. there muſt be a new admiſſion in the latter court. Ca. temp. Hardw. 311. Nor will an admiſſion in one ſuit entitle a party to commence another ſuit *in formâ pauperis*. 1 Lill. Pr. Reg. 851.

be admitted to ſue *in formâ pauperis*; which admiſſion may be either at the commencement of the ſuit, or afterwards *pendente lite* (b). And being ſo admitted, an attorney and counſel ſhall be aſſigned him; he ſhall be permitted to carry on the proceedings *gratis* without uſing ſtamps (c) or paying fees to the officers of the court, unleſs he obtain a verdict for more than 10*l.*, and then the officers ſhall be paid their court fees, and for paſſing the record, &c.

This indulgence of ſuing *in formâ pauperis* was given by ſtat. 11 *H.* 7. c. 12.; but as the enabling men to commence a litigation without expence, is tempting their reſentments with too eaſy a gratification, it was found neceſſary to impoſe a reſtriction upon it in the following reign, as therefore.

(g) Tidd's Pr. 6622. 2 Lill. Pr. Reg. 633. 2 Salk. 506. 1 Str. 420. ſemb. *contr.* 2 Str. 1122. (h) 2 Str. 878. 3 Wilſ. 24. Fitzg. 161.; but ſee Caſ. Pr. C. B.

If the pauper do not proceed to trial according to notice, or otherwiſe miſbehave himſelf, the court will order him to be diſpaupered (g): but until this be done, they will not make any rule about the coſts (h).

(a) Anon. Fitzg. 161. So, if a perſon, after having failed in one action in which he ſued *in formâ pauperis*, commence a ſecond action for the ſame cauſe, but as a pauper. Goodtitle v. Mayo, B. R. H. 29 G. 3. Hullock, 214. *Secùs*, if after a nonſuit in an action in which he did not ſue as a pauper, he commences a ſecond action for the ſame cauſe *in formâ pauperis*. Weſton v Withers, 2 Term Rep. 511.

The court will not ſtay proceedings in a ſecond action, until the coſts are paid of a nonſuit in a prior action for the ſame cauſe (a): nor, if the pauper ſhould ſucceed in the ſecond action, will they deduct the coſts of the firſt, out of thoſe recovered in the ſecond.

Ancell v. Slowman, 8 Mod. 44.

Where a plaintiff, at the time of a nonſuit, was a pauper, the delivery of lands to him afterwards, ſhall not have relation back, ſo as to make him liable to the coſts of the nonſuit.

Hullock, 220. Anon. Barnes, 328. Ruled *acc.* in a late caſe by Gould, J. Imp. Pr. P. C. 2d ed. 567. 2 Keb. 378. Semb. *acc.* Sed. *vide* Comb. 77. 11 Mod. 84. Pr. Reg. C. P. 405. *contr.* (c) But a perſon may be admitted to defend an indictment *in formâ pauperis*; becauſe the proſecutor not being entitled to coſts in criminal proceedings, he cannot be prejudiced by ſuch admiſſion, which is in effect nothing more than ordering the officers of the court to take no fees. Rex v. Wright, Ca. temp. Hardw. 211. 253. 1041. S. C. 6 Mod. 88. S. P. And by ſtat. 2 Geo. 2. c. 28 § 8. a perſon arreſted on a qui tam or information relating to the cuſtoms, upon making affidavit before a judge, or commiſſioner appointed to take affidavits, that he is not worth 5*l.* excluſive of his wearing apparel, and petition to the court, may, at the diſcretion of the court, be admitted to defend ſuch action in

A defendant in a civil (c) action cannot be admitted to defend *in forma pauperis*; becauſe no perſon can be admitted either to ſue or defend as a pauper, but under ſome act of parliament; and the ſtatutes of 11 *H.* 7. and 23 *H.* 8. contain no proviſions on behalf of defendants, but merely enable plaintiffs to ſue in that form. And if the courts had a diſpenſationary power, without the direction of a ſtatute to admit perſons in forma pauperis to proceed *in formâ pauperis*, they would in effect poſſeſs a power of diſpenſing, in many inſtances, with the operation of the ſtatutes relating to coſts.

rmation *in formâ pauperis*, in like manner, and with the ſame privileges, as other poor ſubjects e permitted to ſue for the recovery of their rights.

Although it appears (*a*) to be ſettled that executors and adminiſtrators hall pay the coſts of a *non pros*, yet it hath been holden (*b*), that they re not liable to coſts on a judgment as in caſe of a nonſuit, under the tat. 14 *Geo.* 2. *c.* 17. (*a*) Vol. 2. p. 48. & Higgs v. Warry, 6 Term Rep. 277. (*b*) Booth v. Holt, 2 H. Bl.

In an action in the name of the crown upon a bond under the poſt-orſe act, the court cannot give coſts againſt the crown, although the rmer of the duties is the real party. Rex v. Corum. Anſtr. 59.

A party grieved who recovers damages againſt the ſheriff under the 23 *H.* 6. *c.* 9. for not taking bail, is alſo entitled to coſts. So, under the ſtat. 9 *Eliz. c.* 4. againſt the ſheriff for taking more than the fee allowed by he ſtatute on levying under an execution againſt the plaintiff. Crefwell v. Hoghton, 6 Term Rep. 355. Tyte v. Glode, 7 Term Rep. 267.

It is provided by ſtat. 13 *Geo.* 3. *c.* 78. § 64. that "it ſhall and may be lawful for the court, before whom any indictment ſhall be tried for not repairing highways, to awards coſts to the proſecutor to be paid by the perſons ſo indicted or preſented; if it appear to the court that the defence made to ſuch indictment or preſentment was frivolous." Under his ſtatute the judge at *niſi prius* only hath power to award coſts: if he mit to do it, the court of King's Bench cannot ſupply the defect. But certificate from the judge that the defence was frivolous is ſufficient o entitle the proſecutor to his coſts, though it do not *expreſsly* award oſts. Rex v. Inhabitants of Cheddere ton, 5 Term Rep. 272. Rex v. Inhabitants of Clifton, 6 Term Rep. 344.

Where the plaintiff in replevin pleads ſeveral pleas in bar of an avowry, n which iſſues are joined, and one of them, which eſtabliſhes his right f action, is found for him, and the others are found for the defendant, nd the judge does not certify under ſtat. 4 *Ann. c.* 16. the defendant is ntitled to the coſts, not only of the pleadings which form that iſſue which found for him, but alſo of the trial of that iſſue. Broke v. Willet, 2 H. Bl. 435.

(F) Of Coſts in Replevin.

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(*Alſo by the* 21 *H.* 8.) Nor to pleas of *priſel en autre lieu*, upon which the writ is abated. Com. ep. 122. 2 Ld. Raym. 788.

See too ſtat 8 & 9 W. 3. *c.* 11.

Q. Whether they ſhall have both damages and coſts where there are ſeveral iſſues, and ſome e found for, and the others againſt the defendants? Cro. Ja. 473. 2 Roll. Rep. 37. Brownl. 73. 2 Lutw. 1190. Under 4 Ann. *c.* 16. § 5. they ſhall pay coſts on the ſpecial avowries found againſt them. Stone v. Forſyth, Dougl. 709. n. Where ſome iſſues are found on each ſide, and he judge does not certify that the plaintiff had probable ground for pleading thoſe matters in egard to which any iſſues are found for the defendant, the latter is entitled to have the coſts n reſpect thereof deducted out of the general coſts of the verdict. Dodd v. Joddrell, 2 Term Rep. 235.

By the 17 *Car.* 2. *c.* 7. § 2. (extended to *Wales* and the counties pala-ine by 19 *Car.* 2. *c.* 5.) the defendant obtaining a judgment thereon for he arrearages of rent, or value of the goods diſtrained, is entitled to his ull coſts of ſuit.

By the 11 *Geo.* 2. *c.* 19. § 22. if the defendant avow, or make cogni-ance according to that ſtatute, upon diſtreſs for rent, reliſf, heriot, or other This ſtatute doth not extend to

a ſeiſure for a heriot-cuſtom.

other ſervices, and the plaintiff be nonſuit, diſcontinue his action, or have judgment againſt him, the defendant ſhall recover double coſts of ſuit.

Lloyd v. Winton, 2 Wilſ. 28. Barnes, 148. S. C.

(G) Of Coſts in a Writ of Error.

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(*It extends not*) But where executors and adminiſtrators would be liable to pay coſts in the original action, they will alſo be liable in error. Williams v. Riley, 1 H. Bl. 567. Caſwell v. Norman. *Ibid.* n. 2 Barnard. 450. 2 Str. 977.

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(*But as theſe ſtatutes*) Dougl. 709. n.

(*c*) Theſe coſts include thoſe of the motion for quaſhing the writ of error.

By 4 *Ann. c.* 16. § 25. for preventing vexation, from ſuing out defective writs of error, it is enacted, "That upon the quaſhing of any writ of error, for variance from the original record, or other defect, the defendant ſhall recover againſt the plaintiff in error his coſts (*c*), as he ſhould have had, if the judgment had been affirmed, and to be recovered in the ſame manner."

Cooper v. Ginger, 1 Str. 606. 2 Ld. Raym. 1403. Ratcliffe v. Burton, Ca. temp. Hardw. 135. Though no coſts are recoverable in the original action, yet they are payable on quaſhing a writ of error. Archbiſhop of Dublin v. Dean of Dublin, 1 Str. 262. But where the defendant in error enters continuances to defeat the writ of error, the plaintiff in error is not liable to coſts on quaſhing it. Gould v. Coulthurſt, 1 Str. 139. Rejindoz v. Randolph, 2 Str. 834. But though the act of a defendant may occaſion the quaſhing of a writ of error, yet if it be not reprehenſible, he ſhall not pay the coſts. Cooper v. Robins, Say. Coſts, 207. And none of the ſtatutes give coſts on the reverſal of a judgment. Wyvil v. Stapleton, 1 Str. 617. 8 Mod. 315.

(H) Of Coſts in the ſeveral Steps and Proceedings of a Cauſe.

(*As the courts*) It is laid down in the caſe here referred to in 12 Mod. that, if upon notice of trial, the defendant draws briefs, retains counſel, and makes ready his witneſſes, before that notice is countermanded, upon affidavit thereof, and motion, he ſhall have ſuch coſts as the maſter ſhall tax. But it hath been ſince holden, that if a notice of trial be regularly countermanded, the defendant is not entitled to receive the coſts of a witneſs who reſided in London, and, before the countermand was delivered, ſet out to attend the aſſizes in the country. Heſter v. Hall, Barnes, 307. Goodright v. Hoblyn, *Id* 298. Pr. Reg. C. P. 393. S. C.——A plaintiff is not liable to coſts for not proceeding to trial according to notice, if the delay was the reſult of inevitable accident, Ogle v. Moffit, Barnes, 133. or occaſioned by the neglect of the defendant's attorney. Strong v. Harwood, Say. Coſts, 174. (*c*) Shadford v. Houſton, 1 Str. 317. Sutton v. Bryan, 2 Str. 728.

6 Mod. 2. 1 Lill. Pr. Reg. 472. 2 Salk. 579. 3 Burr. 304. 2 Ventr. 196. Barnes, 125.

No coſts are allowed to either party on a repleader, becauſe it is a judgment of the court upon the pleading; and both parties were in fault to allow an immaterial or inſufficient iſſue to be joined, and therefore, neither of them can have any claim to receive coſts from the other.

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(*By the* 8 *Eliz. cap.* 2.) This ſtatute doth not extend to actions brought by executors or adminiſtrators, in their repreſentative character. Cro. El. 69. Cro. Ja. 361. If the plaintiff enter a *nolli proſequi*, the defendant is entitled to coſts upon this ſtatute. Cooper v. Tiſhe, 3 Term Rep. 511.

(*a*) Tidd's Pr. 885. Real v.

It was formerly not uſual (*a*) in any actions, but ejectments, to ſtay the proceedings in a ſecond action, until the coſts were paid in a prior one for the

the ſame cauſe; and, particularly, if the merits did not come in queſtion, on the former trial (*b*). But of late years, it hath been done, in ſeveral inſtances, on the ground of vexation (*c*); and in one caſe (*d*), where the action was brought by huſband and wife, the court ſtayed the proceedings, until the payment of coſts in the former action, at the ſuit of the huſband only; it being for the ſame demand.

Macky, 2 Str. 1206. Engliſh v. Cox, Cowp. 322. Say. Coſts, 251. S. C. Lazarus v. Pritchard, Barnes, 125. Doe v. Alſton, 1 Term Rep. 491 but ſee Lord Biron's caſe, 1 Ventr. 100.

(*b*) Baſs v. Firmen, 1 Ld. Raym. 697. (*c*) Weſton v. Withers, 2 Term Rep. 511. Gravenor v. Cape, Say. Coſts, 245. Melchar v. the Executors of Halſey, *Id.* 247. 2 Bl. Rep. 741. S. C. 3 Wilſ. 149. (*d*) Lampley and wife v. Sands, H. 25 Geo. 3. B. R. Tidd's Pr. 285.

So, it was formerly not uſual (*e*), in any actions, but ejectments, or actions *qui tam*, to require ſecurity for coſts, where the plaintiff reſided abroad; for it was conſidered, that ſuch a proceeding might affect trade, by excluding foreigners from our courts; and would be a means of clogging the courſe of juſtice. But now although a plaintiff be not compellable to give ſecurity for coſts, merely as a foreigner, if he reſide in this country, yet, whether he be a foreigner or native, if he reſide abroad out of the reach of the proceſs of the court, the proceedings will be ſtayed till he return, or ſecurity be given for the payment of coſts *(f)*.

(*e*) Real v. Macky, 2 Str. 1206. Lamu v. Sewell, 1 Wilſ. 266. Maxwell v. Mayer, Say. Coſts, 156. 2 Burr. 1026. S. C. Boſewell v. Iriſh, 4 Burr. 2105. Golding v. Barlow, Cowp. 24. Nuncomar v. Burdett, *Id.* 158. Engliſh v. Cox, *Id.* 322.

(*f*) Pray v. Edie, 1 Term Rep. 267. Fitzgerald v. Whitmore, *Id.* 362. Doe v. Alſton, *Id.* 491. The practice of the court of Common Pleas in this reſpect hath not been altogether uniform: the circumſtance of the plaintiff's being abroad, was at one time not thought to be *of itſelf* a ſufficient ground for requiring this ſecurity. Parquot v. Eling, 1 H. Bl. 106. But the contrary was afterwards laid down as a ſettled point to guide the practice of the court in future. Ganesford v. Levy, 2 H. Bl. 118. It ſeems now, however, that the point is not ſo entirely ſettled, as not to admit of being departed from, where an adherence to it would induce ſerious hardſhips or inconveniencies. Henſchen v. Garves, *Id.* 383.——The defendant before he makes this application, muſt put in bail. De la Preuve v. the Duc de Biron, 4 Term Rep. 697.

With reſpect to requiring ſecurity for coſts from a foreigner (plaintiff) there ſeemeth to be ſtill a difference of practice in the different courts of *Weſtminſter-hall*. We have ſeen that the courts of Common Pleas and King's Bench, will oblige a foreigner *reſident abroad* to give ſecurity for the coſts. But the court of Exchequer have refuſed to inſiſt upon ſuch ſecurity, not indeed becauſe they thought the rule in itſelf improper, but becauſe there was no precedent in that court to warrant it, and therefore to adopt it in the particular caſe before them would be to give it a retroſpective operation. and conſequently would be unjuſt.

Vide ſupra, vol. 2. 57. Beckman v. Legrainge, Anſtr. 359.

The court of Common Pleas have conſidered the agreeing to take ſhort notice of trial as a waiver of the defendant's opportunity to make an application for ſuch ſecurity.

Michel v. Pareſki, 2 H. Bl 593.

But, where the plaintiff had become bankrupt and left the kingdom, the court of King's Bench required ſecurity, though the parties were at iſſue, and the plaintiff had given notice of trial for the ſittings after the term in which the application was made. And that court has holden (*a*), that if a non-reſident foreigner ſue two defendants, and one of them put in bail, that one may require ſecurity for coſts from the plaintiff, without putting in bail for the other defendant.

Barker v. Hargreaves, 6 Term Rep. 597.

(*a*) Carr. v. Shaw, *Id.* 496.

The party ſucceeding on a ſecond trial, which was granted becauſe a ſpecial caſe reſerved on the firſt was imperfectly ſtated, is not entitled to the coſts of the firſt trial. But (*b*), where the defendant in ſuch a caſe gave

Smith v. Haile, 6 Term Rep. 71.

(*b*) Booth v.

Atherton, *Id.* 144. gave the plaintiff a *cognovit* without going to trial a ſecond time, it was holden, that he was liable to pay the coſts of the former trial.

Lickbarrow v. Maſon, 6 Term Rep. 131. Where a *venire de novo* is awarded, the party ſucceeding is only entitled to the coſts of the ſecond trial.

Hil. 35 G. 3. By a rule of the court of King's Bench, the iſſue money ſhall remain to be taxed as part of the coſts in the cauſe.

(I) Coſts, how aſſeſſed or taxed.

(*After the making*) Formerly, if theſe words were omitted, or even miſplaced, in the judgment, it was error. But this is now helped by 16 & 17 Car. 2. c. 8. § 1., and 4 Ann. c. 16. § 2. And in action of debt, if there be no writ of enquiry to aſcertain the damages ſuſtained by the detention of the debt, the damages aſſeſſed by the court, as well as the coſts of the ſuit, ſhould, in the judgment, be ſtated to be given *with the aſſent* of the plaintiff; but the omiſſion of ſuch ſtatement, it ſeemeth, is aided by 16 and 17 Car. 2. or, at leaſt, may be ſupplied at any time. Tully v. Sparkes, 2 Str. 868. 2 Ld. Raym. 1570. 1 Barnard. 325. 335. S. C. So, if a manifeſt miſcomputation, or any plain miſtake in figures, ſhould appear on the face of the record with regard to coſts, it may be amended. 4 Burr. 1989. 1 Roll. Abr. 205. pl. 5.

7 Mod. 129. Hullock, 622. It is ſaid, that if a judgment be entered up with a blank for the coſts, they cannot be afterwards inſerted.

Green v. Cole, 2 Saund. 257. If the jury aſſeſs coſts in a caſe, wherein none are recoverable by law, the judgment ſhould be entered *nullo habito reſpectu* to ſuch coſts.

Stores v. Tong, Ca Pr. C. P. 7. The jury ought *ex officio* to give coſts in an action in which coſts are recoverable by law; but if they omit or refuſe to do ſo, the court will, on motion, order coſts to be taxed, and indorſed on the *poſtea*.

Ward v. Snell, 1 H. Bl. 10. *Vide* 1 Lill. Abr. 472.

Grymſton v. Reyner, Cro. Eliz. 527. Mo. 708. S. C. Jacob v. Miles, Cro. Jac. 343. In an action of *aſſumpſit*, the plaintiff declared upon two ſeveral promiſes, to which there was the general iſſue, and at the trial a verdict was found for the plaintiff, and ſeveral damages were aſſeſſed with entire coſts. A writ of error being brought, the judgment was reverſed as to the one promiſe, and affirmed as to the other, and the *entire* coſts. S. P.

Wortley v. Rayner, Dougl. 637. Barnes, 120. Say. Rep. 48. 1 Burr. 651. 5 Burr. 2686. The huſband cannot have execution for the coſts on a plea of coverture found for the wife defendant, without a *ſcire facias*.

A demand of coſts muſt be made at the time of ſerving the rule of court under which they are taxed; and upon an affidavit that the coſts were ſo demanded either by the party entitled to receive them, or by ſome perſon by him duly authorized, and that payment was refuſed, an attachment will be granted in the firſt inſtance, and may be moved for the laſt day of term.

Hullock, 624. 2 Term Rep. 157. The coſts allowed to the plaintiff after obtaining judgment in an action on a ſimple contract, or for a debt certain, only extend to the time of ſigning final judgment. In ſuch caſe, the expences of levying, together with all other incidental charges of the execution, muſt be paid by the plaintiff, and not by the defendant; for the ſheriff can levy on the defendant only the ſum given by the judgment. But if the judgment be for a penalty, the plaintiff has a right to receive the whole of his debt, independent on the

he expences of the execution, which, in that caſe, muſt be ſuſtained by he defendant. A defendant, if he prevail, can only levy the amount of is coſts, and that, at his own expence.

It was anciently the practice for the court, or one of the judges, to tax he coſts and make a ſpecial rule for their payment; upon ſervice of which, nd refuſal of payment, an attachment iſſued. But, at this day, coſts are axed in the King's Bench, by the maſter, and in the Common Pleas, y one of the prothonotaries, upon the attornies or agents of the parties ttending them at their reſpective offices for that purpoſe. After the axation, the maſter, or the prothonotary, marks the amount of the coſts n the *poſtea*, inquiſition, or demurrer-roll, as the caſe may be, when inal judgment is ſaid to be ſigned, and execution may be immediately aken out. Hullock, 625. Gilb. H.C.P. 261, 266.

Where any extraordinary expences have been incurred in a cauſe, and generally in country cauſes, an affidavit (in which it is cuſtomary for the arty entitled to the coſts and his attorney to join) ſtating the particulars f ſuch extra expences, is requiſite to enable the proper officer to make an dequate taxation. And it is ſaid, that more than ordinary coſts ought ot to be taxed, until the attornies on both ſides have been heard for their lients, and an affidavit of the coſts produced, except where one of the ttornies, having had notice of the intended taxation, neglects to attend. It is uſual to give ſuch notice to the attorney or agent of the party liable to he coſts; but as this is a matter of courteſy, and not of right, it may be rudent, in ſome caſes, to take out a rule from the office of the clerk of he rules in the King's Bench, or of the ſecondary in the Common Pleas, o be preſent at the taxation, which, when ſerved on the oppoſite party, renders it incumbent upon him to give notice. Hullock, 625. 1 Lill. Abr. 470. 1.

In the taxation of coſts, no allowance can be made for the contingent loſſes, which the witneſſes may have ſuffered by obeying the *ſubpœna*. Thelluſſon v. Staples, Dougl 438.

An incloſure act directed, that the parties who were diſſatisfied with the determination of the commiſſioners might bring actions to try their rights, and that if the verdict ſhould be in favour of the commiſſioners' determination, the coſts ſhould be borne by the plaintiff, and if againſt ſuch determination, then by the proprietors at large. An action being brought by a proprietor, who claimed nine diſtinct rights, and recovered for three only, it was holden, that he ſhould have his coſts only on thoſe iſſues that were found for him, and that on the others the defendant ſhould have his coſts. Braithwaite v. Bradford, 6 Term Rep. 599.

(K) Of Coſts in a feigned Iſſue.

WHEN a feigned iſſue is directed by a court of law, whether in a civil or criminal proceeding, the coſts always abide the event of the verdict. But when a feigned iſſue is ordered by a court of equity, the coſts do not follow the verdict, as a matter of courſe; but the finding of the jury is returned to the court that ordered it, where the coſts are diſcretionary. Still v. Rogers, 1 Lill. Pr Reg. 344. Palmer v. Williams, Barnes, 130. Rex v. Phillips, 1 Wilſ. 261. Herbert v. Wilkinſon, *Id.* 324. Say. Rep. 24. S. C. but in the caſe of Hoſkins v. Lord Berkeley, 4 Term Rep. 402. the court of King's Bench ſtrongly intimated an opinion, that as feigned iſſues were only granted with leave of the court, it would be prudent in future, when they permitted ſuch iſſues to be tried, to compel the parties to conſent, that the coſts ſhould be in the diſcretion of the court.

Where

(d) Rex v. Nicholls, Say. Rep. 229. Thomas v. Powell, 1 Burr. 603 Say. Costs, 144. S. C.

Where the issue is ordered by a court of law, on a rule for an information (*d*), or motion for an attachment (*e*), the costs of the original rule, or motion, do not in general follow the verdict, but only the costs of the feigned issue; which costs are to be reckoned, from the time when the feigned issue was first ordered and agreed to (*a*). Yet when it was ordered, by the consent rule, that the costs should abide the event of the issue, the court directed the *whole* costs to be paid under it (*b*).

(e) Rex v. Griffith, Say. Rep. 253. (a) Thomas v. Powell, 1 Burr. 603. (b) Oldknow v. Wainwright, 2 Burr. 1017. Tidd's Pr. 672-3.

Tempest v. Metcalf, 1 Wilf. 331.

If any one of several issues be found for the plaintiff, he must have his costs.

Williams v. Attorney-General, Burton's Pr. Exch. 248.

Where the crown is party, the plaintiff shall not pay costs, though he submit to a *nonpros*.

Anon. 2 P. Wms. 68.

If an issue be directed out of Chancery to be tried, and the plaintiff give notice of trial, and do not countermand it in time; upon motion, the court of Chancery will give costs, and not put the defendant to move the court of law where the issue is to be tried.

COVENANT.

(M) Of the Pleading.

(A) Of the Manner, and by what Words an express Covenant is created.

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(*The law*) 1 Burr. 290. Dougl. 766. A party may also covenant in respect of past transactions. Plowd 308. So. he may covenant as to time *present*, for it is the constant language of deed of alienation, that the grantor has lawful power to convey. 3 Wooddes. 86.

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(*If there are articles*) 2 Ld. Raym. 1242 1419. 2 Bl. Rep. 820.

Express covenants are obligatory upon the covenantor in every event, and in every state and condition of the thing which is the subject of the covenant. And herein they differ from those which are implied by operation of law: for when the law creates a duty, and the party is disabled to perform it without any default in him, the law will excuse him: but, when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, notwithstanding an accident by inevitable necessity. Hence, a lessee who covenants generally to pay rent, or to repair, is bound to the performance of his covenant, notwithstanding the premises may be destroyed by an accidental fire. So, on a covenant to build

Bullock v. Dommitt, 6 Term Rep. 650.

build a bridge in a substantial manner, and to keep it in repair during a certain time, the party is bound to rebuild the bridge though broken down by an extraordinary flood. Brecknock, &c. Navigation Co. v. Pritchard *Id.* 750.

And with respect to *express* covenants equity follows the law, and where no equitable circumstances arise, will not relieve from them, on account of the destruction of the value of the subject by a subsequent accident. In equity, therefore, as well as at law, a tenant covenanting to repair, damage by fire only excepted, continues liable to the payment of the rent, notwithstanding the premises are destroyed by fire: for the equity of the parties is equal, and therefore the rule of law must prevail. Hare v. Groves, Anstr. 687.

(B) Of Covenants Created by Implication of Law. Page 530

(*As if a Man*) But, in such case, the eviction must be by one who hath a title, though it is otherwise, it hath been said, where there is an express covenant 2 Leon. 104. Cro. El. 214. 2 Brownl. 261, though it seems now to be settled, that an express covenant in the most general terms shall be restrained to lawful interruptions, 3 Term Rep 584. Vaugh. 118 The distinction between *implied* covenants by operation of law, and *express* covenants, is, that *express* covenants are taken more strictly. *Per* Ld. Mansfield. 3 Burr. 1639. Hence, an express covenant to pay the rent is binding on the tenant, at law, in every rent, and in every state and condition of the premises. Paradine v. Jane, All. 27. Monk v. Cowp. 2 Str. 763. Belfour v. Weston, 1 Term Rep. 312. Yet if, in such case, the thing demised could not be enjoyed, a court of equity would give relief Brown v. Quilter, Ambl. 1620.

(C) Where an Action of Covenant is the proper Remedy. Page 532

(*So if A. recovers*) But if articles of partnership under seal be dissolved, and a balance struck, and an express promise be made to pay it, an *assumpsit* may be brought. Foster v. Allanson, 2 Term Rep. 479. So, if there be an express promise to pay a balance struck, though the articles, containing a covenant to account, are subsisting Moravia v. Levy, *Id.* 483. n.

Where the lessor reserved in a lease a right to enter and cut timber, making reasonable satisfaction to the lessee for any damage occasioned thereby; it was holden, that covenant would not lie by the lessee for a wrongful act of cutting down by a third person, without the consent or authority of the lessor, though such act were afterwards countenanced by the lessor. Griffiths v. Brome, 6 Term Rep. 66.

(D) Where there are several Parties: And herein of joint Covenants.

Where a covenant is joint and several, in an action against one only, the breach may be assigned in the neglect of both. Lilly v. Hedges, 1 Str. 553. 8 Mod. 166. S. C.

If two joint lessees covenant jointly and severally, and one of them die, such covenant will be binding upon his executors, notwithstanding he should die before the commencement of the term, and the whole interest must necessarily survive to his co-lessee. Enys v. Donnithorne, 2 Burr. 1197.

If

Duke of Northumberland v. Errington, 5 Term Rep. 522.

If leſſees covenant jointly and ſeverally at the beginning of their covenants, theſe words extend to all their ſubſequent covenants, notwithſtanding the intervention of covenants on the part of the leſſor.

(E) Of Covenants Real and Perſonal: And herein, of the Perſons to whom they ſhall extend; and herein.

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(*In every caſe*) But an executor, it is ſaid, is not chargeable upon a covenant *implied*. Swan v. Scarles, Moor, 74. *Sed qu. & vide* Porter v. Swetnam, Styl. 407. Gilb. Covenants, 327.

Touchſt. 178. Dy. 257.

In general, the heir ſhall not be charged, unleſs expreſsly named. If indeed the leſſee be ouſted by the heir himſelf, it ſeems an action of covenant will lie againſt him; though not if he be ouſted by an elder title from the leſſor.

Barber v. Fox, 2 Saund. 136.

Hence, it is neceſſary in an *aſſumpſit* againſt the heir upon a promiſe to pay money due upon the anceſtor's bond, to aver that the heirs of the obligor were bound.

Brudnell v. Roberts, 2 Wilſ. 143.

But if the leſſor were only tenant for life, a leaſe for years made by him, abſolutely determines upon his death, and the heir cannot take advantage of the covenants in the demiſe.

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(*But if B. had covenanted*) And therefore, it ſhould ſeem that the covenantee would be entitled in equity to a decree for a ſpecifick performance of a covenant to build. City of London v. Naſh, 3 Atk. 515. 1 Vez. 12. But ſee the caſe of Lucas v. Commerford, 3 Br. Ch. Rep. 166.

Bally v. Wells, 3 Wilſ. 25.

If a leſſee of tithes covenants for him and his aſſigns, that he will not let any of the farmers in the pariſh have any part of the tithes, this covenant runs with the tithes, and binds the aſſignee.

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(*If a Man leaſes*) Q. the form of action?

But this caſe was over-ruled in Eaton v. Jaques, Dougl. 455., where it was determined, that covenant will not lie againſt a mortgagee of a term, though the mortgage be forfeited, *till he takes actual poſſeſſion*. It is otherwiſe indeed in the caſe of an aſſignee under an abſolute indefeaſible aſſignment of the whole intereſt in the term; for there actual entry is not neceſſary to make him chargeable. Walker v. Reeves, *id.* 461. n.

Tatem v. Chaplin, 2 H. Bl. 133.

A Covenant in a leaſe, that the leſſee, his executors and adminiſtrators, *ſhall conſtantly reſide upon the demiſed premiſes, during the demiſe*, is binding upon the aſſignee of the leſſee, though he be not named; for it is *quodam modo* annexed and appurtenant to the thing demiſed.

Brewer v. Hill, Anſtr. 413.

A leſſee of tythes covenanted for himſelf and his aſſigns with the owner of lands in the pariſh not to take tythes in kind from him or his tenants, but to accept a reaſonable compoſition not exceeding 3*s.* 6*d. per* acre. An under-leſſee is not an aſſignee within the meaning of this covenant, for this covenant, not being made with the leſſor, does not run with the tythes, but is merely perſonal.

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(*So if a Man*) But *debt* for the rent in ſuch caſe would not lie. *Vide* the caſes *ſupra*, and 1 Freem. 336., Cro. Ja. 309. Wadham v. Marlow, B. R. M. 1784. And if the covenant be merely implied by law, the leſſor's acceptance of the aſſignee will entirely diſcharge the leſſee. 1 Sid. 447. Cro. Ja. 523.

(*In*

(*Alſo, an Aſſignee,*) In this caſe of Knight and Freeman, the aſſignment was fraudulent, and the fraud was averred, and upon that ground the deciſion proceeded. But in a later caſe, this circumſtance, it is ſaid, would not alter the caſe at all, but that immediately upon the aſſignment, the aſſignee is diſcharged. Lekeux v. Naſh, 2 Str. 1221. Bull. *Ni. Pri.* 159. Be the rule of law upon this point what it may, it ſeems to be now ſettled, that courts of equity will compel an aſſignee of a term to account for the rent the whole time he enjoyed the land. Treacle v. Coke, 1 Vern. 165. Whether they will, in order to ſecure the future rents under any circumſtances, reſtrain an aſſignee from aſſigning to a beggar, or inſolvent perſon, was conſidered, but not determined, in the caſe of Philpot v. Hoare, 2 Atk. 219. Ambl. 480. S. C. See this point examined in Fonbl. Eq. Tr. 351. n.

Although all the eſtate and intereſt of a leſſee be diveſted out of him and aſſigned by act of parliament, yet without expreſs words of diſcharge, he is ſtill liable upon his covenant for the rent. Hornby v. Houlditch, Andr. 40. 1 Term Rep. 93. n. S. C. Hence an aſſignment under a commiſſion of bankrupt will not diſcharge the leſſee from his expreſs covenant. Mills v. Auriol, 1 H. Bl. 433. affirmed in error, 4 Term Rep. 94.

(*As an Aſſignee*) But in order to make a covenant run with the land, it is not ſufficient that it be concerning the land; there muſt alſo be a privity of eſtate between the covenanting parties. If therefore a mortgagor and mortgagee of a term make a leaſe, in which the covenants for the rent and repairs are with the mortgagor and his aſſigns, the aſſignee of the mortgagee cannot maintain an action for the breach of theſe covenants, becauſe they are collateral to his aſſignor's intereſt in the land, and therefore do not run with it. Webb v. Ruſſell, 3 Term Rep. 393. But ſuch action may be maintained by the mortgagor himſelf. Stokes v. Ruſſell, *id.* 678., affirmed in error, 1 H. Bl. 562.

(F) How Covenants are to be conſtrued. Page 539

But where in a building and repairing leaſe, the leſſee covenanted to lay out a given ſum in erecting and rebuilding meſſuages or tenements, or ſome other buildings upon the ground and premiſes; and from time to time, &c. all and ſingular the ſaid meſſuages and tenements ſo to be erected, with all ſuch other houſes, edifices, &c. as ſhould at any time or times thereafter be erected, &c. to repair, &c.; and the ſaid demiſed premiſes, with all ſuch other houſes, &c. ſo well repaired, &c. at the end, &c. of the term to deliver up, &c. it was holden, that the covenant to repair extended only to the new erections. Lant v. Norris, 1 Burr. 287.

In a demiſe of corn-mills, there was a covenant on the part of the leſſor, that "if the leſſee, his executors, &c. ſhould before the expiration of the term, be minded to renew, then, upon application, &c. the leſſor, his heirs or aſſigns, ſhould grant ſuch further leaſe, as ſhould by the leſſee, his executors, &c. be deſired, without any fine to be demanded therefore, *and under the ſame rents and covenants only* as in the then leaſe;" and the queſtion was, Whether there muſt be a covenant for renewal again in the ſecond leaſe? The court of Exchequer were of opinion, that under the words *the ſame rents and covenants*, the covenant for renewal ought to be inſerted; and on appeal to the Houſe of Lords, their decree was affirmed. Bridges v. Hitchcock, 1 Br. P. C. 522.

Again, in a leaſe for three lives, the leſſor covenanted, that he, his heirs, &c. ſhould and would (in conſideration of a certain ſum to be paid to him, &c. at *Crewe Hall*, or at the place where the ſaid hall then ſtood, in the name of a fine, for adding one life to the remaining lives therein before mentioned) execute one or more leaſe or leaſes, *under the ſame rents and covenants* which were expreſſed in the then leaſe, *and ſo to continue* Furnival v. Crewe 3 Atk. 83.

tinue the renewing of such leaſe or leaſes to the leſſee, or his aſſigns, paying as aforeſaid to the leſſor, his heirs or aſſigns, the ſum before mentioned for every life ſo added or renewed from time to time. Lord *Hardwicke* held this to be a covenant of perpetual renewal, and decreed a new leaſe to be granted to the aſſignee of the original leſſee with a covenant inſerted in it to that effect.

Cook v. Booth, Cowp. 819

Where the terms of a covenant are plain and unambiguous, a court of law cannot admit of evidence *debors*, to explain the intent of the parties

Again, in ſuch a leaſe, the leſſor had covenanted, that if the leſſee, his heirs, *&c.* ſhould be minded upon the falling in of any of the lives, to ſurrender the demiſe and take a new leaſe; and thereby add a new life to the then two in being, in lieu of the life ſo dying, that he the leſſor, his heirs, *&c.* upon payment of ſo much for every life ſo to be added, in lieu of the life of every of them ſo dying, would grant a new leaſe for the lives of the two perſons named in the former leaſe, and of ſuch other perſon, as the leſſee, his heirs, *&c.* ſhould appoint in lieu of the perſon named in the preceding leaſe, as the ſame ſhould reſpectively die, *under the ſame rents and covenants. There had been ſucceſſive renewals from the time of the firſt leaſe; and in every leaſe the like covenant for renewal had been inſerted.* The court of King's Bench held, that the leſſors *by their own acts* conſtrued this to be a covenant for perpetual renewal.

though the conduct of one of them may be a fraud upon the covenant. Clifton v. Walmeſley, 5 Term Rep. 564.

Ruſſell v. Darwin, 2 Br. Ch. Rep. 639. n.

But where in a leaſe for years determinable upon lives, the covenant was, that the leſſor would upon the death of any of the appointees (by name) add a new third life upon payment of 200*l.* within ſix months; or upon the death of two of them (by name) within ſix months add two new lives upon payment of 500*l.*; or upon the death of all of them (by name) would, upon payment of 1150*l.* make a new leaſe or grant for any three new lives to be nominated and appointed by the leſſee, his executors, *&c.* for the like term as was thereby demiſed, *at and under the like rent, covenants, and agreements therein contained;* Lord *Camden* was of opinion, that the leſſors were not under any obligation to grant any further leaſe than for three new lives only, and that the leſſee was not entitled to have any covenants inſerted for any further renewal; the words of the covenant not obliging the leſſors to grant a new leaſe, but upon the death of ſome one of the perſons named in that leaſe; and they being all dead, no further renewal could be claimed.

Tritton v. Foote, 2 Br. Ch. Rep. 636.

So, under a covenant in a leaſe for twenty-one years, that the leſſor, his executors, *&c.* would, at the end and determination of the ſaid term of twenty-one years, execute a new leaſe of the demiſed premiſes, for the further term of twenty-one years, thereby demiſed, *ſubject to the ſame rents, and purſuant to the ſame exceptions, covenants, reſervations, conditions, and agreements in all reſpects, as were in and by the then granted indenture of leaſe mentioned and expreſſed*, in caſe the leſſee, his executors, *&c.* ſhould deſire the ſame; the leſſee, his executors, &c. firſt giving twelve months notice in writing to the leſſor, his heirs or aſſigns, of his or their deſiring ſuch further term of years as aforeſaid; Lord *Thurlowe* declared the leſſee entitled to a leaſe for ſeven years only, it appearing that the leſſee himſelf had put that conſtruction upon it.

(G) Where

(G) Where the Principal, and all Auxiliary Covenants ſhall be ſaid to be void and extinguiſhed.

IF an indenture of apprenticeſhip be void as contrary to the ſtatute of 5 *Eliz.*, all covenants entered into by a third perſon for ſecuring the performance of that indenture are void alſo. Guppy v. Jennings, Anſtr. 256.

(I) Where the Breach ſhall be ſaid to be well aſſigned.

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(*But now by the* 8 & 9 *W.* 3.) It is now ſettled, that it is compulſory on a plaintiff to proceed in the manner pointed out by the ſtatute in caſes within the proviſions of this ſection,—that he muſt aſſign the breach of ſuch covenants as he proceeds to recover a ſatisfaction for: and if the defendant plead to iſſue, and the cau e go to a jury for trial, the jury, upon the trial of ſuch cauſe, muſt aſſeſs damages for ſuch of the breaches aſſigned, as the plaintiff upon the trial of the iſſues ſhall prove to have been broken. If this be not done, a *venire facias de novo* will be awarded. Drage v. Brand, 2 Wilſ 377. Hardy v. Bern, 5 Term Rep. 540 636. So, if judgment go by default, he cannot enter up judgment for the whole penalty, as he might have done at common law. Roles v. Roſewell, 5 Term Rep. 538. Goodwin v. Crowle, Cowp. 357.——Whether an obligee in a bond of this kind may recover damages beyond the amount of the penalty, is a point which hath not yet received a final adjudication. See White v. Sealy, Dougl. 49. Brangwin v. Perrot, 2 Bl. Rep. 1190. Wilde v. Clarkſon, 6 Term Rep. 303, that he cannot. But Lord Lonſdale v. Church, 2 Term Rep. 388. *contr.*

In an action on a covenant to pay money on one of two contingencies, which ſhall firſt happen, if the plaintiff ſhew that one has happened, he need not aver it to be the firſt. Loggin v. Comitem Orrery, 1 Ld. Raym. 133.

In a declaration in this ſpecies of action it is not merely unneceſſary, but improper, to ſtate the whole of the deed. So much only as will entitle the plaintiff to his action muſt be ſhewn; and that part need not be literally recited, but may be ſet forth according to its ſubſtance and effect; though it is uſual and adviſeable to deviate as little as may be from the expreſſions in the inſtrument. Dougl. 667. Cowp. 665. 727.

(K) Where the Performance ſhall be ſaid to be well ſet forth and pleaded.

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(*If a Man is bound*) See too Sayre v. Minns, Cowp. 578.

On a covenant "to permit the plaintiff in the laſt year of the term to ſow clover among the barley and oats ſown by the defendant," the breach aſſigned was, "that the defendant ſowed barley and oats *without giving notice* to the plaintiff;" to which the defendant pleaded, "that he did not prevent the plaintiff from ſowing as much clover as he thought fit;" and adjudged a good plea. Hughes v. Richman, Cowp. 125.

(L) What

Page 551. (L) What may be pleaded in Bar to the Action.

(*As, where a Writing*) *B.* brings an action of debt upon the bill, but makes no averment in his declaration that he had conveyed the land, or tendered any conveynace of it; it was holden to be well brought notwithstanding, for both parties sealed the deed; and if the plaintiff had not conveyed the land to the defendant, he might have had an action against the plaintiff on the agreement contained in the deed, and so each party had mutual remedy against the other: but it might have been otherwise, if the specialty had been the words of the defendant only, and not the words of both parties by way of agreement, as in the case stated.

Howlett v. Strickland. Cowp. 56.

Unliquidated damages arising from a reciprocal breach of covenant, cannot be pleaded by way of *set-off*.

Turner v. Goodwin, 10 Mod. 190. 2 Barnard. 308. Jones v. Barkley, Dougl. 684 Kingston v. Preston, *id.* 689. Gooddisson v. Nunn, 4 Term Rep. 761. And where mutual covenants go to the whole of the consideration on each side, they are mutually precedent conditions. Boone v. Eyre, cited in 1 H. Bl. 273. Duke of St. Alban's v. Shore, *id.* 270.

But where the covenants are dependent, no action will lie by the one party against the other, unless he have performed, or offered to perform his covenant; the performance of the one being a condition precedent to the performance of the other: therefore, where two acts are to be done at the same time, neither party can maintain an action without shewing a performance, or offer to perform on his part.

Robards v. Stoker, Palm. 110. In Russell v. Russell, 3 Lev. 189. it is said to be no plea, unless executed on both parts.

Accord with satisfaction by deed, is a good plea in discharge of covenant, as well before breach as after; because it is an action merely personal; in which only damages shall be recovered, and it enures as a release of the covenant.

Co. Entr. 117. However, a variation by parol, of the terms of an agreement under seal, can avail neither plaintiff nor defendant at law, though such new dispensation may be a ground for resorting to a court of equity. Littler v. Holland, 3 Term Rep 590.

So, *accord with satisfaction by parol*, made after the breach, is a good plea, the defendant alleging that the terms of the agreement were duly complied with on his part.

(M) Of the Pleadings.

Campbell Jones, 6 Term Rep. 570

A. in consideration of 250*l.* paid by *B.*, and of the farther sum of 25[illegible] to be paid, &c., covenanted that he would, with all possible expedition instruct *B.* in a certain mode of bleaching linen, for which he had obtained a patent; and *B.* covenanted, that he would on or before a certain day or sooner, if *A.* should before that time have instructed him, &c. pay the farther sum of 250*l.* It was holden, that *G.* might sue *B.* for the 25[illegible] without averring that he had taught *B.* the mode of bleaching linen, &c. the covenants of the parties being independent covenants.

Porter v. Shephard, 6 Term Rep. 665.

In a lease for seven years containing the usual covenants, that the lessee should pay the rent, keep the premises in repair, &c. there was a proviso that the lessee might determine the term at the end of the first three [illegible]

five years, giving six months previous notice; and that then from and after the expiration of that notice, and payment of all rents and duties to be paid by the lessee, and performance of all his covenants until the end of the three or five years, the indenture should cease and be utterly void. To an action brought for the non-payment of the rent, the defendant pleaded as to the rent for part of the time, nothing in arrear; and as to the residue, that before the end of the first three years, he, under the above proviso, gave notice to the lessor of his intention to quit, which notice was accepted, and that at the expiration of the notice he gave up the possession. As to the first part of the plea, the plaintiff took issue, which was found for the defendant; and as to the other part he replied, that the defendant did not pay all rent and arrears of rent and duties on the tenant's part to be paid, *&c.* and perform all the covenants in the indenture on his part according to the proviso, until the expiration of the first three years. On demurrer to this part of the replication, it was holden, that the payment of rent and performance of the other covenants are conditions precedent to the lessee's determining the term at the end of the first three years, and that his merely giving six months notice, expiring with the first three years, was not sufficient for that purpose.

A. covenants to build a house for *B.* and finish it on or before a certain day, in consideration of a sum of money which *B.* covenants to pay *A.* by instalments as the building shall proceed. The finishing of the house is not a condition precedent to the paying of the money, but the covenants are independent. *A.* therefore may maintain an action against *B.* for the whole sum, though the building be not finished by the time appointed. Terry v. Duntze, 2 H. Bl. 389.

By articles of co-partnership the plaintiff agreed to take the defendant as a partner, and to give him half the interest in the lease of the house, to commence *from* and *after* the 29th of *September*. The defendant covenanted to pay 300*l.* *on* or *before* that day, as a premium to be admitted as a partner. Upon non-payment of the money at the day, the plaintiff may sue, averring his readiness to take the defendant as partner, without executing or tendering articles of co-partnership, or a conveyance of the lease. Walker v. Harris, Anstr. 249.

In covenant for quiet enjoyment the declaration stated, that before the demise to the plaintiff the defendant had made a demise to another person, which was then subsisting; that in order to get into possession, the plaintiff brought an ejectment, but was non-suited, on account of that prior demise; and that he had never been in possession. The defendant pleaded, that for the first half year of the plaintiff's term, the plaintiff might have enjoyed, *&c.* but that for non-payment of the rent for twenty-one days after that half-year, the defendant had a right to re-enter according to a proviso in the lease, and that he did re-enter, *&c.* This plea was holden to be bad, as being no answer to the plaintiff's demand. Ludwell v. Newman, 6 Term Rep. 458.

Courts and their Juriſdiction in general.

(B) Of the Judges, and Perſons exerciſing a Juriſdiction.

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(*All judges*) He was anciently made by patent alſo: the alteration took place under E. 1. when his title was changed from *ſummus* to *capitalis juſticiarius*. *Ibid.* The chief and other barons of the Exchequer were created in Sir E. Coke's time, *quamdiu ſe bene geſſerint*. *Id.* 117.

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(*By the* 33 *H.* 8. *cap.* 24.) Whereby judges are enabled to act as judges of *oyer* and *terminer* or gaol-delivery in their own counties, which they were incapable of doing by the ſt. 8. R. 2. c. 2.

(C) What determines their Juriſdiction and Authority.

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(*The authority of juſtices*) Bro. Commiſſion 10., ſaith that it is not determined, unleſs proclamation is made of the coming of the King's Bench. But ſee 2 Hawk. P. C. c. 3. § 11.

(D) Of their Diviſion, and the Subordination of one Court to another: And herein,

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(*If a borough*) This caſe is erroneouſly reported—the claim was allowed.

(*If a ſcholar*) The like determination, in the caſe of a viſitor, becauſe he cannot compel a ſpecifick performance. Cowp. 378. So, where a college are to act in a truſt. 1 Vez. 462.

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(*As they ſhall*) 3 Leo. 149. But ſee Bendl. 233, 234. Whoper *alias* Hooper v. Harewood, an attorney of C. P. for battery, conuſance granted to the Biſhop of Bath and Wells.

(*As to the manner*) Where cogniſance of pleas is granted by act of parliament, it is unneceſſary to ſhew that the charter hath at any time before been allowed by the king's writ, or any of his ſuperior courts. 2 Wilſ. 412.—Cogniſance of pleas cannot be claimed by preſcription. Co. Litt. 114. b. 1 Salk. 184. But ſee 4 Inſt. 220.

(*But a plea*) *Vide ſupra* tit. *Abatement* C. the authorities there cited.

(*Inferior Courts*) Where the ſtile of a court ſhall be helped by intendment, ſee Gibbons v. Roberts, 1 Salk 265. Where a ſheriff is empowered by a private act of parliament to take an inquiſition of the value of lands, giving notice to the owners, the notice muſt appear on the back of the inquiſition, to ſhew that he hath a juriſdiction, elſe all the proceedings will be quaſhed. Rex v. Mayor, &c. of *Liverpool*, 4 Burr. 2244.

2 Mod. 195. Lord Raym. 80. 1 Wilſ. 316. 2 Wilſ. 5. Cowp. 20.—Greater indulgence hath of late years been ſhewn to inferior courts, and the preſumption hath rather been in favour of their juriſdiction. In a juſtification under the proceſs of an inferior court it is ſufficient to ſhew that a plaint was levied for a cauſe of action ariſing within the juriſdiction, without ſetting it forth at length, or alleging that the defendant became indebted there. Cowp. 20. 3 Term Rep. 185.

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(*Therefore if an action*) See too 1 Lev. 50. 96. 137 156. 2 Lev. 87. 1 Saund. 73. Ld. Raym. 1310. 2 Wilſ. 16. Cowp. 20. Freem. 321. 1 Term Rep. 151.

(E) Wh

(E) What is incidental to all Courts in general.

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(*Every Court*) For contempts in the face of the court, courts not of record may commit.

Court of Parliament.

(D) Of Elections: And herein,

3. Of the Duty of Returning Officers, and the Remedies againſt them, and herein of the Mode of proceeding upon complaint of undue Elections.

(A) Of the Original and Antiquity of Parliaments.

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(*The baronies*) The feudal peerage was originally territorial; not attached to the perſon, but to the poſſeſſion of the feudal eſtate. "The firſt form of the creation of an earl," according to the author of the Eſſays on *Britiſh Antiquities*, quoted by Sir *J. Dalrymple* in his Eſſay on Feudal Property, c. 8, "was that of a grant of an office over a county. When by the multiplication of earls, the earldoms were become more numerous than the counties, the form was to ereſt a particular eſtate into an earldom or county, which was all that was neceſſary to beſtow upon the proprietor the territorial dignity. Afterwards, when the notion of perſonal honour crept in, certain ſolemnities were uſed at the creation of a peer, ſuch as girding him with a ſword, covering his head with a cap of honour and circle of gold, all of them marks of perſonal reſpect. And now, both in *England* and *Scotland*, the territorial dignity being quite worn out, an earl's patent is ſo framed, as to import a mere perſonal dignity, without relation either to office or to land." The caſtle of *Arundel*, however, ſtill confers an earldom on its proprietor: the act of 3 Car. 1. c. 10., for annexing the caſtle and honour of *Arundel* unalienably to the title of Earl of *Arundel* in the heirs of *Thomas* then Earl of *Arundel*, in its preamble, ſpeaks of the title as real and local. The barony of *Berkeley* of *Berkeley-caſtle* is alſo ſaid to be territorial.

In King *John*'s great charter it is declared, that no ſcutage or aid ſhall be levied on the ſubject *niſi per commune concilium regni noſtri*, except in the three caſes in which a feudal lord was entitled to the aſſiſtance of his vaſſal; namely, on marriage of his daughter, on making his ſon a knight, and to redeem his perſon from captivity; a reſtriction that was declared by the charter to hold good, not only between the king and his tenants, but between every lord and his tenants. In order to aſſemble the *commune concilium regni* to aſſeſs ſuch ſcutages and aids, the king engaged to ſummon all archbiſhops, biſhops, abbots, earls, and greater barons, *ſigillatim per literas*; *præterea*, ſays he, *faciemus ſummoneri in generali per vicecomites, et ballivos noſtros, omnes illos qui de nobis tenent in capite*; a paſſage, that ſeems, beyond all controverſy, to point out the conſtituent members of the great council of the kingdom in thoſe days.

1 Reeves's Hiſt. 209. This proviſion is omitted in Henry the Third's charter.

(B) Of the Perſons of whom it conſiſts.

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(*This auguſt*) Lord Hale thinks that the biſhops ſit in the Houſe of Peers by cuſtom and uſage, and not from their baronial poſſeſſions, a notion which hath been ably controverted by biſhop

Warburton in his *Alliance between Church and State*, 4th edit. 149. but which receives conſiderable ſupport from the reaſoning and authority of the learned editor of Coke upon Littleton. Co. Litt. 13 Ed. 134. b. n. 1.

By the twenty-ſecond and twenty-third articles of the union, ratified by the act of union, the peerage of *Scotland* are to elect ſixteen of their number to ſit in the *Britiſh* houſe of lords; and other not elected peers of *Scotland* are to become peers of the united kingdom, and to have all the privileges of ſuch, except a ſeat in that aſſembly.

Lords Journ. 20th Dec. 1711.

It was reſolved by the houſe, ſoon after the union in the caſe of the Duke of *Hamilton* and *Brandon*, "that no patent of honour granted to any peer "of *Great Britain*, who was a peer of *Scotland*, at the time of the union, "ſhould entitle him to ſit and vote in parliament, or upon the trial of "peers." And the ſame doctrine was adhered to in the following caſe: the Duke of *Queenſberry*'s ſecond ſon was created Earl of *Solway* in *Scotland* when an infant; and afterwards the duke was created Duke of *Dover*, with remainder to ſuch ſecond ſon, and ſat in two parliaments under this creation. But upon his death it was objected, and ſo reſolved by the lords, that the *Scotch* earldom of *Solway* incapacitated the then claimant from taking the dukedom of *Dover* by virtue of ſuch remainder. But theſe reſolutions have been lately over-ruled. The peerage of *Brandon* hath been again claimed, when it was urged, that even ſuppoſing the former deciſions to ſtand, ſtill the patent was not void; that the incapacity to ſit in parliament was only perſonal in the then duke, and his heirs in tail-male were entitled to the peerage of *Brandon*, with all its rights. The matter, however, was taken up in a more general view. For the entry in the lords journals is as follows: "After hearing counſel, as well yeſterday as this day, upon the "petition of *Douglas* Duke of *Hamilton* and *Brandon* to his majeſty, praying a writ of ſummons to parliament by the title of duke of *Brandon*, the "following queſtion was put to the judges: Whether by the twenty-third "article of the act of union, which declares all peers of *Scotland* to be peers "of *Great Britain*, with all the privileges enjoyed by the peers of *England*, except the right and privilege of ſitting in the houſe of lords, and "the privileges depending thereon, the peers of *Scotland* be diſabled from "receiving ſubſequently to the union, a patent of peerage of *Great Britain*, with all the privileges uſually incident thereto? the lord chief baron of the court of Exchequer delivered the unanimous opinion of the "judges preſent upon the ſaid queſtion, that the peers of *Scotland* are not "diſabled from receiving, ſubſequently to the union, a patent of peerage "of *Great Britain*, with all the privileges uſually incident thereto:" whereupon a report was ordered to be preſented to his majeſty, certifying that the ſaid Duke of *Brandon* is entitled to his writ of ſummons.

Printed Caſes of the Lords.

Lords Journ. 6th June 1782.

It was moved to put a ſimilar queſtion to the judges in the year 1711, but the motion was negatived.

In conſequence of this deciſion ſeveral *Scotch* peers were ſoon afterwards created peers of *Great Britain*. But in the year 1708-9 the houſe had come to the following reſolution; "That a peer of *Scotland*, claiming "ſit in the houſe of peers by virtue of a patent paſſed under the great "of *Great Britain* after the union, and who now ſits in the parliament "*Great Britain*, had no right to vote in the election of the ſixteen peers "who are to repreſent the peers of *Scotland* in parliament." And this reſolution ſtanding upon the journals unimpeached, it ſeemed to follow as a conſequence of it, that the ſeat of one of the ſixteen peers as a repreſentative peer, became vacant upon his accepting, or ſucceeding to an ancient ſeat: And therefore, upon the Earl of *Abercorn*'s being created a peer

Lords Journ. 21ſt Jan. 1708-9

Great Britain in the year 1787, the houſe reſolved, "That the Earl of *Abercorn* who was choſen to be of the number of ſixteeen peers, who by the treaty of union are to repreſent the peerage of *Scotland* in parliament, having been created Viſcount *Hamilton*, by letters patent under the great ſeal of *Great Britain*, doth thereby ceaſe to fit in this houſe as a repreſentative of the peerage of *Scotland*." And about this time the houſe ſhewed a ſtrong diſpoſition to adhere to theſe reſolutions. For in the May following it was ordered, "That a copy of the reſolution of *Jan.* 21, 1708-9; be tranſmitted by the clerk of the parliaments to the lord clerk regiſtrar of *Scotland*, with injunction to him to conform thereto." And again in the next year it was reſolved "That it is the opinion of this houſe, that the lord clerk regiſtrar and his deputies, acting at the election of the *Scots* peers, ought to conform to the reſolutions of this houſe, of which they have had notice by order of the houſe." In conſequence of theſe orders the deputies of the lord clerk regiſtrar refuſed to admit the votes of the Duke of *Queenſbury*, Lord *Abercorn*, and other lords in a ſimilar ſituation at the following general election in the year 1790. This refuſal occaſioned an application to the houſe on behalf of the two noble peers above-mentioned, when after a long inveſtigation and conſiderable debate, the houſe was pleaſed to over-rule its former reſolutions, and to reſolve, "That the votes of the Duke of *Queenſberry* and the Earl of *Abercorn*, if duly tendered at the laſt election for electing ſixteen peers of *Scotland*, ought to be counted." And it was afterwards reſolved, "That the tender of the votes of the Duke of *Queenſberry* and the Earl of *Abercorn*, by ſending to the lord chief regiſtrar or his deputies ſigned liſts, together with proper documents of their having qualified themſelves as by law required to vote, was a due and ſufficient tender of their votes at the ſaid election." In purſuance of which reſolutions the votes of theſe noble lords were added to the liſts. Theſe reſolutions were followed by two proteſts, the one of which was ſigned by the Duke of *Leeds* and the Earl of *Kinnoul*, the other, by the Earl of *Lauderdale*. —— The above reſolution of 23d *May* having eſtabliſhed, that the accepting or ſucceeding to an ineleƈtive ſeat, poſterior to the union, did not incapacitate a peer of *Scotland* from voting in the election of the repreſentatives of the *Scottiſh* peerage, the inference which followed from the contrary doƈtrine was neceſſarily done away, and the ſucceſſion to ſuch a ſeat was determined not to vacate the ſeat of a repreſentative peer. A motion, therefore, of Earl *Stanhope*, "That an humble addreſs be preſented to his majeſty, humbly to requeſt that his majeſty will be graciouſly pleaſed to iſſue his royal proclamation for the election of a peer to repreſent the peerage of *Scotland* in the room of the Lord Viſcount *Stormont*, who ſince his election has become Earl of *Manſfield* of *Middleſex*, and has taken his ſeat in the houſe accordingly;" was, after debate, negatived.

At the above election in 1790, Sir *James Sinclair* voted by proxy as Earl of *Caithneſs*, his claim to that dignity not having been allowed, but being then pending. His vote was objected to by the Earls of *Selkirk* and *Lopetown*, who inſiſted, that he had no right to the title he aſſumed; or, ſuppoſing his claim ſhould be admitted, yet as it was not actually allowed at the time of the election, he was not then in a capacity to vote. But the houſe reſolved, "That Sir *James Sinclair* had made out his claim to the title of Earl of *Caithneſs*." And that reſolution was followed by another, "That the votes given by the Earl of *Moray*, as proxy for the Earl of *Caithneſs*, were good."

Lords Journ. 14th Feb. 1787. The ſame reſolution was come to at the ſame time reſpecting the Duke of Queenſberry, who was created Baron Douglas.

Lords Journ. 18th May 1787. 21ſt April 1788.

Lords Journ. 23d May 1793.

6th June 1793.

June 1793.

4th March 1793.

6th June 1793.

By

By 6 *Ann. c.* 23. § 3. the peers actually preſent at the aſſembly of the peers in *Holyrood Houſe* in *Edinburgh*, are required before they vote, to qualify themſelves by taking the oaths of allegiance, ſupremacy, and abjuration, and making and ſubſcribing the declaration againſt popery. Thoſe who live in *Scotland* and wiſh not to vote in perſon, may qualify in any ſheriff's court in *Scotland*, and the ſheriff or his deputy is to return the original ſubſcription of the oath and declaration, ſigned by the peer who took the ſame, and make a return to the peers ſo aſſembled of, ſuch peers taking the ſaid oath, and making and ſubſcribing the ſaid oath and declaration: and thoſe peers who reſide in *England* at the time of iſſuing the proclamation for election, may take and ſubſcribe the oaths, and make and ſubſcribe the declaration in the court of Chancery, King's Bench, Common Pleas, or Exchequer in *England*, which is to be certified by writ (*a*) to the peers in *Scotland* at their meeting under the ſeal of the court where the ſame were taken and ſubſcribed; and peers who have ſo qualified may make a proxy, or ſend a ſigned liſt containing the names of ſixteen peers of *Scotland* for whom they give their votes. And in caſe any peer of *Scotland*, who at any time before the iſſuing of the proclamation for election, hath taken the oaths and ſubſcribed the declaration in *England* or *Scotland*, to be certified as aforeſaid, and, if taken in parliament, to be certified under the great ſeal of *Great Britain*, ſhall at the time of iſſuing ſuch proclamation be abſent in the ſervice of the crown, ſuch peer may make his proxy, or ſend a ſigned liſt.

(*a*) The following inſtrument was determined by the houſe, after reference to the judges, to be a writ ſufficient in law to certify, according to this ſtatute, that *Francis* Viſcount *Dumblane* on the day and year therein ſpecified, appeared in Chancery, open court, and took and ſubſcribed the oaths and declarations therein mentioned. Lords Journ. 5th Feb. 1792.—"George "the Third by the grace of God, &c. To our moſt dear couſins the peers of *Scotland* to be "aſſembled and met at *Holyrood Houſe* in *Edinburgh*, on *Saturday* the 24th day of *July* next enſu"ing, by virtue of our proclamation under our great ſeal of *Great Britain* lately iſſued, for the "election of the ſixteen peers of *Scotland* to ſit and vote in the houſe of peers in the parliament "of *Great Britain*, to be holden at *Weſtminſter*, on *Tueſday* the 10th day of *Auguſt* next enſuing, "greeting: We have inſpected a certain record and regiſter in our court of Chancery in *England*, "made and filed and there remaining, by which it is manifeſt, that on this fourteenth day of "*June* 1790, *Francis* Viſcount *Dumblane* perſonally appeared in open court in Chancery aforeſaid, "and then and there took and ſubſcribed the oath of ſupremacy, and repeated and ſubſcribed "the declaration contained and ſpecified in a certain act of parliament, made in the ſixth year "of the reign of queen Anne, late queen of *Great Britain*, intituled "An act to make further "proviſion for electing ſixteen peers of *Scotland* to ſit in the houſe of peers, &c." and alſo took "and ſubſcribed the oath of allegiance contained and ſpecified in a certain act of parliament "made in the firſt year of our late great grandfather, George the firſt late king of *Great Britain*, "intituled "An act for the further ſecurity of his majeſty's perſon and government, &c." and "alſo took and ſubſcribed the oath of abjuration contained and ſpecified in a certain act of parli"ament made in the ſixth year of our reign, intituled "An act for altering the oath of abjura"ration and the aſſurance, &c." according to the form, direction, and appointment of the acts "aforeſaid. Witneſs ourſelf the 12th day of *June*, in the thirtieth year of our reign."

The above act provides, that ſuch peers of *Scotland* as are alſo peers of *England*, ſhall ſign their proxies and liſts by the title of their peerages in *Scotland*; and that no peer ſhall be capable of having more than two proxies at one time. It alſo enacts, that no peer ſhall come to the meeting with more attendants than he is allowed by the acts then in force in *Scotland*, to take with him to the courts of juſtice; and that any peer who ſhall preſume to propoſe, debate, or treat of any other matter, except the election, ſhall incur the penalties of a *premunire*.

By the 12 and 13 *W.* 3. *c.* 2. commonly called the Act of Succeſſion, it is provided, "That, after the acceſſion of the houſe of *Hanover*, no per"ſon born out of the king's dominions, except of *Engliſh* parents, (altho"he be naturalized,) ſhall be capable of being a member of either houſe of "parliament."

" parliament." And by 1 *G.* 1. *ſt.* 2. *c.* 4. " No bill for naturalization ſhall " be exhibited without ſuch a prohibitory clauſe."

By the act of 4 *Ann. c.* 4. the iſſue of the body of the Princeſs *Sophia*, and all perſons lineally deſcending from her, born, " or hereafter to be born," are declared to be, and ſhall be, to all intents and purpoſes, deemed natural-born ſubjects of this kingdom.

It ſhould ſeem, as if, by this law, all the deſcendants of that princeſs (which deſcription would include the houſes of Pruſſia, Denmark, and Orange) are natural-born ſubjects of this realm. See Lord Somers's Letter to the Elector of Hanover, dated the 12th of April, 1706, and publiſhed in Macpherſon's State Papers, page 33. vol. 2. Accordingly, no bill was paſſed for naturalizing the Princeſs of Wales in 1795, or the Princeſs of Pruſſia, when married to the Duke of York in 1793.

By an act paſſed by the parliament of *Scotland* for ſettling the manner of electing the ſixteen peers, which is inſerted in the act of union, 5 *Ann. c.* 8. *art.* 25. § 12., thoſe who are elected of the ſixteen peers muſt be twenty-one years of age complete. But there is no legiſlative enactment on this ſubject reſpecting other peers. Minors indeed are excluded from ſitting as peers of *Great Britain* when they come to their honours by creation or deſcent; but that is merely by a ſtanding order of the Houſe made the 22d of *May* 1685.

On the 21ſt of October 1667, a writ of ſummons was iſſued to the Earl of Mulgrave, he being then under age; wherefore the Houſe of Lords, by the recommendation of the committee of privileges, referred theſe two queſtions to the judges, " Whether a minor may ſit in quality of a " judge in any court of juſtice, by the law of England, and give judgment? 2. Whether a judg- " ment may by law be excepted againſt by writ of error or otherwiſe, wherein any one that ſat " as a judge and gave his judgment was a minor?" To the firſt of theſe queſtions the Lord Chief Juſtice reported on the 16th of November following, that it was the unanimous opinion of all the judges, " That by the law of England, in the ordinary courts of juſtice, no minor can ſit, " or give any judgment as a judge." On the 14th of December, the Houſe ordered the committee of privileges to prepare " a declaration," reſpecting both the time paſt and to come, which may prevent the inconvenience of minors ſitting in the Houſe. This declaration was reported on the 18th December, " That, according to the law of the realm and the ancient conſtitution of " parliament, minors ought not to ſit or vote in parliament;" and the Houſe agreed to it. The committee then recommended, " That a declaratory bill be prepared to remedy this inconve- " nience for the future, without any retroſpect, and to confirm all that hath already paſſed." The Houſe ordered this latter part of the report to be laid aſide. 2 Hatſ. Prec. 10. notes.

(C) Of the Manner of their Summons and Aſſembling.

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(*The firſt ſummons*) And therefore, till he takes his ſeat, the blood is not ennobled, and if iſſue be joined, whether he were a baron or no, it ſhall not be tried by a jury, but by record of parliament, which could not appear unleſs he were of the parliament. *Ibid.* But in the caſe of nobility by letters patent, the creation is perfect and the blood is ennobled without ſitting: and therefore in Lord Banbury's caſe, the court of King's Bench held, that a peerage claimed under letters patent, is not triable by the record of parliament, but muſt be queſtioned by pleading *non conceſſit*. Rex v Knollys, 1 Ld Raym. 10. A writ of ſummons directed to any temporal perſon who ſits in purſuance of it, gives a barony in fee, without words of limitation. 12 Co. 70. Co. Lit. 9. b. Seld. tit. *Hon.* 746. But letters patent, in which there are no words of limitation, give the grantee a dignity for life only. If the eldeſt ſon of a peer, created by letters patent, limiting the ſucceſſion to the heirs male of his body, be called up by writ of ſummons to the houſe of lords by his father's baronial title, the effect of the writ in that caſe is not to enlarge the courſe of ſucceſſion, ſo as to make a female capable of inheriting, but merely to accelerate the ſucceſſion of the ſon to the barony; for the extent of the inheritance ſtill depends on the nature of the father's title to the barony. Caſe of the claim to the barony of Sidney of Penhurſt diſallowed. Printed caſes of the Lords, June 17, 1782.

(*Alſos writ of ſummons*) Upon a general election, the writ of ſummons iſſues in conſequence of a warrant from the lord chancellor to the clerk of the crown in Chancery; but if a vacancy happens

happens during the ſitting of parliament, or, by the death of a member, or his becoming a peer, in the time of a receſs, then, in conſequence of a warrant from the ſpeaker; in the former of which caſes, the ſpeaker acts by order of the houſe; in the latter, under the regulations and reſtrictions of ſtat. 24. Geo. 3. c. 26.

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(*The ſubſtance*) See the form of the writ, 1 Dougl. 448. Heywood on Elect. 1.

(*At the return*) After the general election in the year 1790, the parliament was prorogued twice before it met. Com. Journ. 26th *Nov.* 1790; and the firſt parliament in this reign was prorogued by four writs of prorogation. *Id.* 3d *Nov.* 1761.

Elſynge, 28, 9.

It doth not appear by the firſt record of ſummons now extant, *an.* 49. *H.* 3. by what warrant the Lord Chancellour cauſed the writ of ſummons to be made. The king was then a priſoner to Montfort. But ſurely none but the king can ſummon the parliament (*a*). And this is the reaſon that *Hen.* IV. having taken his liege lord King *Rich.* II. priſoner on the 20th day of *Aug. an.* 23. cauſed the writs of ſummons for the parliament, wherein he obtained the crown, to bear date the 19th day of the ſame month, and the warrant to be *per ipſum regem et concilium*, and himſelf to be ſummoned by the name of *Henry* Duke of *Lancaſter*.

(*a*) Though it be very clear, that no parliament can be legally aſſembled but by the authority of the crown, yet there are two inſtances of a parliament being called and ſitting, and being acknowledged as ſuch without being originally ſummoned by writs iſſued by order of the king. The firſt was that of the Convention Parliament, which met on the 25th of April, 1660, and ſat till the 29th of December in that year, and was then diſſolved. This parliament was ſummoned by writs iſſued under the direction of an ordinance paſſed on the 16th of March, 1659, by the remainder of the Houſe of Commons that had been called by Charles the Firſt, on the 3d of November, 1640. The ordinance was entitled, "A bill for diſſolving the parliament begun and holden at Weſtminſter on the 3d of November, 1640, and for the calling and holding a parliament at Weſtminſter, on the 25th day of April, 1660." It was, however, thought adviſable afterwards, when the legal government was re-eſtabliſhed, to paſs an act of parliament to remove all diſputes concerning the aſſembling and ſitting of this parliament; and it was accordingly declared and enacted by 12 Car. 2. c. 1. "That the parliament begun and holden at Weſtminſter on the 3d of November, 1640, is fully diſſolved and determined, and that the Lords and Commons now ſitting at Weſtminſter, in this preſent parliament, are the two houſes of parliament, to all intents, conſtructions, and purpoſes whatſoever, notwithſtanding any want of the king's writ of ſummons, or any other defect." But notwithſtanding this expreſs declaration by act of parliament, it appears that doubts were ſtill entertained, whether the parliament of 1660 was legally diſſolved. For, on the 24th of May, 1661, the judges were ordered to attend the Houſe of Lords, to give their opinion upon this queſtion; and on the 6th of June, the judges having attended, and having given an unanimous opinion, "That the ſaid parliament begun on the 3d of November, 1640, is now determined;" the Lords ordered the Attorney-General to prepare a particular bill for declaring this to be the law; and a clauſe for this purpoſe was inſerted in an act which paſſed in the 13th of Cha. 2. c. 1. entitled, "An act for the ſafety and preſervation of his Majeſty's perſon and government againſt treaſonable and ſeditious practices and attempts." 2 Hatſ. Prec. 280. It is remarkable, that ſuch a proviſion ſhould be inſerted in a *temporary* law. The other inſtance of a parliament, ſummoned by writs, not iſſued by the king's authority, is the Convention Parliament, which met on the 22d of January, 1688, and which was elected by virtue of letters written by the Prince of Orange, in conſequence of the addreſs of the Lords Spiritual and Temporal, and of thoſe members of the Houſe of Commons that had ſerved in any of the parliaments during the reign of Charles the Second, who together with the aldermen, and ſeveral of the common-council of London, had aſſembled at St. James's on the 26th of December, at the deſire of the Prince of Orange. Theſe letters were directed to the Lords Spiritual and Temporal, and to the ſeveral counties, univerſities, cities, boroughs, and cinque ports, for calling a convention to meet on the 22d of January. After ſettling the crown on the Prince and Princeſs of Orange, an act was immediately paſſed, as in the former inſtance, for removing and preventing all queſtions and diſputes concerning the aſſembling and ſitting of this preſent parliament, by which "this convention is declared to be the two houſes of parliament to all intents and purpoſes whatſoever, notwithſtanding any want of writ of ſummons or other defect; and that the act, and all other acts to which the royal aſſent ſhall be given, before the next prorogation, ſhall be underſtood, taken, and adjudged in law to commence upon the 13th day of February, which day their Majeſties, at the requeſt and by the advice of the Lords and Commons, did accept the crown and royal dignity of the King and Queen of England, France, and Ireland and the dominions and territories thereunto belonging." Notwithſtanding this ſtatute, it was thought

" thought advisable, on the meeting of the next parliament, elected by virtue of writs issued by King William and Queen Mary, to pass another act, " For recognizing their Majesties, and for " avoiding all questions touching the acts made in the parliament assembled at Westminster, the " 13th of February, 1688." This act, the 2d of W. & M. st. 1. c. 1. *enacts*, " That all and singular the acts made in the said parliament, were and are laws and statutes of this kingdom." See, in the Lords Journal of the 5th of April 1690, a very curious protest on the subject of this bill, touching the validity of the last parliament, and the objection which had been made to the want of writs of summons. 2 Hats. Prec. 281-2.

The warrant hath been divers; sometimes *per breve de privato sigillo*; but most commonly *per ipsum regem*, or *per ipsum regem et concilium*. *Id. ibid.*

If the king hath been absent out of the land, and a *custos* appointed (as the manner is) the writ bears *teste* by the *custos*, and the warrant is *per ipsum regem, et dominum custodem, et concilium, prout an.* 13 E. 3. *Teste* Edwardo *duce* Cornubiæ, *&c. custode* Angliæ. *Per ipsum regem, et dominum custodem, et concilium. An.* 20 E. 3 *consimile. An.* 9 H. 5. *Teste* Johanno *duce* Bedford, *custode* Angliæ, *Per ipsum regem et concilium. An.* 9 H. 6. The king being in Paris, *teste* Humfrido *duce* Gloceſtriæ, *custode* Angliæ. *Per breve de privato sigillo.* But, if the king be within the land, though within age, and a protector appointed him, he alone is *testis* to the writ, and the warrant is *per ipsum regem; prout an.* 1 H. 6. and sometimes *per ipsum regem et concilium.*

By the act of 7th and 8th of *W.* 3. *c.* 25 § 1. " When any new par- " liament shall be summoned or called, there shall be *forty* days between " the *teste* and return of the writs of summons." But by the 22d article of the treaty of union, it is resolved, " That such time shall not be less than " *fifty* days after the date of the royal proclamation issued for that purpose." From that time to the present, though no positive law has been made on the subject, *fifty* days have always been allowed between the *teste* and return of the writs of summons.

Formerly, the parliament, when prorogued, could not be convened before the expiration of the time to which they were prorogued. But by the 26th of G. 3. *c.* 107. § 95, 96, 97. (*a*), the king is empowered to call out the militia, and summon parliament upon fourteen days notice, in all cases of actual invasion, or upon imminent danger thereof, and in all cases of rebellion and insurrection, which notice by an act of this session (37 G. 3.) is declared to be sufficient in any case.

(*a*) This constitutional safeguard was first given by the statute of 16 G. 3. c. 3.; which statute was only temporary, for seven years, and was suffered to expire, so that the country was deprived of it for three years.

By the 5th of *Eliz. c.* 1. § 16. all members, before they come into the parliament-house, are to take the oath of supremacy before the Lord Steward for the time being, or his deputy or deputies, for that time to be appointed.

By the 7th of *Ja.* 1. *c.* 6. §. 8. the oath of allegiance is, in like manner, ordered to be taken by members before they come into the house.

By the 30th of *Cha.* 2. *st.* 2. every member is to take the oath of allegiance and supremacy, and make and subscribe the declaration against transubstantiation, between the hours of nine in the morning and four in the afternoon, a peer at the table in the middle of the House of Peers, and whilst a full house of peers is there, with their Speaker in his place; and a member of the House of Commons, at the table in the middle of that house, whilst a full house is duly sitting, with the Speaker in the chair.

By

At the beginning of the parliament which met in the year 1780, there was some debate in the House of Lords, whether any lord might, notwithstanding the limitation of time expressed in this and the preceding act, be admitted to take the oaths, and sign the declaration *after four o'clock*; and the Lords determined that he might.—The House of Commons, by their uniform practice, have always determined differently. Nor does this determination of the Lords seem to be consistent with an order of their lordships, "That lords who come to take the oaths be present for that purpose at the first sitting of the house; otherwise to withdraw from the debates for that day." 2 Hats. Prec. 82.

By the 13th of *W.* 3. *c.* 6. § 10. every member is to take the oath of abjuration "at the table," in the same manner, and between the same hours, as he takes the oaths of allegiance and supremacy by the 30th of *Cha.* 2.

Notwithstanding all these laws which are introductory to a member's taking his seat in the house, a person when returned, is, though he should not have taken his seat, to all intents a member, except as to the right of voting, and is entitled to the same privileges as any other member of the house. Insomuch that upon the 13th of April, 1719, the House determined "That Sir Joseph Jekyll was capable of being chosen of a committee of secresy, though he had not been sworn at the clerk's table." 2 Hats. Prec. 83. note.

By the 33d of *G.* 2. *c.* 20 every member (except as is therein excepted) is, before he presumes to vote in the House of Commons, to take the oath of his being qualified, and to deliver in his qualification at the table.

(D) Of Elections: And herein,

(*Also it may*) This act is repealed by 28 Geo. 3. c. 52. § 31., so far as relates to determinations subsequent to that act.

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(*By the* 10 *H.* 6.) In *Scotland*, by an act of *James* 6 A. D. 1587. c. 114. none were entitled to vote in counties, who had not a 40*s.* land of old extent, holding of the king. By an act of Car. 2. A. D. 1661. c. 25. those voting on church lands were obliged to have 1000*l. Scots* of present rent. By another act in that reign, A. D. 1681. c. 21. voters were obliged to have either a 40*s.* land of old extent, or 400*l. Scots* of valued rent. And by later statutes, still greater attention is required to the purity of the rolls.

The stat. 14 Geo. 3. c. 58. repeals so much of this and the act in the text and other old acts therein specified, as relates to the residence either of the elected, or electors.

By subsequent statutes of 7 & 8 W. 3. c. 25. 10 Ann. c. 23. and 18 Geo. 2. c. 18. § 5. this qualification of a freehold estate of the clear yearly value of 40*s.* must be *over and above all rents and charges payable out of or in respect of the same*, and the voter is required to swear that he is a freeholder, and has an estate of such value. Two committees have determined, that the interest of a mortgage is a charge, which, if it reduces the value under 40*s.* takes away the vote; though there is an intermediate decision of a committee, wherein the contrary was holden. 2 Luders 467. The case of Wetherell v. Hall, B. R. M. 23 Geo. 3. which arose on a qualification under the same act of 23 Car. 2. c. 25. § 3, turned on a similar point, and received a determination agreeably to those of the two committees.

10 Ann. c. 23. The st. 13 G. 2. c. 20 extends the regulations for the prevention of fraudulent conveyances for election purposes to cities and towns which are counties of themselves.

No person shall vote in right of any freehold granted to him fraudulently to qualify him to vote. Fraudulent grants are such as contain an agreement to re-convey, or to defeat the estate granted; which agreements are made void, and the estate is absolutely vested in the person to whom it is so granted. And every person who shall prepare to execute such conveyance, or who shall give his vote under it, shall forfeit 40*l.*

§ 2. Two or more votes may be given successively for the same estate or interest at the same election; as, when a freeholder votes and dies, his heir or devisee may

Every voter must have been in the actual possession or receipt of the profits of his freehold, or been entitled thereto to his own use for one year before the election; except it came to him by descent, marriage, marriage-settlement, devise, or promotion to a benefice or office.

may afterwards vote at the ſame election. And it ſeems to be generally true, that where no length of poſſeſſion is required by any act of parliament, the elector may be admitted to vote, though his right accrued ſince the commencement of the election. 1 Dougl. 272. 2 Lud. 427.

No perſon ſhall vote in reſpect of an annuity or rent-charge, unleſs regiſtered with the clerk of the peace twelve calendar months before the election. 2 Geo. 3. c. 24.

In mortgaged or truſt eſtates, the perſon in poſſeſſion, under the above mentioned reſtrictions, ſhall have the vote. 7 & 8 W. 3 c. 25 § 7.

Only one perſon ſhall be admitted to vote for any one houſe or tenement, in order to prevent the ſplitting of freeholds, and conveyances for that purpoſe ſhall be void. *Ibid.*

But a husband may vote for his wife's right of dower, without an actual aſſignment of it by metes and bounds. 20 Geo. 3. c. 17. § 12.

No eſtate ſhall qualify a voter, unleſs it hath been aſſeſſed to the land-tax ſix months before the election, either in the name of the voter or of his tenant; but if he has acquired it by marriage, deſcent, or other operation of law, in that caſe, it muſt have been aſſeſſed to the land-tax within two years before the election, either in the name of the predeceſſor, or perſon through whom the voter derives his title, or in the name of the tenant of ſuch perſon. 20 Geo. 3. c. 17.

No tenant by copy of court-roll ſhall be permitted to vote as a freeholder. 31 Geo. 2. c. 14.

No freeman of any city or borough (other than ſuch as claim by birth, marriage, or ſervitude) ſhall be entitled to vote therein, unleſs he hath been admitted to his freedom twelve-calendar months before. 3 Geo. 3. c. 15.

This act, which is called the *Durham* act, was occaſioned by, and ſeems confined to, the admiſſion of *honorary* freemen only.

In boroughs where the houſeholders or inhabitants of any deſcription claim to elect, no perſon ſhall have a right to vote as ſuch inhabitant, unleſs he hath actually been reſident in the borough ſix months previous to the day on which he tenders his vote. 26 Geo. 3. c. 100.

In burgage-tenure boroughs, no length of poſſeſſion is required from the voters. 1 Dougl. 224.

Perſons under twenty-one years of age (*a*), or perſons convicted of perjury or ſubornation of perjury (*b*), or employed in managing and collecting the duties of exciſe, cuſtoms, ſtamps, ſalt, windows, or houſes, or the revenue of the poſt-office, are incapable of voting at any election (*c*).

(*a*) 7 & 8 W. 3. c. 25. § 8.
(*b*) 2 G. 2. c. 24. § 6.
(*c*) 22 G. 3. c. 41. But this laſt act does not extend to freehold offices granted by letters patent, nor to commiſſioners of the land-tax, or perſons acting under them.

Perſons lawfully convicted of voting or with-holding their votes in conſequence of a bribe, provided they are ſerved with proceſs within two years after the commiſſion of the offence, are for ever diſqualified to vote. 2 Geo. 2. c. 24. § 7. 9 Geo. 2. c. 3. § 8.

By § 8. of the act of 9 Geo. 2. if the offender diſcover any other perſon offending againſt the act, ſo that ſuch perſon be thereupon convicted, he thereby procures an indemnification for himſelf. But the diſcovery of an offender already indemnified, it hath been adjudged, will not avail him. Lord Portcheſter v. Petrie, E. 23 Geo. 3. B. R.

In general, it ſeems, that perſons receiving alms are diſqualified to vote. But by 18 *Geo.* 3. *c.* 29. § 25. pariſh relief given to the family of any militia-

militia-man, during the time of actual ſervice, will not deprive him of his right to vote.

R. *Nem. Con.* 14. Dec. 1699. R. *Nem. Con.* Feb 1700. No peer hath a right to vote at any election, nor ſhall any lord lieutenant of a county concern himſelf therein. And by ſtatute 2 *W. & M. ſeſſ.* 1. *c.* 7. the lord warden of the *cinque ports* ſhall not recommend any members there. R. 24 Oct. 1702.

5 & 6 W. & M. c. 20. 12 & 13 W. 3. c. 10. If any officer of the exciſe, cuſtoms, ſtamps, or certain other branches of the revenue, preſume to intermeddle in elections by perſuading any voter or diſſuading him, he forfeits 100*l.* and is diſabled to hold any office.

For the qualifications of electors in *Scotland*, ſee 6 *Ann. c.* 6. 9 *Ann. c.* 5. 12 *Ann. ſt.* 1. *c.* 5. 7 *Geo.* 2. *c.* 16. 16 *Geo.* 2. *c.* 11. For elections for *Cheſter*, ſee 34 & 35 *H.* 8. *c.* 13. *Wales*, 35 *H.* 8. *c.* 11. *Durham*, 25 *Car.* 2. *c.* 9. *London*, 11 *Geo.* 1. *c.* 18. *New Shoreham*, 11 *Geo.* 3. *c.* 55. *Coventry*, 21 *Geo.* 3. *c.* 54. *Cricklade*, 28 *Geo.* 3. *c.* 36. § 41.

From the time the clergy have waived the right of taxing themſelves, which was ſoon after the Reſtoration, they have voted in the election of members of the Houſe of Commons by virtue of their eccleſiaſtical freeholds. This was done at firſt without any particular law for the purpoſe: but there are two acts of parliament ſince paſſed which ſuppoſe it to be now

Page 576 *a right*, viz. 10 *Anne*, *c.* 23. & 18 *G.* 2. *c.* 18.

(*An Alien, though*) According to Lord Coke, an alien naturalized is eligible. 4 Inſt. 47. But now by 1 Geo. 1. ſtat. 2. c. 24. no perſon can be naturalized, unleſs there be a clauſe in the bill, expreſsly declaring him to be incapable of ſitting in either houſe of parliament.

This doctrine has been ſanctioned by two deciſions of committees of the houſe of commons. In the firſt, it was determined, that the ſheriff of *Berks* could not be elected for *Abingdon*, a borough within that county, 1 Dougl. 419: in the other, that the ſheriff of *Hants* could be elected for the town of *Southampton* within that county, becauſe *Southampton* is a county of itſelf, and is as independent on *Hampſhire*, as on any other county. 4 Dougl. 87.

(*One under the age*) This law may be thought to be rather defective, for it remains to be inquired, what penalty is here aſcertained, and what tribunal is to judge and pronounce ſentence. 1 Wooddeſ. 46.

(*None of the judges*) So, by 7 Geo. 2. c. 16. § 16. none of the judges in *Scotland* can be elected. Thorp, a baron of the Exchequer, was ſpeaker to the commons, Ann. 31 H. 6. 3. Com. Dig. tit. *Parliament.* (D 9.) 4 Inſt. 47.

(*None of the Clergy*) But of late years, it hath been determined, that *deacons* are eligible to parliament, leaving the queſtion undecided as to prieſts. Newport caſe, 2 Luders on Elect. 169. &c. The authorities to prove that the clergy are ineligible, are books prior to the reſtoration, 4 Inſt. 27. Moor 783. about which time the clergy, that is, the beneficed clergy, gave up the right of taxing themſelves, 2 Burn's E. L. 27. (which tax always required the ſupplemental confirmation of parliament, *Id.* 22.) and received (that is, the beneficed clergy) as a compenſation, though a very inadequate one, the privilege of voting at county elections: ſo, that it ſeemeth difficult to aſſign any reaſon for their excluſion at preſent. See further on this point, 1 Wooddeſ. 47-8. Whether a clergyman be eligible in *Scotland* is ſtill matter of doubt, though it ſeems ſettled by practice, that he may be enrolled upon the roll of freeholders.

Bac. H. 7. 13. Com. Dig. tit. *Parliament.* (D. 9.) So, *temp. H.* 7. perſons outlawed for treaſon could not come into parliament, till their attainders were reverſed.

Ruled by all the juſtices. 1 And. 293. Nor perſons outlawed after, or before judgment, in a civil action. Com. Dig. *ubi. ſupr.*

Nor

Nor perſons taken in execution upon a judgment. Moor, 57. Com. Dig. *ubi ſupr.*

But now every knight of a ſhire ſhall have a clear eſtate of freehold or copyhold to the value of 600*l. per annum*, and every citizen and burgeſs to the value of 300*l* (*c*); except the eldeſt ſons of peers, and of perſons qualified to be knights of ſhires, and except the members for the two univerſities Of this qualification the member muſt make oath, and give in the particulars in writing at the time of taking his ſeat (*d*); or, upon refuſal, the return is void. 9 Ann. c. 5.

(*c*) Or mortgage, if the mortgagee has been in poſſeſſion ſeven years before his election

(*d*) 33 G. 2. c. 20.

No perſons concerned in the management of any duties or taxes created ſince 1692, except the commiſſioners of the treaſury (*e*), nor any of the officers following (*f*), *viz.* commiſſioners of prizes, tranſports, ſick and wounded, wine licences, navy, and victualling; commiſſioners of the revenue in *Ireland;* ſecretaries or receivers of prizes; comptrollers of the army accounts; agents for regiments; governors of plantations and their deputies; officers of *Minorca* or *Gibraltar;* officers of the exciſe and cuſtoms; clerks or deputies in the ſeveral offices of the treaſury, exchequer, navy, victualling, admiralty, pay of the army or navy, ſecretaries of ſtate, ſalt, ſtamps, appeals, wine licences, hawkers and pedlars, nor any perſons that hold any new office under the crown created ſince 1705 (*g*), are capable of being elected or ſitting as members. Nor ſhall any contractor (*h*) with the officers of government, or with any other perſon for the ſervice of the publick, be capable of being elected, or of ſitting in the houſe as long as he holds any ſuch contract, or derives any benefit from it.

(*e*) 5 & 6 W. & M. c. 7.

(*f*) 11 & 12 W. 3. c. 2. 12 & 13 W. 3. c. 10. 6 Ann. c. 7. 15 Geo. 2. c. 22.

(*g*) 6 Ann. c. 7.

(*h*) 22 G. 3. c. 45.

No perſon having a penſion under the crown during pleaſure, or for any term of years, is capable of being elected. 6 Ann. c. 7. 1 Geo. 1. c. 56,

If any member accepts an office of profit from the crown, except an officer in the army or navy accepting a new commiſſion, his ſeat is void; but ſuch member, provided the office were prior to 1705, is capable of being re-elected. 6 Ann. c. 7.

No regiſtrar (for regiſtering memorials of deeds, &c.) within the weſt or eaſt riding in the county of *York*, or his deputy, is capable of being elected. 2 & 3 Ann. c. 4. § 22. 6 Ann. c. 35. § 32.

No candidate ſhall, after the *teſte* of the writ or ſummons to parliament, or after the *teſte*, or the iſſuing out, or ordering of the writ of election upon the calling or ſummoning of any parliament, or after the vacancy, give any money or entertainment to his electors, or promiſe to give any, either to particular perſons or to the place in general, in order to his being elected; upon pain of being incapable, upon ſuch election, of ſerving for that place of parliament. 7 & 8 W. 3. c. 4. The treating vacates that election only; but the candidate is not diſqualified from being re-elected, and ſitting upon a ſecond return. 3 Lud. 455. but *contr. Ia.* 162.

The eldeſt ſons of peers of *Scotland* are incapable of electing or being elected to repreſent any ſhire or burgh in *Scotland*. Comm. Journ. 3d Dec. 1708.

This point hath lately been diſcuſſed with conſiderable ingenuity and ability in the houſe of lords on an appeal from a decree of the court of ſeſſions. The queſtion aroſe upon the claim of Lord Daer, eldeſt ſon of the Earl of Selkirk, to be enrolled a freeholder of the ſtewarty of *Kirkcudbright*, at the Michaelmas court in 1791. It was objected, (and it was the ſole objection, for his lordſhip was admitted to be in every other reſpect qualified,) that his lordſhip being the eldeſt ſon of a peer of the realm, was incapable of being enrolled. The freeholders, however, admitted his claim; but upon an appeal to the court of ſeſſion, the objection was ſuſtained, and his

his lordſhip's name was directed to be expunged from the roll; and this decree was affirmed in the houſe of lords. Lord Daer v. Johnſtone and others, printed caſes of the lords, 26th March 1793.

The notion, that the clergy are ineligible ſeems now to be almoſt entirely done away. We have ſeen that it has been expreſsly determined by the houſe in Mr. *Ruſhworth*'s caſe, that a deacon is eligible. But there is a difference, it has been ſaid, between perſons in prieſt's or in deacon's orders; the firſt is an indelible character, the other not. But there ſeems to be no foundation for this difference; the character of a deacon is equally indelible with that of a prieſt, as appears from the 76th canon.

2 Hatſ. Prec. 68.

A perſon elected and returned a member of the Houſe of Commons, is not eligible for any other place, unleſs by the acceptance of an office, or ſome other act, he vacates his former ſeat, One reaſon among others, for this is, that, though a member is elected by the freeholders of a county, or the electors of a particular borough, he becomes, when elected, the repreſentative of the whole commonalty of *Great Britain*, and is therefore already the legal repreſentative of the county or borough, whoſe ſeat is at that time vacant.

At a general election, whilſt the writs are executing together in all parts of the kingdom, it has been uſual for the ſame perſon to be elected for two or more different places, and, when the Houſe meets, for ſuch perſon to make his election for which place he will ſerve. But, when a perſon is elected, and the indenture of return is executed, and actually *returned* into the Crown-office, from that inſtant he becomes in law a member of the Houſe of Commons, and is not eligible for any other place. See Lord Althorpe's caſe, March, 1782.

(*a*) Vol. 1. 123.

It is ſtated in the preceding part of this work (*a*), that perſons outlawed in civil actions, or in execution, are ineligible. This poſition is queſtionable, and Mr. *Hatſell*'s opinion is, that it ſhould ſeem from the reſult of the caſes upon the ſubject, that a perſon is eligible, though an outlaw, or in execution, at the time of his election. At the ſame time it muſt be confeſſed, that the point is not clearly eſtabliſhed.

The eldeſt ſons of peereſſes in their own right, and of biſhops, as lords of parliament, are within the exception of the qualification act of the 9th of *Anne*, *c.* 5.

General Carpenter's caſe, July 7th, 1715.

Ambaſſadors, and miniſters employed abroad, are eligible. The commiſſaries appointed in 1714 to treat with the commiſſaries of *France*, and the commiſſioners appointed in 1778 to treat with the *Americans*, were conſidered as falling within this deſcription.

Mr. Roſe's caſe, June 1788.

The clerk of the parliaments has been elected, and admitted to ſit as member of the Houſe of Commons.

The ſtatute of 6 *Anne*, *c.* 7. which incapacitates any perſon from being elected, or ſitting as a member of the Houſe of Commons, who ſhall accept of an office of profit under the crown created ſince the year 17[illegible] except from its operation any member, being an officer in the army or navy, who ſhall receive any new or other commiſſion in thoſe ſervices. When Admiral *Boſcawen* was appointed general of marines in 1759, there was a doubt, whether the marines being to ſerve at land as well as at ſea, and being regimented, he, being only a ſea-officer, would not vacate his ſeat by ſuch acceptance; the part of the appointment which concerned the land ſervice being to him, a mere naval officer, a new appointment, and not a promotion in the navy. But upon conſideration and conſultation with the law-officers of the crown, and after inſpection of the ſeveral documents and acts relating to the matter, it was determined, though with much doubt, that he ſhould not vacate his ſeat.

2 Hatſ. Prec. 58.

It is provided by the 18th of *G.* 3. *c.* 59. § 4. and the 33d of *G.* 3. *c.* 5. That the ſeats of members returned to ſerve in parliament ſhall not be vacated by the acceptance of a commiſſion in any corps of fencible men in *Scotland*, or in any corps to be raiſed in *Great Britain*, in which the officers ſhall not be entitled to half-pay, or to rank in the army after their actual ſervice.

In 1774, Mr. *Maitland* was elected for the burghs of *North Berwick*, &c.; upon which a petition was preſented againſt that election, ſtating that Mr. *Maitland* was ineligible from his holding the office of clerk of the pipe in the Exchequer, which was alleged to be a new office created ſince the 25th of *October* 1705. But it was determined, that though the particular office under the name of the *Clerk of the Pipe* did not exiſt at the time of the Union, yet becauſe the functions of that office had been always executed in *Scotland*, though by an officer under another name, this was not a *new* office within the meaning and ſpirit of the act of Queen *Anne*, and that therefore Mr. *Maitland* was eligible. 2 Hatſ. Prec. 56. 2 Dougl. Elect. Caſ. 423. In June 1785, upon the third reading of "the "bill for "better "examin-"ing and auditing the publick accounts," a doubt was ſuggeſted by Mr. Fox, Whether the commiſſioners who were to be appointed under the authority of that bill would come within the meaning of the words of the ſtatute of Queen Anne, as holding a *new office*, and by that be diſqualified from being eligible or ſitting in the Houſe of Commons; or, whether they would be conſidered as executing only the *old office* of auditor of the impreſt, from which the then preſent auditors were removed by that bill. Mr. Pitt, Chancellour of the Exchequer, ſeemed to think from the words in the bill, that it was a new office, and therefore no clauſe was neceſſary ſpecifically to exclude theſe commiſſioners from the houſe and the Speaker was of the ſame opinion. But in conſidering Mr. Maitland's caſe, and it being intended that theſe commiſſioners ſhould not be eligible, Mr. Pitt was induced to conſent to the inſertion of a clauſe, declaring directly, that they ſhould be incapable of being elected, or ſitting as members.

Of the Duty of Returning Officers, and the Remedies againſt them; and herein of the Mode of Proceeding upon Complaints of undue Elections.

23 H. 6. c. 14. 7 & 8 W. 3 c. 25. 12 Ann. Seſſ. 1. c. 15.

We have ſeen above, that the writ of ſummons iſſues from the clerk of the crown in Chancery in conſequence of a warrant from the lord chancellor or ſpeaker of the houſe of commons, according as the election is general, or not. Within three days (*a*) after the receipt of this writ, the ſheriff is to ſend his precept, under his ſeal, to the proper returning officers of the cities and boroughs within his county, commanding them to elect their members: and theſe officers are to proceed to election within eight days (*b*) from the receipt of the precept, giving four days notice of the ſame: and to return the perſons choſen, together with the precept, to the (*c*) ſheriff.

(*a*) The officer of the Cinque Ports has ſix days by 10 & 11 W. 3 c. 7.

(*b*) In *New Shoreham*, election muſt be within *twelve* days, with eight days notice thereof. (*c*) The notice muſt be given within the hours of 8 o'clock in the forenoon, and 4 in the afternoon from the 25th *October* to the 25th of *March* inclusive, and within the hours of 8 in the forenoon, and 6 in the afternoon from the 25th of *March* to the 25th of *October* inclusive, and not otherwiſe. St. 33 Geo. 3.

25 Geo. 3. c. 84. § 4.

With reſpect to county elections, the ſheriff having indorſed on the writ the day on which he received it, ſhall, within two days after the receipt thereof, cauſe proclamation to be made at the place (*d*) where the enſuing election ought by law to be holden, of a ſpecial county court to be there holden for the purpoſe of ſuch election only, on any day, *Sunday* excepted, not later from the day of making ſuch proclamation than the ſeventh day, nor ſooner than the tenth day.

(*d*) The ſheriff cannot alter the place without the conſent of all the candidates. See an

an expreſs act of parliament 20 Geo. 3 c. 1. for holding the election for *Hampſhire* at New *Alresford*. So, for adjourning the poll from Wincheſter to Newport in the *Iſle of Wight*. 7 & 8 W. 3. c. 25. 25 Geo. 3 c. 84. § 16.

Upon the day fixed for the election, the returning officer is firſt to take an oath againſt bribery, and for the due execution of his office. The candidates muſt, if required by each other, or by two electors, ſwear to their qualification: and the electors both in counties and boroughs to their, and the latter are alſo compellable to take the oaths of allegiance, ſupremacy, and abjuration, and the oath againſt bribery and corruption.

34 Geo. 3. c. 73. And to prevent delays, the returning officer is required, at the requeſt of any of the candidates, made in writing under his hand, to appoint commiſſioners to adminiſter the oaths of allegiance, ſupremacy and abjuration, who are to deliver a certificate to the party to whom the oaths have been adminiſtered, of his having taken them, upon the production of which he is permitted to poll in like manner as if he had taken the oaths before the returning officer.

25 Geo. 3. c. 84. § 5. All electors for cities and boroughs are likewiſe to ſwear to their name, addition, or profeſſion, and place of abode; and alſo, like freeholders in counties, that they believe they are of the age of twenty-one, and that they have not been polled before at the election.

§ 1. If a poll is demanded at any election for any county or place in *England* or *Wales*, it ſhall commence either on that day, or at the fartheſt upon the next, and ſhall be continued from day to day (*Sundays* excepted) till

§ 3. be finiſhed; and it ſhall be kept open ſeven hours at the leaſt each day between eight in the morning, and eight at night; but if it ſhould be continued till the fifteenth day, then the returning officer ſhall cloſe the poll at or before three in the afternoon, and ſhall immediately, or on the next day, publickly declare the names of the perſons who have a majority of voices; and he ſhall forthwith make a return accordingly, unleſs a ſcrutiny is demanded by any candidate, or by two or more of the electors, and he ſhall deem it neceſſary to grant the ſame, in which caſe he is to proceed thereupon; but ſo as that, in all caſes of a general election, if he has the return of the writ, he ſhall cauſe a return of the members to be filed in the crown-office on or before the day on which the writ is returnable. If he is a returning officer acting under a precept, he ſhall make a return of the precept at leaſt ſix days before the day of the return of the writ; but if it is not a general election, then, in caſe of a ſcrutiny, a

§ 6. return of the member ſhall be made within thirty days after the cloſe of the poll. Upon a ſcrutiny, the returning officer cannot compel any wit-

§ 3. neſs to be ſworn, though the ſtatute gives him a power of adminiſtering an oath to thoſe who *conſent* to take it. And where there are objections and votes on each ſide, he ſhall decide alternately on them.

7 & 8 W. 3. c. 7. 12 Ann. 1 Seſſ. c. 15. 25 Geo. 3. c. 84. § 14. The ſcrutiny being finiſhed, the ſheriff muſt make a return of the perſons who have a majority on the reviſed poll within the time limited by And the perſons ſo returned are the ſitting members until the houſe of commons, upon petition, ſhall adjudge the return to be falſe and illegal.

Double damages may be recovered for any falſe return, tho' there have been no determination of the houſe of For a falſe return, the ſheriff, by the old ſtatutes of *H.* 6. forfeits and the returning officer in boroughs 40*l.* and they are beſides liable to action at the ſuit of the party grieved, in which double damages ſhall be recovered. And they are alſo liable to ſuch an action for wilfully neglecting, or refuſing to return the perſon, whom the houſe of commons ſhall adjudge to be the legal repreſentative. And for any offences against the act of *25 Geo.* 3. *c.* 84. they are puniſhable by information or in-

ment.

Com-

of commons relative to the right of election for the place in question. Wynne v. Middleton, 1 Wilf. 125.——By ſtat. 7 & 8 W. 3. c. 7. the ſheriff was liable to a penalty of 500*l.* for not making a return, at the return of the writ, if it were a general election, or within fourteen days, if an occaſional vacancy. Any perſon bribing the returning officer forfeits 300*l.* 7 & 8 W. 3. c. 7.

When the election is over, the returning officer is bound, under a penalty of 500*l* to deliver forthwith a copy of the poll to any perſon deſiring it, and paying a reaſonable charge for writing it. And the ſheriff muſt within twenty days after a county election deliver upon oath to the clerk of the peace all the poll books of ſuch election without any embezzlement or alteration; and where there are more than one clerk of the peace, the original poll books to one of the clerks, and atteſted copies to the reſt to be kept among the records of the county. 7 & 8 W. 3. c. 25. § 6. 10 Ann. c. 23. § 5. The check polls as well as the original books, muſt be lodged with the clerk of the peace. Rex v. Davies, 2 Str. 1048.

If a perſon having a right to vote is hindered by the preſiding officer, an action on the caſe lies at common law. Aſhby v. White, 2 Ld Raym. 938. 1 Salk. 19. 6 Mod. 45. 8 State Tr. 89. 1 Br. P. C. 45. But the obſtruction muſt be wilful and malicious. Drewe v. Colton, Lent aſſizes for Cornwall, *cor.* Wilſon J. 2 Lud. 245. Sargent v. Millward, 2 Lud. 248.

Whether it lies at common law for a falſe, or double return. 2 Lev. 114. 2 Ventr. 370. 3 Lev. 29. 2 Salk. 502. 1 Wilſ. 127.

The returning officer, it ſeems, is not to judge of the diſability of candidates. 1 Comm. Journ. 511. 513. 515. 880. 11 Comm. Journ. 201.

If the freedom of election is violated by any riotous and tumultuous proceedings, the ſheriff may take the offenders into cuſtody. But whether he may commit, where the election is not obſtructed in any manner amounting to a breach of the peace, may admit of ſome doubt. 1 Comm. 6. Journ. 82. 834. 837.

By the ſtatutes of 10 *Geo.* 3. *cap.* 16. explained and amended by 11 *Geo.* 3. *c.* 42.; both of which are made perpetual by 14 *Geo.* 3. *c.* 15 and ſtill farther improved by 25 *Geo.* 3. *c.* 84. 28 *Geo.* 3. *c.* 52. and 32 *Geo.* 3. c. 1. a tribunal is erected and regulated for determining the merits of conteſted elections. By theſe ſtatutes, any perſon may preſent a petition complaining of an undue election; but one ſubſcriber of the petition muſt enter into a recogniſance, himſelf in 200*l.* with two ſureties in 100*l.* each, to appear and ſupport his petition; and then the houſe appoint ſome day beyond the days after the commencement of the ſeſſion, or the return of the writ, and give notice to the petitioners and the ſitting members to attend the bar of the houſe on that day by themſelves, their counſel, or agents; which day may be altered; but notice muſt be given of the new appointed day. On the day fixed, if 100 members do not attend, the houſe ſhall adjourn from day to day, except over *Sundays*, and for any number of days over *Chriſtmas-day*, *Whitſunday*, and *Good Friday*; and when two or more members are preſent, the houſe ſhall proceed to no other buſineſs, except ſwearing in members, receiving reports from committees, amending returns, attending his majeſty or commiſſioners in the houſe of lords, receiving meſſages from the lords, or on days appointed for the trial of any articles of impeachment exhibited by the commons in parliament, the buſineſs neceſſary for that purpoſe. Then the names of all the members belonging to the houſe are put into ſix boxes or glaſſes in

equal numbers, and the clerk draws a name from each of the glaſſes in rotation, which name is read by the ſpeaker, and if the perſon is preſent, and not diſqualified, it is put down, and in this manner they proceed till forty-nine ſuch names are collected. But beſides theſe forty-nine, each party ſelect, out of the whole number preſent, one perſon, who is to be the nominee of that party. Members who have voted at that election, or who are petitioners, or are petitioned againſt, cannot ſerve; and perſons who are ſixty years of age, or who have ſerved before, are excuſed if they require it; and others who can ſhew any material reaſon, may alſo be excuſed by the indulgence of the houſe. After forty-nine names are ſo drawn, liſts of them are given to the reſpective parties, who withdraw, and alternately ſtrike off one (the petitioners beginning) till they are reduced to thirteen; and theſe thirteen, with the two nominees, conſtitute the ſelect committee. If there are three parties, they alternately ſtrike off one; and in that caſe, the thirteen chooſe the two nominees. The members of the committee thus formed are then ordered by the houſe to meet within twenty-four hours; and they cannot adjourn for more than twenty-four hours, except over *Sunday*, *Chriſtmas-day*, and *Good Friday*, without leave of the houſe; and no member of the committee can abſent himſelf without the like leave, upon ſpecial cauſe, verified upon oath. The committee cannot proceed to buſineſs with fewer than thirteen members (*a*); and they are diſſolved, if for three ſucceſſive days of ſitting, their number is leſs than that: they continue to ſit notwithſtanding a prorogation of parliament. They are all ſworn at the table of the houſe, that they will give a true judgment according to the evidence, and every queſtion is determined by a majority. They may ſend for witneſſes, and examine them upon oath. When the whole evidence is heard, they report to the houſe, whether the election be a due election or void, and alſo whether the petition or defence be frivolous and vexatious, in which caſe the party aggrieved ſhall recover coſts: and the houſe, on being informed of ſuch report by the chairman of ſuch committee, order the ſame to be entered in their journals, and give the neceſſary directions for altering or confirming the return, or for iſſuing a new writ, or for carrying ſuch determination into execution, as the caſe may require.

(*a*) If a committee have ſat 14 days, 12 members, and if 25 days, 11 members, may proceed to buſineſs.

But when the committee are of opinion that the merits of a petition depend upon a queſtion reſpecting the right of election, or the appointment of a returning officer, they require the counſel of the reſpective parties to deliver a ſtatement of the right for which they contend, and the committee then report to the houſe thoſe ſtatements with their judgment thereupon; and if no perſon petition within a twelvemonth, or within fourteen days after the commencement of the next ſeſſion, to oppoſe ſuch judgment, it is final and concluſive for ever. But if ſuch a petition be preſented, then, before the day appointed for the conſideration of it, any other perſon, upon his petition, may be admitted to defend the judgment, and a ſecond committee are appointed exactly in the ſame manner with the firſt, the deciſion of which committee puts an end to all further litigation on the point in queſtion.

But a renewed petition muſt be preſented within 14 days after the commencement of any ſubſequent ſeſſion, and upon its being preſented, a day and hour, not leſs than 14 days diſtance, muſt be appointed by the houſe for taking it into conſideration. If petitions are not renewed within this time, the judgment of the committee upon the point in queſtion ſhall be final and concluſive.

In order to prevent unneceſſary delays in the execution of writs for the election of members for *Scotland*, it is provided by 35 *G.* 3. *c.* 65. that the ſheriff or ſteward depute or ſubſtitute of any county or ſtewartry ſhall, within ſix days after receipt of the writ, direct the notices required by law to be given as to the time and place of election, and that the day of election ſhall not be ſooner than ſix, or later than fifteen days after the day of publication at the church doors.

The act alſo directs, that no other perſon but the ſheriff or ſteward depute, or his ſubſtitute, ſhall receive or execute the writ; and that if any principal or high ſheriff or ſteward, or any other perſon ſhall interfere in the execution of the writ, he ſhall forfeit a thouſand pounds, and be incapacitated from ever bearing or executing any office or place of truſt under the crown. The act likewiſe impoſes a penalty of five hundred pounds upon ſheriffs or ſtewards deputes, or their ſubſtitutes, neglecting or refuſing to perform their duty.

It is provided by 36 *G.* 3. *c.* 59. That if after counting the Houſe according to the directions of the 40th of *G.* 3. *c.* 16. there be leſs than one hundred members preſent, or if the forty-nine members, not ſet aſide nor excuſed, cannot be completed, the Houſe may (after the order for taking the petition into conſideration ſhall have been adjourned to a particular hour on the following day as in that act is directed) proceed upon any order of the day for the call of the Houſe that may have been previouſly fixed for that day, or direct that it be adjourned, and act therein as is uſual in ſuch caſes: and in caſe no order of the day for a call of the Houſe ſhall have been previouſly fixed for that day, then the Houſe may order that the Houſe be called over on ſuch future day as they ſhall appoint, and may make all neceſſary orders relating thereto, and in any caſe may make ſuch further orders as to them ſhall ſeem expedient for enforcing the attendance of members on the buſineſs of the Houſe; and the Houſe ſhall then adjourn to the ſame day to which ſuch order or orders ſhall be adjourned, and ſo from time to time, as occaſion ſhall require; and in caſe no ſuch proceedings with reſpect to the call of the Houſe, or the above matters, ſhall take place, or, if in the courſe of thoſe proceedings the Houſe ſhall be adjourned for want of members, the Houſe ſhall be taken to be adjourned to the ſame day to which ſuch order or orders ſhall have been adjourned. But if ſuch forty-nine members cannot be completed, the Houſe ſhall not proceed to any of the above matters until the door is unlocked, and the parties, their counſel and agents, are withdrawn from the bar. Nor ſhall the Houſe proceed to any other buſineſs (other than ſuch as may be expreſsly allowed by any act of parliament) until there be a due attendance of members, except calling over the Houſe, adjourning ſuch call, or ordering a call on a future day, and making orders relative thereto, or other orders for enforcing the attendance of members on the buſineſs of the Houſe.

(E) Of the Method of paſſing Bills.

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(*An act of parliament*) See Co. Lit. 159. b. n. 2. 13th ed.

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(*To the paſſing*) But not when they ſit to exerciſe judgment. Stand. Ord. Houſe of Lords, 12th June 1689, and 15th March 1697. 8vo. edit. 1748. They are now made by the king's licence. Elſ. c. 5.

1 Wooddeſ. 41. Elſ. c. 5. Ord. 25 Feb. 1625. *ibid.*

Proxies from a ſpiritual lord are to be made to a ſpiritual lord; and from a temporal lord to a temporal lord; and no lord can receive more than two proxies: and a lord voting in a queſtion muſt vote as proxy, if proxies are called for (*d*).

(*d*) Ord. 11th Feb. 1694. *ibid.*

Elſ. c. 5. A lord ſhall not have above two proxies. By order 2 Car. Ruſhw. 269. 4 Inſt. 12, 13.

It hath been made a queſtion, if a proxy be given to two or more lords, and they differ, whoſe voice ſhall ſtand; which is ſaid to have been reſolved by the Earl of *Mancheſter*, lord preſident of the council, in favour of him who is firſt named in the delegation, and preſent. But according to Lord *Coke*, if three are proxies of the ſame lord, and all preſent, and one is content that a bill paſs, and the other two are not content, this is no voice.

4 Inſt. 13.

The mere preſence of the lord in the houſe, though he neither argue, conſent, nor ſpeak any thing, ſeemeth to be a revocation of his proxy.

Seld. 3 Vol. 2 P. 1476.

A lord may be ſummoned with a clauſe that he do not make a proxy.

The form of giving the royal aſſent to bills has been for a conſiderable time paſt by the clerk of the Houſe of Lords, either the king preſent, or in the preſence of commiſſioners authoriſed by him. There have been inſtances (*a*) of bills being paſſed by letters patent. In the ſtatute of the 33d of *Henry* the Eighth, *c.* 21. (*b*) intitled, "Queen *Catherine* and her "complices attainted of high treaſon," it is declared, § 3. "That the "king's royal aſſent, by his letters patent under the great ſeal, and ſigned "with his hand, and declared and notified in his abſence to the Lords "Spiritual and Temporal, and to the Commons aſſembled together in "the High Houſe, is and ever was of as good ſtrength and force as "though the king's perſon had been there perſonally preſent, and had "aſſented openly and publickly to the ſame." And in § 4 it is enacted, "That this royal aſſent and all other royal aſſents hereafter to be ſo given "by the kings of this realm, and notified as is aforeſaid, ſhall be taken "and reputed good and effectual to all intents and purpoſes without "doubt or ambiguity; any cuſtom or uſe to the contrary notwithſtand-"ing."

(*a*) Lords Journ. 22 March 1620. 11 July. 1625.

(*b*) Raſt. Stat. tit. Parliament, § 18.

3 Parl. Hiſt. 298. Dyer, 93.

One of the grounds alleged for the reverſal of the attainder of the Duke of *Norfolk* in the reign of *Henry* the Eighth was, that the king had not *ſigned* the letters patent for giving the royal aſſent to the act with his own hand, but that his ſtamp had been ſet to them by one *William Clerk*. And the queſtion of the validity of the act upon this ground was brought and argued before all the judges at Serjeants' Inn, by the perſons who had purchaſed the lands of the attainted duke; but it does not appear that the judges gave any opinion upon it.

2 Hatſ. Pre. 323.

All the commiſſions and letters patent for giving the royal aſſent to bills agreed upon by both Houſes, recite, "Whereas we have ſeen and "perfectly underſtood an act agreed upon by you (*a*), our loving ſubjects "the Lords Spiritual and Temporal and the Commons in this our preſent "parliament aſſembled, and indorſed by you, as hath been accuſtomed, "*&c. &c.* This recital, ſaith Mr. *Hatſell*, which ſhews the neceſſity of the bill being communicated to the king, after it has been agreed upon by both Houſes, clearly explains, what might otherwiſe have been matter of doubt, "Why the commiſſioners, who in ſeveral inſtances had been, by "a prior commiſſion, authoriſed not only to begin and hold the parlia-"ment, *but to do every thing which for us, and by us, ſhall be there to* "*do*

(*a*) "It is "not only "lawful," ſaith my Lord Clarendon, "for the "Privy "Council, "but their "duty, to "give "faithfully

" *done*, could not under that commiſſion have authority to give the royal " and freely
" aſſent to any bill." And as the former commiſſion is not revoked, this " their ad-
ſhews why the Lord Chancellour in 1708, 1754, 1768, and 1789, gave " vice to
the royal aſſent by virtue of two commiſſions, *viz.* the general one upon " the king
opening the ſeſſion, and a ſpecial one for the purpoſe of giving the royal " upon all
aſſent to the bills in queſtion. Lord *Clarendon* ſays, " That when it was " matters
" propoſed on *Charles* the Firſt going into *Scotland* in 1641, that he ſhould " concluded
" leave a commiſſion with ſome perſons to paſs ſuch acts as ſhould be pre- " in parlia-
" pared and be agreed to by both Houſes in his abſence, it was found " ment, to
" that no ſuch commiſſion could be legally granted, to give the royal " which his
" aſſent to any acts that were not conſented to by both Houſes, at the " royal
" date of the commiſſion." " aſſent
" is ne-
" ceſſary,
" as well as
" upon any

" other ſubject whatſoever. Nay, a privy-counſellour, as ſuch, is bound to diſſuade the king " from conſenting to that which is prejudicial to the crown; at leaſt, to make that prejudice " manifeſt to him; though as a private perſon he could wiſh the matter conſented to. And " therefore, by the conſtitution of the kingdom, and the conſtant practice of former times, all " bills, after they had paſſed both Houſes, were delivered by the clerk of the parliament to the " clerk of the crown, and by him brought to the Attorney-General, who preſented the ſame to " the king in council; and having read them, declared what alterations were made by thoſe " bills to former laws; and what benefit or detriment, in profit or juriſdiction, would accrue " thereby to the crown; and then upon a full and free debate by his counſellours, the king re- " ſolved accordingly upon ſuch bills as were to be enacted into laws; and reſpited the other that " he thought not fit to conſent to. As this hath been the known practice, ſo the reaſon is very " viſible; that the royal aſſent being a diſtinct and eſſential part towards the making a law, " there ſhould be as much care taken to inform the underſtanding and conſcience of the king " upon thoſe occaſions, as theirs, who prepare the ſame for his royal aſſent." Hiſtory of the Rebellion, vol. 1. book the 3d, pag. 157. One of the reaſons aſſigned in the preamble to the act of 13 & 14 Car. 2. c. 29. for the reverſing of Lord Strafford's attainder, is, that when the king ſigned the commiſſion for giving the royal aſſent to the bill, he did it " with exceeding great " ſorrow, and it was ever remembered by him with inexpreſſible grief of heart; and out of his " majeſty's great piety he did publickly expreſs it, when his own ſacred life was taken away by " the moſt deteſtable traitors that ever were." This ſhews that it was the opinion of parlia- ment, that it was eſſential to the validity of an act, that the royal aſſent to it ſhould be given freely. *Note*, The inherent and conſtitutional prerogative of the crown, to withhold the royal aſſent, has not been exerciſed ſince the 11th of March 1707, when Queen Anne refuſed her aſſent to " a bill for ſettling the militia of that part of Great Britain called Scotland."

When a bill has paſſed both Houſes, it is not neceſſary that it ſhould be ſent back to the Commons before it receives the royal aſſent, unleſs it be a bill of ſupply, for this the Commons claim a right of preſenting by their Speaker. 2 Hatſ. Prec. 320.

On the 7th of *March* 1785 a commiſſion was made out and paſſed the great ſeal, for giving the royal aſſent to ſeveral bills agreed upon by both Houſes; but, by ſome miſtake, the malt bill, which had paſſed both Houſes, and the agreement to which by the Lords had been communicated to the Commons, was left out. As ſoon as this was diſcovered, from the liſt of bills ready for the royal aſſent, which is always ſent to the Speaker, notice of the error was given to the Lords, and a deſire expreſſed, that it might be rectified by iſſuing a new commiſſion, and not executing the commiſſion which was then ready. Accordingly, no proceedings were had upon the firſt commiſſion, but another commiſſion, in which the malt-bill was included, was prepared, and paſſed the great ſeal, and the bills named in it received the royal aſſent the next day, the 8th of *March*. 2 Hatſ. Prec. 321.

Bills for a general pardon; for the reverſal of attainders or outlawries, and for reſtitution in blood; for granting honours and precedency, originate with the crown, and muſt be formally recommended by the king before 63. Inſta 2 Hatſ. Prec. 337-8. 3 Hatſ. Prec. 24.

bill which passed in 1663, intituled, "An "act for "settling the lands of the Earl of Kent and the Lord Lucas on the marriage of the said Earl with "the daughter of the said Lord Lucas," there is a clause (which, as no particular mention of it appears in the Lords Journal, was probably inserted, whilst the bill was before the committee) that has no reference to the title of the bill; and though it relates to honours and dignities, does not appear to have had the consent of the crown till the bill was offered for the royal assent. The clause recites, "That Charles II. having by letters patent created the Countess of Kent "Baroness Lucas, to her and her heirs male, and for want of such issue, to the heirs of her body; "and if at any time after her death, and default of issue male, there shall be more persons than "one co-heirs, that then the said honour shall not be in suspence or extinguished, but shall go "to such of the co-heirs as by course of descent would be entitled to other entire inheritances, "as, offices of honour or publick trust;" the clause proceeds to enact, "That the said declara-"tive clause in the said letters patent shall be and is hereby ratified and confirmed; and that the "said barony, honour, and title, from time to time, &c. &c." repeating the words of the letters patent. By this uncommon limitation, perhaps the only one of its kind, the barony of Lucas, upon the death of the Marchioness Grey, widow of Philip second Earl of Hardwicke, in 1797, devolved upon her ladyship's eldest daughter Amabella Viscountess Polwarth, who has accordingly assumed the title of Baroness Lucas. The Marchioness Grey was daughter of Amabel Countess of Breadalbane, the eldest daughter of Henry, thirteenth Earl and first Duke of Kent.

before they can be taken into consideration. So, of bills of supply, and all bills for the application of publick money. But though recommended immediately from the crown, these bills must afterwards receive the royal assent in the same manner with other bills.

2 Hatsell Prec. 62-3.

In general, each House has a right to originate and pass such bills as to them may seem proper; except that the Lords have in several instances claimed the exclusive right, that bills for restitution of honours, or in blood, should commence with them; and the House of Commons have on their part asserted, and, it should seem, invariably preserved, the exclusive exercise of the right, "that bills of supply, imposing burthens on "the people, should be the grant of the Commons; and that the Lords "should have no other voice than as one branch of the legislature, by "their assent to give the authority of a law to the levying of those aids and "taxes which the Commons shall think wise and fitting to impose." Other bills of what nature soever, whether relating to the parliament itself, or to either House separately, may have their commencement indifferently in either House.

Comm. Journ. July the 3d, 1678.

(F) Of the Continuance, Adjournment, Prorogation, and Dissolution of the Parliament.

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(*The house of commons*) It is not a prorogation of the house of lords or commons, but of the parliament. 1 Bl. Comm. 187.

Vide 2 Hatsell Prec. tit. King, c. 3.

There seems to be no doubt but that it is the privilege of both Houses to adjourn themselves. The king may signify his desire, and has frequently done so, that the parliament should adjourn itself, but he has no authority to adjourn it, and it is in the wisdom and prudence of either House to comply with his requisition or not, as they see fitting.

2 Hatsell Prec. 309, 310.

A prorogation of the parliament, is either by the king's command, and in his presence, signified by the Lord Chancellour, or Speaker of the House of Lords, to both Houses, or by writ under the great seal directed to the Lords and Commons, or by commissioners appointed by a special commission for that purpose. The first is the usual mode of proceeding, where the parliament is prorogued at the close of the session. But there seems

ſeems to be no inſtance where the parliament has been prorogued by writ, except upon the meeting of a new parliament after a general election, and before a Speaker of the Houſe of Commons is choſen: upon this occaſion when the members of the Houſe of Commons come to the place appointed for adminiſtering to them the oaths, by the Lord Keeper or his deputies, "on their being informed, that the parliament is to be prorogued by writ directed to the Lords and Commons, they go directly "without going into the Houſe of Commons, or expecting any meſſage "from the Lords, to the Houſe of Peers, where the writ for proro-"guing the parliament is read." This is the form of the entry in the Journal of the Houſe of Commons, without expreſſing by whom, or upon what authority, this information to the Commons is conveyed. The proroguing by commiſſioners, ſpecially appointed for that purpoſe, is the uſual form, when the parliament meets from time to time during the receſs.

The more ancient form of diſſolving parliament was by the king's command, ſignified to both Houſes in the preſence of the ſovereign, in the Houſe of Lords, by the Lord Chancellour, or Speaker of that Houſe. Where the king was not preſent in perſon, a commiſſion was iſſued under the great ſeal, appointing certain lords therein named to be commiſſioners for the purpoſe of executing the royal authority upon this occaſion. The later practice (*a*), and that which hath been followed without interruption ever ſince the Revolution, hath been, that the parliament is prorogued to a certain day; and then a proclamation iſſues, diſcharging the members of both Houſes from their attendance upon that day, and diſſolving the parliament. 2 Hatſ. Prec. 360.

(*a*) This practice, ſays Mr. Hatſell, has probably ariſen from thoſe motives, that are ſuggeſted by Charles I. in his ſpeech in 1628, "That it ſhould be a gene-"ral maxim with kings, themſelves only to execute pleaſing things, and to avoid appearing per-"ſonally in matters that may ſeem harſh and diſagreeable." For however proper it may be frequently to appeal to the ſenſe of the nation at large, by the election of a new parliament; and however flattering this may be to the electors; it happens from a variety of circumſtances, that to the elected, who are actually in poſſeſſion of ſo valuable a privilege, as that of giving their voice in the great council of the nation, a diſſolution of parliament is always an unwelcome and unpleaſing meaſure. 2 Hatſ. Prec. 362. Where the diſſolution is rather abrupt, and the king is diſſatisfied with his parliament, the reaſon here aſſigned for the practice may have its weight: but, where the period of the natural diſſolution of parliament is not very diſtant, it does not ſeem to be a very harſh meaſure in the crown to accelerate the event a little; and therefore, though previouſly to the diſſolution of the parliament in 1796, it was, as uſual, formally prorogued, yet his majeſty in his ſpeech at the cloſe of the ſeſſion intimated his intention of immediately diſſolving it, and calling a new one.

With reſpect to the calling and holding of parliaments, the prerogative of the crown by the ancient laws of the realm was under no particular reſtraint. But by the ordinance of the 5th of *Edward* 2. it was directed, "That the king ſhall hold a parliament once in every year, or twice, if "*meſtier ſoit* (*b*)," and this ordinance was afterwards enforced by the ſtatutes of the 4th and 36th of *Edward* the Third.

(*b*) The *Dictionnaire de Trevoux* explains the word "*meſtier*" ſometimes to mean *opus, neceſſitas*, but adds, "*Il eſt vieux en ce ſens.*"

By the ſtatute of 16 *Car.* 1. and 16 *Car.* 2. *c.* 1. it is enacted, "That "the holding of parliaments ſhall not be diſcontinued above three years "at the moſt."

By the bill of rights, 1 *W. & M.* ſeſſ. 2. *c.* 2. it is declared, "That "for redreſs of all grievances, and for the amending, ſtrengthening, and "preſerving of the laws, parliaments ought to be held frequently."

By

By the 6th of *W. & M. c.* 2. it is declared and enacted, "That a "parliament ſhall be holden once in three years at the leaſt."

(*c*) This appears to be the firſt act which limited the prerogative of the crown in this reſpect; for the acts paſſed in the 16th year of Charles I. and 16th of Charles II. which by Lord Clarendon, Burnet, and the other hiſtorians of thoſe times, are improperly called, "Bills for triennial Parliaments," were not intended to limit the duration, but to ſecure the meeting and ſitting of parliaments." 2 Hatſ. Prec. 364.

The latter act limits the duration of parliaments (*c*) to three years; but this limitation has been extended by a ſubſequent act, *viz.* 1 *G.* 1. *ſtat.* 2. *c.* 38 to ſeven years.

By the ſtatute of the 6th of *Anne*, *c.* 7. § 4. it is provided, that thenceforth no parliament ſhall be determined or diſſolved by the death or demiſe of her majeſty, her heirs or ſucceſſors; but ſuch parliament ſhall continue, and is empowered and required, if ſitting at the time of ſuch demiſe, immediately to proceed to act, notwithſtanding ſuch death or demiſe, for and during the term of ſix months, unleſs it ſhall be ſooner prorogued or diſſolved: and if ſuch parliament ſhall be prorogued (*a*), then it ſhall meet and ſit upon the day to which it ſhall be prorogued, and continue for the reſidue of the ſix months, unleſs ſooner prorogued or diſſolved. And by § 6. in caſe there is no parliament in being at the time of the demiſe of the crown, that hath met and ſat, then the laſt preceding parliament ſhall immediately convene and ſit at *Weſtminſter*, and be a parliament to continue, as if it had never been diſſolved

(*a*) That is, by the ſucceſſor.

But this clauſe is repealed by the 37th of *G.* 3. *c.* 127. by which it is enacted, that in caſe of the demiſe of the crown ſubſequent to the diſſolution or expiration of a parliament, and before the day appointed by the writs of ſummons for aſſembling a new parliament, then the laſt preceding parliament ſhall immediately convene and ſit at *Weſtminſter* and be a parliament to continue for ſix months, and no longer, but ſubject to be ſooner prorogued or diſſolved by the ſucceſſor And in caſe of the demiſe of the ſucceſſor within the ſix months, and before ſuch parliament ſhall have been diſſolved by him, or after it ſhall have been ſo diſſolved, and before it hath met in the manner thereby provided, the ſaid laſt preceding parliament ſhall immediately convene and ſit, and continue to be a parliament for ſix months longer, to be computed from ſuch laſt-mentioned demiſe, but ſubject to be ſooner prorogued or diſſolved by the ſucceſſor; and ſo as often as any ſuch demiſe ſhall happen before a new parliament ſhall have met in manner thereby provided. And in caſe of the demiſe of the crown on the day appointed by the writs of ſummons for calling and aſſembling a new parliament, or at any time after ſuch day, and before ſuch new parliament ſhall have met and ſat, ſuch new parliament ſhall, immediately after ſuch demiſe, convene and ſit at *Weſtminſter*, and be a parliament, to continue for ſix months and no longer, but ſubject to be prorogued or diſſolved by the ſucceſſor.

(G) Of the Juriſdiction of the Houſe of Lords.

Page 583

(*Every ſuit*) See a clearer account of parliamentary impeachments, 2 Wooddeſ 596. 620.

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(*As this court*) And that theſe, as well as appeals and impeachments by the commons, do not abate by the prorogation or diſſolution of the parliament. Sir T. Raym. 483. 2 Lev. 93. Comm. Journ. 23 Dec. 1790. Lords Journ. 16 May 1791.

Court

Court of Chancery. Page 585

(C) Of the extraordinary Court, proceeding according to Equity: And herein,

UPON this head the Editor takes leave to refer the Student to the last chapter of the third volume of the *Commentaries*, and to Mr. Hargrave's Notes upon the *Treatise of Equity*, where the principles upon which the court of Chancery exercises its equitable jurisdiction are traced in a most masterly manner. A clear and succinct account of the origin of the court of Equity in Chancery will be found in the third volume of Mr. Reeves's *History of the Law*.

Court of King's Bench. Page 591

(A) Of the Jurisdiction of the Court of King's Bench: And herein.

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(By the *statute of Gloucester*) And though the demand, upon the face of the record exceed 40*l*., now, (for the law formerly was different. Oulton v. Perry, 3 Burr. 1592.) the court will, on motion, stay the proceedings. Steane v. Holmes, 2 Bl. Rep. 754. Kennard v. Jones, 5 Term Rep. 495. Wellington v. Asters, 5 Term Rep. 64.

Court of Common Pleas.

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(Towards the *Norman*) See also note 2, 13th edit. Co. Lit. 71. b. and Mad. Hist. Exch. c. 2. edit. 63. 539.

Court of Exchequer. Page 597

(A) Of the Nature and Antiquity of this Court.

THE court of Exchequer has a general jurisdiction over every part of the publick revenue; and has complete power to interfere in the accounts of the publick accounts in every part of their process. It cannot be *Ex parte* Durrand, Anstr. 743.

be deprived of this power but by expreſs proviſion in an act of parliament; it is competent to it therefore to control the conduct of the commiſſioners of publick accounts under the 25 *Geo.* 3. *c.* 52., that ſtatute not having expreſsly ouſted it of its juriſdiction.

This authority may be exerted in two ſhapes; either by motion or petition to the court, or by the more formal method of an information by the Attorney General, or a bill againſt him. In the ordinary applications to take off an *inſuper* improperly impoſed, to remove the hands of the ſheriff on an improper levy, and the like, a motion is the proper mode of obtaining the aſſiſtance of the court. But, where the nature of the queſtion, or intricacy of the circumſtances render it impoſſible to come at the juſtice of the caſe on motion, the more formal mode, by bill or information, muſt be reſorted to.

(B) In what Caſes it has a Juriſdiction.

Page 598
(*The debtor*) But ſee the preceding note, and the ſame fiction is uſed on the equity ſide.

Page 599
(*If A. is outlawed*) And if an action be commenced in another court, and it appear from the pleadings, that the revenue is concerned in the event of it, the cauſe will be removed by ſuch court into the office of pleas of this court Lamb v. Gunman, Parker, 143.

Per Parker, C. B. Park. Rep. 69. There cannot be an information upon a ſeizure to condemn goods by proclamation, but only in the court of Exchequer; and the reaſon is, becauſe, upon all ſuch ſeizures, every perſon concerned may have and know a certain place to reſort unto for his remedy in this kind.

Bercholt v. Candy, Bunb. 34, 5. And the court of Exchequer will remove an action brought in another court for the ſeizure of a ſhip, though no information is filed in it; but after the information has been tried in it, and a verdict for the defendant, they will not remove an action brought in another for the ſeizure.

Penny v. Bailey, *id.* 309. So, an action of trover againſt an officer for goods ſeized and condemned, and alſo a great coat, ſaddle, *&c.* was removed upon an affidavit that the goods, *&c.* were actually condemned, and that the great coat, *&c.* were thrown in only to give colour.

Berkley v. Walters v. *id.* 306. But this court would not remove an action for taking ropes and cordage againſt an officer who had ſeized two cables, one of which only was foreign, and actually condemned.

(*By the* 33 *H.* 8.) By the privy ſeal, 1 Geo. 2., which empowers the barons to compound or diſcharge all forfeitures of recognizances, penalties, fines, iſſues, amerciaments, and other ſums of the nature of recognizances, fines, iſſues, and amerciaments, whereby the ſubjects are chargeable to his Majeſty, the court diſcharged a penalty fixed by ſtatute, Rex v. Dibbens, Parker, 165. So, fines judicially ſet have been compounded. Nov. 21ſt, 6 W. & M. cited *ibid.* And now by ſtat. 4 Geo. 3. c. 10., the barons are empowered to diſcharge without any *quietus*, recognizances eſtreated into the Exchequer for neglecting to attend as parties or witneſſes, or to proſecute indictments in any court of record, or at the aſſizes, &c. upon petition and affidavit on behalf of the perſons who may be impriſoned, or be liable to be impriſoned on the forfeiture of ſuch recognizances: but the act expreſsly provides that no diſcharge ſhall be given on ſuch petitions where any debt is due to the crown, other than by the recognizances ſo prayed to be diſcharged; nor in any caſes of defrauding the revenue by contraband trade, or aſſaulting the officers of the cuſtoms or exciſe in the execution of their duty, or any perſon lawfully aſſiſting them therein.

(C)

(C) Of the Manner of its Proceedings.

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(*If prohibited*) And even for perishable goods, it is discretionary in the court whether they will grant it or not. Parker v. Ashton, Bunb 21. Vincent v. De Laar, Parker, 196 What shall be such a delay as shall authorize the awarding of a writ of delivery cannot be certainly stated: indeed, it seems to be generally agreed, that if a seizure be in the vacation, and there is no information filed the term following, if it could have been tried in that term, that this would be a delay to ground a writ of delivery upon. Johnson v. Sowers, Bunb. 30. Where it appeared in an information, that goods seized by the officer of commissioners of excise, were removed from one port to another without a permit, the court granted a writ of delivery, upon giving security, this being an unlawful importation, and therefore not within their jurisdiction. Warwick v. White, *id.* 106.

Court of the Constable and Earl Marshal.

Page 601

(A) Of the Manner of holding this Court: And herein, whether it can be holden by Commission, by the Earl Marshal only; and whether it may be prohibited if it exceeds its Jurisdiction.

Page 602

(*But notwithstanding*) See upon this point a letter written soon after the Revolution by Dr. Att to Lord *Sommers*, then attorney-general. Hearn's Disc. of Eminent Antiq. 2d ed. vol. 2. 250. Co. Litt. 72. b. note 1. 13th edit.

Of the Court of the Justices of Oyer and Terminer, and Gaol-Delivery.

Page 604

(A) Of the Manner of authorizing Commissioners of *Oyer* and *Terminer*, and Gaol-Delivery: And herein of the Determination of their Power.

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(*These commissions*) By 25 Geo. 3. c. 18., and 32 Geo. 3. c. 48., the justices of *oyer* and *terminer* and gaol delivery of *Newgate* for the county of *Middlesex*, and the justices of the peace for that county, are empowered to continue and proceed in a session of gaol delivery, of the peace, and of *oyer* and *terminer*, notwithstanding the happening of the essoign day of term, or the sitting of the court of King's Bench at *Westminster*, or elsewhere in the county of *Middlesex*.

(B) Of

(B) Of their Juriſdiction when appointed.

Page 606
(*By the* 1 *E.* 6. *cap.* 7.) See 8 G. 3. c. 15. *infra.* vol. 3. 141.

(C) Of the Form of their Proceedings and holding their Courts.

BY *ſt.* 19 *Geo.* 3. *c.* 74. § 70. "Whenever the courts of aſſiſe, "*prius*, *oyer* and *terminer*, or gaol-delivery, for any county at large "*England*, ſhall be holden in or near any city or town that is alſo a coun "of itſelf, and at the ſame time with the like or any of the like cour "for the ſaid city or town, the lodgings of the judge or judges ſhall b "conſtrued and taken to be ſituate both within the county at large, an "alſo within the county of ſuch city or town, for the purpoſe of carryi "this act into execution, and of tranſacting the buſineſs of the aſſizes f "ſuch county at large, and for the county of ſuch city or town, duri "the time that ſuch judge or judges ſhall continue therein for the exec "tion of their ſeveral commiſſions."

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Of the Court of Seſſions of Juſtices of the Peace.

(*e*) 2 Leach's Hawk. P.C. c. 8. § 58. n. Ca. temp. Hardw. 80. (*f*) 2 Str. 832. 865. (*g*) Andr. 105. (*h*) 2 Lev. 229.

WHEN the juſtices are once legally convened, they cannot adjour any matter depending before them, without expreſsly adjourning t ſeſſions alſo (*e*); which adjournment muſt ſhew when the original ſeſſio commenced (*f*). There is indeed no neceſſity to ſet out all the pa cular adjournments (*g*); though when a warrant is iſſued for taking one, it muſt be ſhewn that the ſeſſions continued by adjournment till taking (*h*).

(*i*) 4 Burn. Juſt. 184. (*k*) Ca. temp. Hardw. 81.

They cannot refer any ſubject of their inquiry to the determination the judges of aſſiſe, without the conſent of the parties (*i*); for they a bound to make a final judgment themſelves (*k*).

(*l*) Ca. temp. Hardw. 79. (*m*) 2 Str. 1263. 2 Salk. 606.

When they proceed upon indictments, as a court of record at comm law, their proceedings muſt contain the formal and regular continuanc (*l*); for the ſeſſions once dropped cannot be reſumed (*m*).

The ſeſſions being conſidered as one day, the juſtices may alter the judgments during the continuance of it.

1 Burr. 245. 2 Salk. 477.

Upon appeals their diſcretion is co-extenſive with that of the t juſtices, and they need not give the reaſon upon which their opinion founded.

(*n*) Cowp. 369.

The ſeſſions may proceed by information on 5 *Eliz.* for exerciſing trade, (*n*) &c. But they cannot make an original order for lane ow

s to pay over monies to their ſucceſſors (*o*); nor can they make a new venger's rate (*a*), or ſet aſide an aſſignment of an apprentice bound out the juſtices (*b*), nor have they cognizance over the bailiff of a corpora- for not qualifying (*c*).

(*o*) 3 Burr. 1366.
(*a*) *Id.* 1460.
(*b*) 1 Str. 40.
(*c*) Say. Rep. 138.

Of the Eccleſiaſtical Courts.

) The ſeveral Courts which exerciſe a Juriſdiction: And herein,

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This authority) A faculty may be ſubſcribed, regiſtered, and enrolled by the deputy of the f clerk of the faculty. Rex v. Epiſc. Ceſtr. 8 Mod. 364.

6. Of the Court of Peculiars.

As the perſons, entitled to peculiar juriſdiction, have no known or cer- regiſters, or publick place to keep their records in, and wills are there- e liable to be loſt: they are ordered by canon 126, once in every year, o pain of being ſuſpended from the exerciſe of their juriſdiction, to ibit into the publick regiſtry of the biſhop of the dioceſe, or of the n and chapter, under whoſe juriſdiction the peculiars are, every origi- teſtament of every perſon in that time deceaſed, and by them proved, a true copy of every ſuch teſtament, examined, ſubſcribed, and ſealed the peculiar judge and his notary.

If a peculiar be ſubordinate to the biſhop, the cauſe muſt be referred to immediate ordinary, as in the caſe of an archdeacon (*a*) or commiſ- , and not to the archbiſhop, unleſs the peculiar have his immediate rt to the archbiſhop.

Hob. 186.
(*a*) The peculiar juriſdiction of an archdeacon is not

perly a peculiar, but rather a ſubordinate juriſdiction. *Per* Holt, C. J. 6 Mod. 308. 2 Roll. 446-8.

But if the peculiar be free by a general exemption from all ordinary ſdiction (which was common in the caſe of monaſteries both by the nts of kings and popes) then the cauſe muſt be remitted to the king, ppeals muſt alſo be in ſuch caſes; and ſo it is provided by ſtat. 25 *H.* . 21.

Hob. 186.
A peculiar *primâ facie* is to be underſtood of him who hath co-

nate juriſdiction with the biſhop. *Per* Holt, C. J. 6 Mod. 308. Where one dies poſſeſſed of ds in ſeveral peculiars within the ſame dioceſe, adminiſtration ſhall not be granted by the op of the dioceſe, but by the metropolitan; inaſmuch as they are exempt from ordinary juriſ- ion. Gibſ. 472. Swinb. a. 440.

9. Of the Court of Delegates.

Page 613

This court is erected) Such a commiſſion may be granted at the inſtance of a perſon intereſted, gh not an original party in the cauſe. Jones v. Bougett, 1 Atk. 298.

(D) In

(D) In what Cases the Ecclesiastical Courts are allowed to have Jurisdiction.

Page 618
(*As if payment*) 1 Ventr. 291. S. P. Shatter v. Friend, 1 Show. 158. 172. S. P. Comb. 1[illegible] S. C. Holt, 752. S. C. 2 Salk. 547. S. C.

(E) How they are to proceed, as to those Matters in which they have a Jurisdiction, otherwise will be controuled by the Temporal Courts.

Page 620
(*A citation*) *Vide infra*, 3 vol. 476.

Page 622 Of the Court of Admiralty.

THE jurisdiction of the admiralty is twofold, and holden before distinct tribunals: the one, is the ordinary court for deciding in controversies relating to contracts made at sea, and is called the *instance* court; the other determines the right to maritime captures and seizures, and is called the *prize* court. The jurisdiction in both cases is exercised by the same person: he is appointed judge of the admiralty by a commission under the great seal, which enumerates particularly, as well as generally, every object of his jurisdiction, but makes no mention of prize. To constitute *that* authority, or to call it forth, in every war, a commission under the great seal issues to the lord high admiral, to will and require the court of admiralty, and the lieutenant and judge of the said court, his surrogate or surrogates, and they are thereby authorised and required, to proceed upon all and all manner of captures, seizures, prizes, and reprisals of all ships and goods, that are, or shall be taken; and to hear and determine, according to the course of the admiralty, and the law of nations. And a warrant issues to the judge accordingly.

(A) To what Places the Jurisdiction of the Admiralty is confined.

Page 623
(*By the* 15 *R.* 2. *cap.* 3.) The words in the act are, "*par aval les pountz.*" In the old abridgment it is *portis*: in the *Nova Statuta* it is *pointz*.

Page 624
(*By the* 2 *H.* 4.) Ca. temp. Hardw. 271. 2 Str. 1075.

Lindo v. Rodney, Dougl. 613.

The above statutes, it hath been solemnly determined, are intended to check the usurpations of the *Instance* court only, and do not at all relate to the *Prize* court: for the jurisdiction in cases of prize does not depend on the locality, but the nature of the question, which is not governed by the rules of the common law, but by the *jus belli*. Hence, the prize court have exclusive cognizance of all captures made *at land* by the assistance of a fleet.

(B) To

) To what Things its Juriſdiction extends: and herein of ſuch Matters as ariſe partly on Sea, and partly on Land.

Page 625

But if the owner) But if a ſhip be arreſted by proceſs out of the Admiralty court for a matter ing within their juriſdiction, and ſhe be reſcued afterwards at land, the cognizance of the reſ- belongs to the Admiralty juriſdiction. Rigden v. Hedges, 1 Ld. Raym. 446. *Per* Holt, J.

ff an Engliſh) And that court having excluſive juriſdiction over all queſtions of prize; hath ſame juriſdiction over all matters that are conſequential to it, Le Caux v. Eden, Doug. 594. Lindo v. Rodney, *id.* 591, n. 1. Livingſtone v. M'Kenzie, 3 Term Rep. 332. Smart v. lff, *id.* 323. or ariſe incidentally in the conſtruction of acts of parliament or proclamations. me v. Earl of Camden, 1 H. Bl. 476. *contr.* but reverſed in K. B. 4 Term Rep. 382, and that erſal affirmed in parliament. Printed Caſes of the Lords, June 22d, 1795.

C) To what Contracts its Juriſdiction extends: And herein of Contracts made on Sea.

Page 626

In caſes of neceſſity) An hypothecation bond given in the courſe of a voyage, though it be ex- ted on land, and *under ſeal*, is cognizable in the Admiralty court. Menetone v. Gibbons, 3 rm Rep. 267. Johnſon v. Shippen, 2 Ld. Raym. 982. 1 Salk. 35. S. C. 6 Mod. 79.

The mariners) In the caſe above referred to in Salk. 33. p. 4., Lord Holt is made to ſay, that as by mere indulgence that mariners were permitted to ſue in the Admiralty for their wages: t it is againſt the ſtatute of 15 R. 2. expreſsly, but that *communis error facit jus*. But the ſtat. nn. c. 16. § 17. puts ſuits for ſeamens' wages very clearly, though by implication, upon a le- footing, for the words of that ſection are, "That all ſuits and actions in the court of Admi- alty for ſeamens' wages, ſhall be commenced and ſued within ſix years next after the cauſe of ch ſuits or actions ſhall accrue."

Page 627

So a ſhipwright) 2 Wilſ. 264.

But if there be) Campion v. Nicholas, Stra. 405. Day v. Searle, 2 Stra. 968. How v. Nap- , 4 Burr. 19.

Nor can the maſter) Comm. Rep. 74.

If there are) The whole doctrine here advanced hath been over-ruled, and the right of the miralty court to compel ſecurity in ſuch caſe as well for the freight, as for the value of the pective ſhares in the ſhip, in the event of her being loſt, and to do execution upon it, hath been gnized in ſeveral ſubſequent caſes. Dimmock v. Chandler, Fitzg. 197. 2 Str. 890. S. C. 1 ardiſt. 415. S. C. Lambert v. Achetree, 1 Ld. Raym. 223. Blacket v. Anſley, *id.* 235 De ve v. Hedges, 2 Ld. Raym 1285. Ouſton v. Hebden, 1 Wilſ. 101. Such right had indeed n allowed in preceding caſes. Anon. 2 Ch. Ca. 36. Shelly v. Winſon, 1 Vern. 297. Anon. n. 230.

) To what Crimes and Offences its Juriſdiction extends.

Page 628

By the 28 *H.* 8. *cap.* 15.) But by 12 Geo. 3. c. 20, "Standing mute in piracy amounts to a nviction, and the court ſhall award the ſame ſentence as on a conviction by verdict or con- ſion."

By

By *ſtat.* 33 *Geo.* 3. *c.* 66. § 70., which is to continue in force during the preſent hoſtilities with *France*, a ſeſſion of *oyer* and *terminer* and gaol-delivery for the trial of offences committed on the high ſeas, within the juriſdiction of the Admiralty of *England*, is required to be holden twice at leaſt
§ 71. in the year. And any commiſſioner named in the commiſſion for trying ſuch offences, or any juſtice of the peace may take informations upon oath touching the ſaid offences, and cauſe the parties to be apprehended and commit-
§ 72. ted; and ſhall bind over all perſons whom they ſhall reſpectively judge neceſſary, to appear, proſecute, and give evidence againſt the offender at the next Admiralty ſeſſions, which information and recognizance ſhall be tranſ-
§ 73. mitted to the regiſtrar to be laid before the court: And the marſhal, his deputy, all ſheriffs, and other officers for keeping the peace are required diligently to obey and execute the precepts, warrants, and orders of the court.

(E) By what Law it proceeds, and the Form of ſuch Proceedings.

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(*If a merchant's*) But the property is not completely veſted ſo far as to the former owner in favour of a reſcuer or vendee, till there has been a ſentence of condemnation in ſome, foreign or domeſtick, Admiralty court. 10 Mod. 79. 3 Burr. 694. 1208-9. Doug. 617. And it is uſual in the prize acts to preſerve the right of the original owner, even after condemnation, paying the ſalvage thereby fixed.

Page 631

(*By the civil law*) Though in the form a recognizance. Brymer v. Atkins, 1 H. Bl. 164.

(*When a* (*f*) *proviſionate*) For this court, as well as the court of Chivalry, is governed by the civil law; and by that law, there can be no appeal, but where *gravamen eſt irreparabile*. Sir Henry Blount's caſe, 1 Atk. 295. *Vide* Moor, 814 *contr.*

3 Bl. Com. 69. It is only from the ordinary court of the Admiralty, that the appeal lies to the delegates. From the *prize* court the appeal is in purſuance of national conventions, to commiſſioned members of the privy council, called lords commiſſioners in prize cauſes.

Of the Marſhalſea and Palace Court.

Page 632

(*King Charles the Firſt*) The court of the *Marſhalſea*, and the *palace court*, though here treated of, and indeed very frequently confounded together, are in fact two diſtinct courts. The former is by preſcription: the latter was erected by letters patent in the 6th year of King Charles the First: the former was originally holden before the ſteward and marſhal of the king's houſe, and was inſtituted to adminiſter juſtice between the king's domeſtick ſervants. 1 Bulſtr. 211. holds plea of all treſpaſſes committed within the verge of the court, where only one of the parties was in the king's domeſtick ſervice, 1 Sid. 105. and of all debts, contracts, and covenants, where both of the contracting parties belong to the royal houſehold; Artic. *ſup. cart.* 28 Edw. 1. c. 3. 2 Edw. 3. c. 2. 10 Edw. 3. ſt. 2 c. 2. The latter is to be holden before the ſteward of the houſehold, and knight marſhal, and the ſteward of the court, or his deputy; with juriſdiction to hold

plea of all perſonal actions whatſoever which ſhall ariſe between any parties within twelve miles of the palace at Whitehall. 1 Sid. 180. 2 Salk. 439. This court, therefore, is ſtationary, whereas the other is ambulatory, and obliged to follow the king in all his progreſſes, its verge extending for twelve miles round his majeſty's place of reſidence. 13 R. 2. ſt. 1. c. 3. Both of the courts are now holden together in the borough of Southwark once a week: and a writ of error lies from both to the court of King's Bench: the writ of error from the Marſhalſea court is allowed by the ſtatutes of 5 Edw. 3. c. 2. and 10 Edw. 3. ſt. 2. c. 3. for as this tribunal was never ſubject to the juriſdiction of the chief juſticiary, the writ of error at common law lay only to parliament. 1 Bulſtr. 211. 10 Co. 79. 3 Bl. Comm. 76.

Courts Palatinate.

Page 634

(*A man cannot*) In the caſe of Edgworth v. Davies, 1 Ch. Caſ. 41. it is ſtated to have been reported, upon view of precedents, *that the juriſdiction of the counties palatine was allowable between parties dwelling in the ſame county, and for lands there, and for matters local.*

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(*The proceedings*) Or in the court of Chancery. 1 Ch. Rep. 55.

Of the Royal Franchiſe of Ely.

(*Ely is not a*) The franchiſe is of much earlier date than the time of Henry the Firſt. The biſhoprick was founded by that prince in the tenth year of his reign, A. D. 1109., and immediately after, the grant here alluded to was made. But the franchiſe itſelf may be traced back to the 7th century, and Henry's charter refers to preceding grants, and declares that the church of Ely ſhall *continue* to have the ſame privileges and liberties as it had *die, quâ Edwardus vivus et mortuus fuit.* See Bentham's Ely, 46. Appendix, 23.

(*And therefore*) See the record in this caſe, Bentham's Ely, Appendix, 26. *Vide ſupra*, tit. *Courts and their Juriſdiction in general*, D. 3.

Courts of the Foreſt.

Page 637

(*A Foreſt, as*) The office is divided between two, one for the foreſts on this ſide of Trent, the other for thoſe beyond.

Page 638

(*By the 7 R. 3. cap. 3.*) In a *ſcire facias* againſt the defendant, *quare non ſatisfecit* a fine ſet upon him at the juſtice ſeat in the foreſt of Deane, the plea was, that the juſtice was at Glouceſter, which is out of the foreſt; and thereupon it was demurred, becauſe the beginning of the juſtice ſeat was at ſuch a place within the foreſt, and adjourned to Glouceſter. All the court held it good enough, although the juſtice ſeat were begun in a place out of the foreſt, and gave judgment for the king.

By ſome late acts of parliament for the puniſhment of deer-ſtealers, the accuſations are to be judged and ſentence is to be given in the ordinary tribunals.

2 Wilſ. 104. It is to be obſerved, that as the foreſt law is not the general law of the land, the king's courts are not bound to take notice of it, unleſs it be pleaded.

Of the Sheriff's Torn.

(A) The Manner of holding this Court.

Page 641 (*The Sheriff*) 2 Hawk. P. C. c. 10. § 12.

(C) In what Caſes it has a Juriſdiction.

Page 644 (*But a preſentment*) A preſentment is not traverſable in a court leet; but in order to give the defendant an opportunity of being heard, it may be removed by *certiorari* into the King's Bench, and there traverſed. Rex v. Roupell. Cowp. 458. But the court will not grant a *certiorari* for ſuch purpoſe, where the amercement has been eſtreated, and the fine paid. Rex v. Ripon, 2 Term Rep. 184.

Of the County Court.

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Walſh, v. Troyte, 2 H. Bl. 29. Tubb v. Woodward, 6 Term Rep. 175.

NO action can be brought in the county court, unleſs both the defendant reſide, and the cauſe of action ariſe within the county: therefore, though the demand be under forty ſhillings, yet, if the cauſe of action ariſe in one county, and the defendant reſide in another, the action muſt be brought in the ſuperior courts.

Of the Court-Baron.

Page 648 (*The ſuitors are*) 4 Term Rep. 446. S. P.

Watkin's Gilb. Ten. 433. Co. Litt. 58. 4 Term

In the court-baron, as we have ſeen before, the freeholders are judges; the court therefore ſhould be ſtated to be holden before *them*. And the ſuitors, before whom it is holden (*a*), ſhould, regularly, be named.

ep 446. 484. 2 Ld. Raym. 862. Spir. Laws, b. 28. c. 27. and 42. (a) Moore, 75. pl. 205. 3 cun. 8.

It happens in many manors that the court-baron and cuſtomary court are ended together. In ſuch caſes care ſhould be taken to keep the acts of he ſeveral ſuitors quite diſtinct. For it has beeen ruled (*b*), that debt will ot lie for an amerciament of a free-tenant, unleſs it appear ſatisfactorily, at the perſons who aſſeer it are free-tenants alſo. It ſeems the ſafer way, hen theſe courts are holden together, not to mention expreſsly before hom they were holden; but to ſtate the perſons preſent generally, and ſo ave it to the law, which will conſider the proper buſineſs of each court to ve been tranſacted before the regular judges (*c*).

Watkins's Gilb. Ten. 432.
(*b*) Baldwin v. Tudge, 2 Wilſ. 20.
(*c*) 1 Freem. 525. ca. 707.

It is generally laid down in our books, that if there be not two frank ſui- rs at the leaſt, a court-baron cannot be holden, and conſequently, that the anor is deſtroyed. But it ſhould ſeem, that there muſt be *more* than two ank tenants holding of the manor, to enable the lord to hold a court; for herwiſe, if one of them was the plaintiff, and the other the defendant, it ould be impoſſible to try them by their peers. We find an inſtance in the giſter (11 *b.* & *Bro. Cauſe a remover plea, &c. pl.* 35.) of a cauſe being moved out of a court-baron, by reaſon there were *but four* ſuitors there.

See Watk. Treatiſe on Copyholds, 9. Bro. Court-Bar. pl. 22. Compriſe, pl. 31. Glover v. Lane, 3 Term Rep. 445. Tonkin v. Croker, 2 Ld. Raym. 863-4.

Although there be but *one* free-tenant, yet the ſignory, as to him, remains th reſpect to his ſervices, *&c.* notwithſtanding there can be no court lden.

1 Anderſ. 257. 2 Ld. Raym. 864.

And though *all* the tenancies eſcheat, yet it ſhall ſo far continue a manor contemplation of law as to preſerve the rights of leets, wrecks, *&c.*

Calth. 13.

Courts of the Cinque Ports.

Page 651

If a man is impriſoned) But there can be no doubt, but that they will go there.

Of the Courts of the Stannaries.

Page 652

As duke of *Cornwall*, when he hath had livery and inveſtiture of the me. And from thence the appeal lies to the king himſelf, in the laſt ſort.

3 Bulſt. 183. Dodridge's Hiſt. of Cornw. 94.

See further upon this ſubject *Pearce's Laws and Cuſtoms of the Stan- ries.*

Of the Court of Commiſſioners of Sewers.

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(*There is a rule*) See further for the practice of the court with reſpect to the filing of the orders, Anon. 2 Barnardiſt. 151. Rex v. Cann, 2 Str. 1263. A *certiorari* to bring up an order for the removal of their clerk, is of common right, and not diſcretionary, 1 Str. 609. Fortesc. 374. 8 Mod. 331.

(*An order of ſewers*) Q. Whether an acre-tax be a right aſſeſſment? whether the right way be not to aſſeſs the particular lands according to the danger they lie in. Commiſſioners of Sewers v. Newburgh, 3 Keb. 827. Bow v. Smith, 9 Mod. 94.

2 Str. 1127. A rate may be made to re-imburſe charges.

Court of Pipowders.

(*This court is*) A more ingenious and ſatisfactory etymology is given by a learned modern writer, who derives it from *pied puldreaux*, a pedlar, in old French, and therefore ſignifying the court of ſuch petty chapmen as reſort to fairs or markets. Barrington's Obſervat. on the Stat. 337.

Howell v. Johns, Cro El. 773. From this court a writ of error lies, in the nature of an appeal to the courts at *Weſtminſter*, which are now bound by the ſtatute of 19 Geo. 2. *c.* 70., to iſſue writs of execution in aid of its proceſs after judgment, where the perſon or effects of the defendant are not within the limits of this inferior juriſdiction.

Of the Courts in London.

1. The Court of Huſtings.

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(*This is the*) So, Sir H. Spelman in his Gloſſary *voc.* Huſtings.

4. The Court of Requeſts.

1. In *London*.

Brooks v. Moravia, 2 H. Bl. 220. THE court of requeſts for the city of *London* has no juriſdiction of a ſuit, unleſs both the plaintiff and defendant reſide within the city.

2. In *Southwark*.

The *Southwark* court of requeſts act, 22 *G.* 3. *c.* 47., cannot be *pleaded* to an action brought in a ſuperior court, there being no prohibitory clauſe in that act, as there is in the *Weſtminſter* act of 23 *Geo.* 2. *c.* 27. and the *Tower Hamlets* act of 23 *G.* 2. *c.* 30. The proper mode for the defendant to avail himſelf of it is, *by entering a ſuggeſtion* on the record after verdict, or the execution of a writ of inquiry.—Where the plaintiff having obtained judgment on a general demurrer to ſuch a plea, executed a writ of inquiry on which the damages were aſſeſſed at leſs than forty ſhillings, five days before the end of the term, and ſigned judgment on the laſt day of the term, the court in the next term refuſed to direct their officer to review his taxation of coſts to the plaintiff, on an affidavit ſtating the former proceedings, and that the defendant was *reſiant* within the juriſdiction of the inferior court, becauſe he ought to have entered a ſuggeſtion, and that before final judgment was ſigned. And to entitle himſelf to ſuch a ſuggeſtion, even ſuppoſing it to be moved for in time, the defendant muſt ſtate in the affidavit, not only that he is *reſiant* within the juriſdiction of the court of requeſts, but alſo that he is liable to be warned or ſummoned to it. And after a judgment by default, the defendant is ſtill in court for the purpoſe of entering ſuch a ſuggeſtion. It ſhould ſeem too, that a judgment on a general demurrer to a plea in bar, the matter of which, even if well pleaded, would be no defence to the action, is to be conſidered as a judgment by default.

Barney v. Tubb, 2 H. Bl. 351.

Curteſy of England.

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THE right of a huſband to retain the land of his deceaſed wife was confined, according to *Glanville* (*a*), to ſuch eſtates as were given with the woman *in maritagium*. But in *Bracton*'s time the claim had exceeded itſelf; for he ſays (*b*), the huſband ſhould have the land if he married a woman *habentem hæreditatem vel maritagium, vel aliquam terram ex ſi donationis*, having any inheritance, whether a *maritagium* or other gift of land.

(*a*) Lib. 7. c. 18.
(*b*) Lib. 5. c. 30. § 7.

It appears from both theſe writers, that the ſecond huſband was equally entitled to be tenant by the curteſy with the firſt. But this doctrine was combated by one *Stephanus de Segrave* whoſe name is found among the juſtices itinerant in the reign of *Henry* the Third, as founded on a miſconception of the meaning and deſign of this ſort of eſtate. He thought there was an injuſtice in giving an eſtate *per legem Angliæ* to the ſecond huſband, more eſpecially when there were children alive of the firſt marriage. And this opinion of *Stephanus de Segrave* was afterwards eſtabliſhed by the ſtatute *de donis* in reſpect of conditional eſtates.

1 Reeves's Hiſt. 298. Among the ſtatutes which are claſſed under the denomination of *ſtatuta incerti temporis* we find the *...ium pro tenentibus Angliæ*, which muſt evidently have been written before the ſtatute *de donis*, inaſmuch as it declares that the *ſecond* huſband ſhall inherit. Again, as it confines the curteſy to eſtates given *in maritagium*, according to Glanville, without including all inheritances, as Bracton does, it muſt have been written before the latter author penned his book. But, if this was a ſtatute before Bracton's time, that author, where he examines the queſtion of the ſecond huſband claiming by the curteſy, and mentions Segrave's opinion againſt it, (lib. 5. c. 30. § 7.) could not be ſuppoſed to omit noticing any ſtatute that had been made ſo deciſive as this is. 2 Reeves's Hiſt. Law, 315.

(*Tenant*

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(*Tenant by the curteſy*) This is a miſtake; it was known in other countries, though not under this name. By the reſcript of Conſtantine it is eſtabliſhed *ut hæreditatis maternæ pater uſum fructum, filii proprietatem haberent.* Crag. j. f. dieg. 22. § 40. Cod. l. 6. le. 1. And the laws of the Almains define the eſtate almoſt in the very terms uſed by the laws of England. Lindenbrog. L. Aleman- 1. 92. We find it in the feudal ſyſtem, not indeed as a neceſſary conſequence of the feudal tenure in its original purity, but ariſing from the expreſs terms of the inveſtiture. The language of the feudal law is *maritus uxori non ſuccedit in feudum, niſi ſit ſpecialiter inveſtitus.* Wright's Ten. 193. n. c.——Sir W. Blackſtone inclines to think, that tenancy by the curteſy of England was ſo called, as ſignifying an attendance upon the lord's *court* or *curtis*, (that is, being his vaſſal or tenant,) not as denoting any peculiar favour belonging to this iſland. 3 Comm. 126. The contrary, however, is maintained by one of his ſucceſſors in the Vinerian chair. 2 Wooddeſ. 18.

Rot. Claus. 11 H. 3. Wright's Ten. 193. n. 9. Hale's Hiſt. C. L. 180.

The words of this law, as they are found in a writ of 11 *H.* 3 ordaining the reception of it in *Ireland*, are *Si aliquis deſponſaverit aliquam mulierem, ſive viduam, ſive aliam, hæreditatem habentem, et ipſe poſtmodum ex eâ prolem ſuſcitaverit, cujus clamor auditus fuerit inter quatuor parietes, idem vir, ſi ſuper vixerit ipſam uxorem ſuam, habebit totâ vitâ ſuâ cuſtodiam hereditatis uxoris ſuæ, licet ea fortè habuerit heredem de primo viro ſuo qui fuerit plenæ ætatis.*

(A) What Perſons may be Tenants by the Curteſy; what not.

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(*The words of this*) But the marriage of perſons in this unhappy ſtate is merely void, by reaſon of their incapacity to contract, and one of the circumſtances neceſſary to the completion of their title to the eſtate is therefore wanted.

(B) Of what Sort of Inheritance this Eſtate is allowable: of what not.

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(*Of a uſe at*) But curteſy of truſts is now allowed in equity, tho' dower is refuſed. Otway v. Hudſon, 2 Vern. 583. Williams v. Wray, *id.* 681. Chaplin v. Chaplin, 3 P. Wms. 229. And therefore of money to be inveſted in land. Sweetapple v. Binden, 2 Vern. 536. Cunningham v. Moody, 1 Vez. 174.

(5. *A man may*) S. C. 1 And. 278. S. C.; but this point does not appear in any of the reports.

(6 *Of lands in Gavelkind*) But of ſuch lands of the wife the tenancy by curteſy extends only to a moiety, and it ceaſeth if the huſband marries again. This at leaſt is the cuſtom of Gavelkind in Kent. Robins. Gav. b. 2. c. 1.

Roberts v. Dixwell, 1 Atk. 607.

11. Where a teſtator directed his truſtees to convey a fourth part of his freehold lands to the uſe of his daughter for her natural life, ſo as ſhe alone ſhould take the rents, her huſband not to intermeddle therewith; and after the performance of ſeveral other truſts, in truſt for the heirs of the body of the daughter; Lord *Hardwicke* held, that in this caſe the truſt was merely executory, that the wife took an eſtate for life only, and therefore the huſband was not entitled to be tenant by the curteſy.

Sir John Savage's caſe, 2 Leon. 109.

Where the cuſtom was, that if a man took to wife a cuſtomary tenant of the manor, and had iſſue, and over-lived her, he ſhould be tenant by the curteſy; and one married a woman to whom a cuſtomary tenement did deſcend during the coverture, and had iſſue, and ſurvived her; it was adjudged that he ſhould not be tenant by the curteſy, becauſe the woman was not

not a cuſtomary tenant *at the time of the marriage*, and ſo not within the cuſtom, which was to be taken ſtrictly. But this caſe has been denied to be law by *Holt*, C. J. and *Powell*, J. in the caſe of *Clements* v. *Scudamore*, 1 *P. Wms.* 62. 2 Lord *Raym.* 1028.; and in 1 *Salk.* 243. *S. C.* it is ſaid to have been denied by the whole court.

(C) What Eſtate the Wife muſt have to let in the Huſband to be Tenant by the Curteſy. Page 662

(*Littleton acquaints us,*) But the wife muſt be ſole tenant both of the freehold and the inheritance. Co. Lit. 183. a.

(2. *So, if one,*) As the ſtatute *de donis* does not extend to huſbands claiming curteſy, or wives claiming dower, it is for this reaſon probably, that a huſband may have curteſy, and a wife dower of a rent reſerved upon a gift in tail. For though as between the donor and his heirs, and the donee and his heirs, the rent is incident to the reverſion in conſequence of the ſtatute *de donis*, yet, as againſt a huſband claiming curteſy, or a wife claiming dower, the donor muſt, to warrant the poſitions of Lord Coke, have a rent in groſs, that is diſtinct from any eſtate, as he had before the ſtatute *de donis*. Preſton on Eſtates, c. 6. note.

So, of eſtates determining by a *ſpringing* or *ſhifting uſe*, the huſband, by the latter opinion, ſhall have his curteſy, notwithſtanding the determination of the eſtate of his wife. And of this opinion was *Anderſon*. If a feoffment, ſaid he, be made to the uſe of *J. S.* and his heirs, until *J. D.* hath done ſuch a thing, and then unto the uſe of *J. D.* and his heirs, the thing is done, and *J. S.* dieth, his wife ſhall be endowed. In this caſe the eſtate of *J. S.* was a determinable fee in point of quality, but it is not on that account that the wife was entitled to dower, but becauſe the eſtate of *J. D.* took effect by *ſpringing* or *ſhifting uſe*. And this opinion of *Anderſon* has been followed by a deciſion to the ſame effect in the caſe of an executory deviſe. Thus *Joſeph Sutton* deviſed his eſtate to truſtees, upon truſt to pay the rents and profits for the maintenance and education of *Mary Barrs*, till ſhe arrived at twenty-one or was married; and from and after the ſaid *Mary Barrs* ſhould have attained her age of twenty-one years, or ſhould be married, he gave and deviſed all the ſaid land and premiſes to the ſaid *Mary Barrs*, her heirs and aſſigns for ever. But in caſe the ſaid *Mary Barrs* ſhould happen to die before ſhe arrived at the age of twenty-one years, and without having iſſue of her body lawfully begotten, then, from and after the deceaſe of the ſaid *Mary Barrs*, without iſſue as aforeſaid, he gave and deviſed all his ſaid eſtates unto his grandſon *Walter* for life, with ſeveral remainders over. *Mary Barrs* married *Solomon Hanſard*, and had iſſue a ſon, who died in her life; and afterwards *Mary Barrs* died under twenty-one. In this caſe, the court of King's Bench were unanimouſly of opinion, that on the deceaſe of *Mary Barrs*, her huſband became entitled to be tenant by the curteſy for his life, and that, ſubject thereto, the deviſees over became entitled by way of executory deviſe.

1 Leon. *ubi ſupra.* Preſton on Eſtates, *ubi ſupra.*

Buckworth v. Thirkell Tr. 25G. 3. Co.Lit.241. a. note 4. 13th edit. 1 Collect. Jurid. 332.

It is eſſential to this eſtate, that the iſſue ſhould take as heir to the wife; that they ſhould take by deſcent; for if they take by virtue of a remainder over, their birth will not entitle the huſband.

8 Co. 34. Summers v. Partridge, 2 Atk. 47.

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(*That the wife*) But entry is not always neceſſary to give ſeiſin in fact; for if the land be in leaſe for years, curteſy may be without entry, or even receipt of rent, the poſſeſſion of the leaſe for years being deemed the poſſeſſion of the huſband and wife. De Grey v. Richardſon, 3 Atk. 469.

(2. *But*

(2. *But now of such*) But if the advowson be appendant to a manor, and the wife die before entry into the manor, Lord Hale thought the husband would not be entitled to be tenant by the curtesy of the advowson. Hal. MSS. Hargr. notes on Co. Lit. 29. a.

Casborne v. Scarfe, 1 Atk. 603. Vin. Abr. Curtesy, E. pl. 23. S.C. more fully reported.

So, of lands mortgaged in fee by the wife previously to the marriage, the husband shall be entitled to be tenant by the curtesy. For his neglect in not paying off the mortgage, is not similar to the case of laches in a husband, *viz.* as in a case where entry is requisite, because it is nothing near so easy to pay off a mortgage as to make an entry; and an objection of this kind holds equally strong in the case of a trust estate, for a husband may more easily get a decree for his trustees to convey, than a decree to redeem a mortgage, which is attended with many delays.

Ewer v. Astwike, 1 Anders. 192 Moor, 272.

In copyholds where the custom allows of this estate, the entry of the husband in the right of his wife in her life-time, though she dies before admittance, will, it seems, be a sufficient seisin.

Hearle v. Greenbank 3 Atk. 695. 1 Ves. 298. See Mr. Preston's observations on this case in his chapter upon this title. Prest. on Estates.

With respect to trusts or equitable estates, the wife must have such an interest that her husband may have a seisin or possession in nature of a seisin in her right. Therefore, where a father devised estates to trustees in trust to apply the profits for the sole and separate use of his daughter (a feme covert) during her life, and not to be subject to the debts or control of her husband, with power to dispose of them by will, notwithstanding the coverture; Lord *Hardwicke* held, that the husband had no seisin either in law or in equity, and therefore was not entitled to be tenant by the curtesy: that the legal estate was in the trustees: that the father had made the daughter a *feme sole*, giving her the profits for her life, but not subject to the control of her husband; the husband then had no seisin in equity during the coverture: and further, the tenancy by curtesy in this case would be directly contrary to the intent of the testator.

Rex v. Inhabitants of Great Farringdon, 6 TermRep. 679.

A. agreed to give a cottage to his grandson on his marriage, but no conveyance was executed; the grandson entered, fitted it up at his own expence and lived in it several years: then the grandfather died intestate, leaving an only child (the mother of the grandson), who never entered on the cottage, or received or demanded any rent for it: the mother died leaving a husband and an only son (the above-named grandson): the husband is not entitled to be tenant by the curtesy; for the wife never reduced the estate into possession, she never had a seisin in fact.

Doe v. Rivers, 7 TermRep. 277.

A woman, tenant in tail, by lease and release previous to her marriage, conveyed to trustees to the use of herself till the marriage, then to the husband for life, then to herself for life, then to the first and other sons of the marriage, &c. The marriage took effect; the feme died in the life-time of her husband, leaving issue. The husband cannot take as tenant by the curtesy, for there was never any one moment during the coverture when the wife was seised of an estate-tail in possession.

Page 667 (D) Of the Husband's Title being initiate by the having of Issue, and to what Purposes: And herein,

(*If the husband*) In answer to this question, another may be asked, *viz.* who is to avoid the lease if the tenant chooses to hold the land?

(F) D

F) By what means this Title may be prevented and destroyed.

The husband leaving his wife, and living with another woman, does not forfeit his tenancy by the curtesy. 3 P. Will. Rep. 269, 276, 277. Steadman v. Palling

If by articles previous to marriage a woman grants to her intended husband, during their joint lives, the interest of her money, and the rents of her estate, to maintain the house, &c., this does not abridge his legal rights, 3 Atk. 423. but he is entitled to curtesy both in such real estates as she had at the time of the marriage, and in what came afterwards.

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CUSTOMS.

CUSTOMS must in their nature be confined to individuals, and what is common to all mankind can never be claimed as a custom. Hence a custom for all executors to be sued by action of debt in the Mayor's court in *London*, was holden to be bad. So, of a custom for *all persons* for the time being, *being in a particular parish*, to play at all kinds of lawful games, sports, and pastimes, in the close of *A.* at all seasonable times of the year, at their free will and pleasure. *Secus*, of such a custom for *all the inhabitants* of the parish. Sherfom v. Bostock, Fitzg. 51. Fitch v. Rawling, 2 H. Bl. 393.

A) Of the Commencement and Length of Time necessary to establish a Custom. Page 670

(*The frequent repetition*) But a prescription may be laid by way of custom, where the necessity of the case requires it; as in case a copyholder claims a right of common out of the manor, he must lay a prescription in the lord, but where he claims common in the waste of the lord, as he hath strictly no inheritance in the land, but is only tenant at will, and as a prescription must always be laid by way of a *que estate*, which he cannot allege, not being tenant in fee, for in strictness the fee-simple is in the lord; therefore, the law allows him to allege it as a custom in the occupiers of such an estate. 6 Co. 60. b. Ca. temp. Hardw. 293. So, where a man claims only a discharge in his own soil, or a mere easement in the soil of another, he may lay it by way of custom. *Ibid.* So, matters of personal privilege or exemption may be laid generally to express the nature and extent of such privileges; either as having respect to place, as, all the citizens of London, Hob. 86. or to condition, as all serjeants at law, all attornies, &c. 1 Ventr. 86.—Another difference to be remarked between custom and prescription, is, that the latter must always have a legal origin; it must be of such things as may be created by grant, reservation, or deed: whereas it is not always necessary that the cause or consideration on which the former is founded should appear. 6 Co. 60. b. 1 Ventr. 387. Cowp. 47. Dougl. 126. Hence, the corporation of London having a customary duty on corn imported, it was holden to be a good custom, that factors free of the corporation shall receive to their own use that part of the duty which arises from corn consigned to them as factors; though neither the commencement, nor consideration of such custom could be traced. Cocksedge v. Fanshawe, B. R. Dougl. 119. affirmed in the Exchequer-chamber, and afterwards in the House of Lords. Printed cases of the lords, 5th June 1783.

But no man can allege a custom or prescription against an act of parliament; as, that every pound of butter sold in a particular market shall weigh eighteen ounces. Noble v. Durell, 3 Term Rep. 271. However, a man may prescribe against an act of parliament, when his prescription or custom is saved or preserved by another act of parliament. Co. Lit. 115. a. And Lord Coke makes a difference between acts in the negative and in the affirmative: for a statute made

made in the affirmative, without any negative expreſſed or implied, doth not take away the common law. 2 Inſt. 200. And he obſerves a difference likewiſe between ſtatutes that are in the negative, for if a ſtatute in the negative be declarative of the antient law, a man may preſcribe or allege a cuſtom againſt it, as well as he may againſt the common law. Co. Lit. 115. a. See Mr. Hargrave's annotations on this part of Lord Coke's commentary. See alſo 2 Mod. 39.

(*Hence it is,*) This doctrine is controverted by a late writer. 2 Wooddeſ. 51.

(B) What Perſons are affected with, or bound by a Cuſtom.

(*The king only,*) The objection to a cuſtom, that it interfered with the king's prerogative, was grounded on the maxim "*nullum tempus occurrit regi,*" and as that maxim is now abrogated by ſt 9 Geo. 3. c. 16. the objection ſeemeth to be at an end.

(C) Of ſuch Cuſtoms as are againſt the Rules of the Common Law, yet, not being unreaſonable in themſelves, are good. and from the Conveniency of them, bind in particular Places.

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Wiggleſworth v. Dalliſon, Dougl. 201.

It is a good cuſtom, that tenants, whether by parol, or deed, (*a*) ſhall have the away-going crop after the expiration of their term; for it is for the benefit and encouragement of agriculture.

(*a*) For the cuſtom in ſuch caſe does not alter or contradict the agreement in the deed: it only ſuperadds a right which is conſequential to the taking. *Ibid.* In Doe v. Snowden, 2 Bl. Rep. 1225. it is ſaid by the court, that if there is a taking from old Lady-day (5th April), the cuſtom of moſt countries would entitle the leſſee to enter upon the arable at Candlemas (2d Feb.), to prepare for the Lent corn, *without any ſpecial words for that purpoſe* in the leaſe.

Lewis v. Harris, *Cor.* Skynner, C B. Hereford, Summer aſſizes 1778.

So, a cuſtom that the tenant may leave his away-going crop in the barns, *&c.*, of the farm for a certain time after the expiration of the leaſe, and his quitting the eſtate is good.

Beavan v. Delahay, 1 H. Bl. 5.

Eaſtconrt v. Weekes 1 Lutw. 799.

A cuſtom, that the executors and adminiſtrators of every cuſtomary tenant for life, if he ſhould die between *Chriſtmas* and *Lady-day*, ſhall hold over till the *Michaelmas* following, ſeemeth to be good.

(*A cuſtom in Exeter*) No mention is made of ſuch cuſtom in the book referred to.

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(*But every cuſtom*) Upon this principle, a cuſtom for the lord of a manor, or the tenants of his collieries who had ſunk pits, to throw the earth and coals upon the land near ſuch pits, ſuch land being cuſtomary tenement, and parcel of the manor, there to continue, and to lay and continue wood there, for the neceſſary uſe of the pits, and to take coals ſo laid away in carts, and to burn and make into cinders coals laid there, at their pleaſure, was adjudged to be void. It was alſo adjudged void for uncertainty the word *near* being too vague and looſe to ſupport ſuch a claim. Wilkes v. Broadbent, 1 Wilſ. 63. 2 Str. 1224.

Cort v. Birkbeck, Dougl. 218.

A cuſtom, that the inhabitants of a manor ſhall grind all their corn, grain, and malt, which by them, or any of them, ſhall be uſed or ſpent, ground within the manor—at certain mills, is good. But if it were, that they

they ſhould grind—all their grain whatſoever by them ſpent or ſold—at certain mills, it would be void.

A cuſtom in a pariſh, that every pariſhioner ſhall bury his relations in the church-yard as near as poſſible to their anceſtors, is bad. Fryer v. Johnſon, 2 Wilſ. 28.

(D) Where from the Benefits accruing from them they ſhall bind.

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(*See a cuſtom.*) In the caſe of the city of Oxford, it was ruled, upon the authority of Wagoner's caſe, 8 Co. 25 b. that a cuſtom in that city, by which every perſon not being a freeman of the city, who expoſes goods to ſale in the city, except in fairs or markets, is liable to a penalty, is good, notwithſtanding there were no exception of victuals; and that a cuſtom to diſtrain for the penalty was alſo good. Moir v. Munday, Say. Rep. 181.

(*The lord of a*) Criſp v. Bellwood, Colton v. Smith, Cowp. 47 S. P.

The corporation of *Malden* in *Eſſex* preſcribed in a *que eſtate* "that "they and all thoſe, &c., time whereof, &c., had uſed to repair the "port, in conſideration whereof, they had uſed time whereof, &c. to "receive for all lands ſold within the precinct of the borough, a certain "rate of 10*d.* in the pound out of the purchaſe-money:" it was adjudged a good cuſtom; and this is what they call *land cheap;* for the landholder reaps a benefit by the trade coming to the town, by reaſon of the port. Cited by Holt, C. J. 1 Ld. Raym. 386.

(E) Where from the Certainty or Uncertainty of them, they ſhall be deemed good, or void.

A cuſtom for *poor and indigent houſeholders* living in *A.*, to cut and carry away rotten boughs and branches in a chaſe in *A.* is bad, the deſcription of *poor houſeholders* being too vague and uncertain. Selby v. Robinſon, 2 Term Rep. 758.

A cuſtom, that "when a tenant took a farm, in which there was any open field, more or leſs, for an uncertain term, it was conſidered as a holding from three years to three years," was holden to be void for uncertainty, becauſe the quantity of open ground was not aſcertained, and one rood might determine the tenure of 100 acres of land incloſed. Roe v. Lees, 2 Bl. Rep. 1171.

But a preſcription for ſo much money for ſetting up a ſtall in a fair; and for ground *near* the ſtall, is certain enough, for the quantity of ground near a ſtall may be determined by the uſage of the fair. Bennington v. Taylor, 2 Lutw. 1517.

See Wilkes v. Broadbent, *ſupra.*

So, a preſcription to take "three *Wincheſter* buſhels of barley *out of and* for every ſhip's cargo of barley brought upon a quay to be exported *in any ſhip*," is ſufficiently certain, for the word *cargo* is a mercantile term, and very intelligible when referred to a ſhip. Sargent v. Read, 2 Str. 1228. 1 Wilſ. 91. The preſcription in Mr. Nolan's MSS. report, omits the words in italicks. See Nolan's edit. of Sir J. Strange's Reports.

(H) Of

(H) Of the Manner of alleging and Pleading a Cuſtom.

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(*One preſcription*) One cuſtom may be pleaded to another without a traverſe, where the latter is not inconſiſtent with, but only a qualification of the former. Kenchin v. Knight, cited 2 Wilſ. 101.

Cuſtoms of London.

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(*The ancient city*) When a cuſtom has been once certified by the recorder, the courts muſt take notice of it. They cannot have it certified over again. *Per* Lord Mansfield, Dougl. 380. However, if they are diſſatisfied with a certificate, they may ſend it to be re-conſidered. 2 Ver. 504. As the recorder certifies the return *ore tenus*, he is, of courſe, not bound to ſign the copy of it. 3 P Wms. 17. If the certificate be falſe, an action lies againſt the mayor and aldermen, and not againſt the recorder; for it is their certificate by the recorder. Hob. 87.

(A) Of the Cuſtoms of London in general.

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(*If a freeman*) So, a cuſtom to exhibit an information by the common ſerjeant for opprobrious words ſpoken of an alderman, and on conviction to fine and impriſon, is good. 1 Ventr. 35. 2 Lev. 200. 2 Salk. 425. 2 Ld. Raym. 777. 7 Mod. 28. But a cuſtom to commit in ſuch caſe in the firſt inſtance, is void. Cro. El. 689.

(*It is a good*) Where Gawdy, J. held the cuſtom not good, becauſe it extended as well to ſtrangers as to citizens.

(*By the cuſtom*) It cannot, unleſs the want of juriſdiction appear on the face of the proceedings. Blacquiere v. Hawkins, Dougl. 378. In the caſe of Argyle v. Hunt, the court could not judicially take notice of the cuſtom in London, for an action to lie for the word "whore;" probably, becauſe it had never been certified by the recorder. And in Stainton and wife v. Jones, which came on to be tried before Lord Mansfield, at the ſittings after M. 23 G. 3. at Guildhall, in an action on this cuſtom for calling Stainton's wife a whore, the plaintiffs were non-ſuited, not being able to prove the cuſtom to cart whores in London. A book from the town clerk's office was produced, but it contained no account of ſuch cuſtom. Lord Mansfield ſaid, that he could not take notice of the cuſtom unleſs proved. It was ſtated on that occaſion, that the cuſtom had never been proved in ſuch a manner as to maintain an action in Weſtminſter Hall; that in the city court, the action is maintained, becauſe they take notice of their own cuſtoms without proof. Doug. 380. notes (95, 96.)

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(*Beſides theſe*) But this exemption from toll can be claimed by *reſident freemen* only. Rex v. Hanger, 3 Bulſt. Hargr. Law Tracts, 128. Corporation of London v. Corporation of Lynn, 1 Term Rep. 130.

And he cannot ſtop ancient lights by an erection upon a new ſoil, or beyond the old foundation. Priv. Lond. 56. For the repair of his houſe, a man may, by cuſtom in London, ſet his poles and ladders upon the ſoil, or houſe of another adjoining. But he cannot break the houſe or ſoil. *Id.* 59.

The former ſtatute is confined to party-walls between houſes, and does not extend to party walls between ſtables. Rex v. Pratt, 4 Burr. 2298.

(B) Of the Cuſtom of London in reſpect to Orphans.

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(*The Orphans*) The chamberlain pays intereſt for the money. 1 Ch. Ca. 182. S. C.

(C) Of

(C) Of the Cuſtom of London in reſpect to a Freeman's Eſtate: And herein,

(*Here it is*) In the caſe of Biddle v. Biddle, 18th March, 1718, before Lord Parker, it was ſaid, that the widow is entitled to the furniture of her chamber; or in caſe the eſtate exceeds 200*l.* then to 50*l.* inſtead thereof. Vin. Abr. tit. *Cuſtoms of London*, (B. 2. p. 2.)

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(*But if a*) A mortgage ſhall be paid out of the perſonal eſtate, in preference to the cuſtomary or orphanage part; becauſe the cuſtom of London cannot take place till after the debts are paid. 1 P. Wms. 335.

Neither ſhall receipts in chemiſtry, phyſick, &c. be reckoned part of his eſtate. 1 Vern. 61.

(*But now*) If there were iſſue of the firſt marriage living at the time of the ſecond, the death of ſuch iſſue afterwards will not prevent the cuſtom from attaching, and bar the widow from claiming under it. Danſen v. Hawes, Ambl. 276.

A being about to marry an orphan of the city of *London*, agreed with the court of aldermen, in conſideration of the marriage, and of their giving their conſent thereto, to take up his freedom within a certain time, which time he ſurvived, but died without performing his agreement. It was decreed, that he was in equity to be taken as a freeman, and therefore his perſonal eſtate was to be diſtributed according to the cuſtom, notwithſtanding he had by will made a different diſpoſition of it. It was ſaid by the chancellour, that the agreement being entered among the orders and proceedings of the court of aldermen, and that court being a court of record, it became matter of record. Frederick v Frederick, 1 P. Wms. 710. 4 Br. P. C. 7. S. C.

If a freeman diſpoſes of his property in ſuch manner as not to take place till after his death, it is a fraud upon the cuſtom, and the property ſhall be ſubject to it. Smith v. Fellows, 2 Atk. 62. 377.

So, if, ſeveral years before his death, he purchaſes a leaſehold eſtate for 20 years, in the joint names of himſelf and wife, it is a fraud upon the cuſtom, and the eſtate ſhall be applied as the reſt of his property. Coomes v. Elling, 3 Atk. 676.

A freeman of very advanced age, ill of the gout, two days before his death, by deed of the ſame date with his will, aſſigned part of his perſonal eſtate in truſt for the ſeparate uſe of his daughter, and directed that ſhe ſhould not have power to give it to her huſband. She had married without conſent, but the father had been reconciled to her and her huſband. The deed was not delivered to the daughter. Lord *Hardwicke* held it to be a teſtamentary diſpoſition in fraud of the cuſtom, and that it was competent to the huſband to diſpute it; but he would not allow him to take the wife's cuſtomary part, without making a ſettlement upon her. Tomkins v. Ladbroke, 2 Vez. 591.

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(*If a city*) If a man marries an orphan, and dies; his repreſentatives are not entitled to any part of what was his wife's cuſtomary ſhare, but the whole belongs to the wife. Vin. Abr. tit. *Cuſtoms of London*, (B. 10.) 18.

(*By the laws*) It is ſaid to be ſufficient, if the father declare the ſame by any writing under his hand, although it be in an almanack, or elſewhere. Green's Privil. of Lond. 53. In Dean v. Delevar, cited in 1 P. Wms. 642. it is ſaid to be ſufficient; though written *by the father's book-keeper, or ſervant*. But the reporter adds a *quære*. The ground of requiring the value of the advancement to appear in this manner, is, partly by reaſon of the difficulty of taking an account after ſuch a length of time, but principally becauſe it cannot be known, what is to be brought into

into hotchpot; and if it does not appear what the ſum was, the other children may be wronged. *Per* Lord Hardwicke, 1 Vez. 16.

So, where the daughter only, being of full age, had, upon her marriage, for a valuable conſideration, releaſed her cuſtomary ſhare. Lockyer v. Savage, 2 Str. 947.—So, if the wife be under age, and the huſband and ſhe, in conſideration of a marriage portion, covenant to releaſe her orphanage ſhare, the huſband's covenant is conſidered in equity, on a bill againſt the huſband and wife for a ſpecifick performance of the articles, as an abſolute releaſe, and will extinguiſh the wife's right. By an old law in the city, called Jud's law, a huſband is authorized to agree with the wife's father, though ſhe be under age. Medcalfe v. Medcalfe, 2 Atk. 63. But the releaſe extorted by a father from his ſon, merely for the ſake of maintenance, and not for his advancement in marriage or trade, is abſolutely void, as a fraud upon the cuſtom. Heron v. Heron, 2 Atk. 160. So, if a father who has children, ſome of age, ſome under age, take a releaſe from thoſe who are of age, the releaſe is void, for if the infants do not conſent when they come of age, they may engroſs the whole orphanage part in excluſion of the reſt. Morris v. Boroughs, 1 Atk. 399. Where a daughter accepts a legacy of 10,000*l.* left her by her father, who recommended it to her to releaſe her right to her orphanage part, which ſhe does accordingly; if the orphanage part be much more than her legacy, though ſhe was told ſhe might elect which ſhe pleaſed, yet, if ſhe did not know ſhe had a right, firſt to inquire into the value of the perſonal eſtate, and the *quantum* of the orphanage part before ſhe made her election, this is ſo material that it may avoid her releaſe. Puſey v. Deſbouvrie, 3 P Wms. 316.

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A freeman of London) Where a child, though an only child, is advanced and the *quantum* of the advancement does not appear, he ſhall be deemed *fully* advanced. Cleaver v. Spurling, 2 P. Wms. 527. Fawkner v. Watts. 1 Atk. 406. Elliot v. Collier, 3 Atk. 526. 1 Vez 15 S. C. 1 Wilſ. 168. S. C. And advancement in marriage with a firſt huſband who died in the father's life time, is a bar to a ſecond huſband. 1 Atk. 406.

Parol evidence of the father's declarations with reſpect to the advancement, can in no caſe be received: but declarations of the huſband, or of the wife during the coverture of the firſt huſband, are admiſſible. 1 Atk. 407.

(*A ſettlement*) But where a freeman by will charged 1500*l.* on his real eſtate for his daughter, and gave her a ſhare of his perſonal eſtate; the court would not allow her to take the ſum charged on the real eſtate, and alſo claim an orphanage, but put her to abide entirely by the will, or by the cuſtom. Cowper v. Scot, 3 P. Wms. 119.

Car v. Car, 2 Atk. 277. If a freeman by will gives 200*l.* to his ſon, and in his life pays him 200*l.* and takes a receipt in full for what was intended him by the will, this ſhall be conſidered as an advancement, and brought into hotchpot.

Weyland v. Weyland, 2 Atk. 632. Where a father, upon the marriage of his ſon, ſettled 5000*l.* S. S. annuities upon himſelf for life, remainder to his wife for life, remainder to his ſon for life, remainder to his ſon's wife for life, remainder to the iſſue of the marriage; it was holden, that the ſon, to entitle himſelf to a ſhare of the father's perſonal eſtate, muſt bring the whole 5000*l.* and not the value of his eſtate in it for life only, into hotchpot.

Cowper v. Scott, 3 P. Wms. 119. If a man makes an executor in truſt, and deviſes his perſonal eſtate among his ſeven children, and four of them are advanced by him in his life-time, and one of them dies before the teſtator; the children advanced ſhall have their ſhare of this ſeventh part, without bringing what they have received into hotchpot.

(*And therefore*) 2 P. Wms. 526. Ambl. 189. S. P. See City v. City, 2 Lev. 130. *ſemb. contra.* But ſee alſo Lord Hardwicke's remark on that caſe in 2 Vez. 595.

Morris v. Burroughs, 1 Atk. 399. Sums of money, however ſmall, if given as advancement, muſt be brought into hotchpot; but trivial ſums given as preſents ſhall not.

Hender v. Roſe, 3 P. Wms. 317. So, ſmall ſums given occaſionally, or maintenance-money or allowance at the univerſity or for travelling, ſhall not be deemed part of a child's advancement, nor ſhall money given with him as apprentice.

A gi

A gold watch, or wedding clothes, are no advancement, nor a gift of *l.* in money, where the orphanage ſhare is conſiderable. Neither is con- t to a daughter's marriage any bar to her, where the *quantum* does not pear under the father's hand. Elliot v. Collier, 3 Atk. 526. 1 Vez. 15.

Where a freeman had two daughters, *A.* and *B.* and on *A.*'s marriage ve 2000*l.* and a bond for 2000*l.* more at his death, and afterwards gave r 428*l.* to buy a houſe, which was done; and *B.* married without his ſent, but he was afterwards reconciled to her, often ſtayed weeks with r, and gave her preſents from time to time to about 500*l.* but no ad- ncement; it was decreed, that *A.*'s 2000*l.* and 2000*l.* ſhould be brought o hotchpot, but not her 428*l.* nor *B.*'s 500*l.* Hume v. Edwards, 3 Atk. 450.

If a father buy an office, though but at will, or a commiſſion, it is an ad- ncement. Norton v. Norton, 3 P. Wms. 317. note O.

So, if, ſome years after the marriage of a freeman's ſon, the parents on th ſides meet, and agree to advance 200*l.* a-piece to lie by till they can rchaſe a commiſſion in the army for him, this is an advancement, and bars n of his orphanage ſhare. Hearne v. Barber, 3 Atk. 213. In this caſe it was ſaid that Judd's

which was an act of common council in the time of Henry the 6th, does not make it a bar ſs it was an advancement upon marriage.

But if a freeman, before marriage, ſettles ſome part of his perſonal eſtate n his intended wife, to take effect after his death, this will bar her of r cuſtomary part, though no mention be made of the cuſtom. Lewin v. Lewin, 3 P. Wms. 15.

If a wife be divorced *a menſâ et thoro* for adultery, ſhe forfeits her right her moiety and widow chamber under the cuſtom. Pettifer v. James, Bunb. 16.

So, if he deviſe no more than his teſtamentary part, the children ſhall e both their legacies, and their cuſtomary ſhares; but if he deviſe his ole eſtate, they muſt make their election. Wilſon, v. Philips, Bunb. 195.

If a freeman deviſe all his eſtate, orphanage and teſtamentary, and ſome he children abide by the cuſtom, others by the will, the ſhares of the lat- ſhall not go among the others, but ſhall accrue to the teſtator's eſtate, and according to the will. Morris v. Burroughs, 2 Atk. 627.

Although neither the father, nor the orphan, can deviſe either the or- nage part or contingency of the benefit of ſurvivorſhip, or the part which rued by ſurvivorſhip; yet if the father make a diſpoſition by his will in- ſiſtent with the cuſtom, the children muſt make their election to abide by will or the cuſtom; for they cannot abide by the will in part, and have benefit of the cuſtom alſo. Harvey v. Deſbouverie, Ca. temp. Talb. 130 See alſo Hanbury v. Lord Bateman, 2 Atk. 63.

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ſe alſo) 2 Ld. Raym. 1328. S. C. by the name of Redſhaw v. Braſier.
ut the funeral expences of a child dying after his father, ſhall be paid out of the orphanage . 3 Atk. 676. And if a father maintains his daughter after her huſband's death, his execu- ſhall be conſidered as a creditor for ſo much as the maintenance amounted to, which ſhall be cted out of the daughter's cuſtomary ſhare. 3 Atk. 526. 1 Vez. 15.

Where the wife's right to the orphanage part is extinguiſhed by the re- of the huſband, the eſtate is left as if it had never been charged with it, it is conſidered as part of the teſtator's general perſonal eſtate, and does go wholly to the executor of the father, as part of the dead man's re. 1 Atk. 64.

(D) Of

(D) Of the Cuſtoms of London as it relates to Feme Coverts.

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(*By the cuſtom*) 4 Term Rep. 361. S. P.

(H) Of the Cuſtom of Foreign Attachment: And herein.

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(*A debt due by*) So, a ſum of money directed to be paid by *A.* to *B.*, by the maſter's allocatur cannot be attached in *A.*'s hands. Coppell v. Smith, 3 Term Rep. 312. So, a ſum of money awarded under a rule of court cannot be attached. Grant v. Hawding, E. 7 G. 3. *B. R. Ibid.*

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(*By this Cuſtom*) But the defendant muſt be ſummoned, or have notice, though it hath been alleged, that the cuſtom in the city-court is to give no notice,) elſe the judgment againſt the garniſhee will be erroneous, and the money paid or levied in execution of it will not diſcharge the debt from the garniſhee to the defendant. Fiſher v. Lane, 3 Wilſ. 297.

(*If in debt the*) Foreign attachment may be given in evidence on the original iſſue.

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DAMAGES.

Page 4

(D) Of aſſeſſing the Damages: And herein.

(*In all actions*) But fraud vacates the policy, and therefore no ſuch action would lie.

Page 5

(*Where the jury*) But a *remittitur* cannot be entered in a term ſubſequent to that in which the judgment is entered. Wray v. Liſter, 2 Str. 1110. Chevely v. Morris, 2 Bl. Rep. 1300.

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(*In treſpaſs*) Yalden v. Hubburb, Com. Rep. 231. 2 Ld. Raym. 1382.

(*In caſe*) In treſpaſs, tort, &c. new actions may be brought for matter ſubſequent to the depending ſuit, and therefore damages cannot be given for it: but it is otherwiſe where a duty or demand has ariſen, pending the writ, for which no ſatisfaction can be had by a *new* ſuit, there ſuch duty or demand ſhall be included in the judgment upon the action already depending, as in the old writ of annuity; *aſſumpſit* for principal and intereſt, upon a contract obliging the defendant, the principal with intereſt from ſuch a time. Robinſon v. Bland, 2 Burr. 1086.

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(*If an action*) It is the rule of the court of C. P. to award a *venire facias de novo* in ſuch caſe upon payment of coſts, that the plaintiff may ſever his damages. Anger v. Wilkins, Bar. 478. Smith v. Haward, *Id.* 480.

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(*If an action upon*) But if one of the promiſes be inſenſible, or impoſſible to be performed, and there be a general verdict for the plaintiff with entire damages, the judgment will not be arreſted; becauſe it is not to be intended, that any part of the damages was aſſeſſed as to ſuch promiſe. 1 Roll. Abr. 577. pl. 5, 6. But a diſtinction is made by Lord C. J. Vaughan, in Nichols v. Reeve, 1 Freem. 83. between a legal impoſſibility of performing a promiſe, and a phyſical one; that it is only with reſpect to the latter that the above rule holds: for in the other caſe, *non conſtat* to the jurors whether the promiſe be good or not in law, and therefore the preſumption is, that they gave damages for it.

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(*If in treſpaſs*) 1 Wilſ. 30.

So, where two defendants in *aſſumpſit* ſevered in pleading, and the one pleaded a bankruptcy, which, on iſſue joined, was found for him, it was holden, that the plaintiff might enter a *nolle proſequi* as to him, and ſtill proceed to final judgment and execution againſt the other.

(*If in trover*) And agreeably to that reſolution the law is now ſettled. For where the count is of a *joint* treſpaſs, and the jury find the defendants guilty of a *joint* treſpaſs, or they all confeſs the treſpaſs, the damages cannot be ſevered. Hill v. Goodchild, 5 Burr. 2790. Onſlow v. Orchard, 1 Str. 422. Lowfield v. Bancroft, 2 Str. 910. Mitchell v. Milbank, 6 Term Rep. 199. Page 9

(*In treſpaſs and*) Though if ſeveral damages be aſſeſſed in ſuch caſe, and judgment thereupon entered up, it would be error, yet is it no ground to arreſt the judgment. Carth. 19. 6 Term Rep. 199.

If there be judgment by default as to part, and an iſſue upon other part, or in an action againſt ſeveral defendants, if ſome of them let judgment go by default, and others plead to iſſue, there ought to be a ſpecial *venire*, as well to try the iſſue, as to inquire of the damages, *tam ad triandum quam ad inquirendum*, and the jury, who try the iſſue, ſhall aſſeſs the damages for the whole, or againſt all the defendants. In theſe caſes, when the defendants who plead to iſſue are acquitted at the trial, the jury, in ſome inſtances, ſhall aſſeſs damages againſt the defendants who let judgment go by default, and in others not. In actions upon *contract*, as *covenant* (*d*) *aſſumpſit*, (*e*), *&c.* the plea of one defendant, for the moſt part, enures to the benefit of all; for the contract being entire, the plaintiff muſt ſucceed upon it againſt all or none; and therefore, if the plaintiff fail at the trial, upon the plea of one of the defendants, he cannot have judgment of damages againſt the others, who let judgment go by default. But in actions of *tort*, as *treſpaſs*, *&c.* where the wrong is joint and ſeveral, the diſtinction ſeems to be this, that where the plea of one of the defendants is ſuch, as ſhews the plaintiff could have no cauſe of action againſt any of them, there, if this plea be found againſt the plaintiff, it ſhall operate to the benefit of all the defendants, and the plaintiff cannot have judgment or damages againſt thoſe who let judgment go by default (*a*): but where the plea merely operates in diſcharge of the party pleading it there, it ſhall not operate to the benefit of the other defendants, but notwithſtanding ſuch plea be found againſt the plaintiff, he may have judgment and damages againſt the other defendants (*b*).

Tidd's Pr. 591. 11 Co. 5.

(*d*) 1 Lev. 63. 1 Sid. 76. 1 Keb. 284. S. C.

(*e*) Ca. Pr. C. B 107. Pr. Reg. 102. S. C. 3 Term Rep. 662.

(*a*) 2 Ld. Raym. 1372. 1 Stra. 610.

(*b*) 2 Str. 1108. 1122.

If there be a demurrer to part, and an iſſue upon other part, or, in an action againſt ſeveral, if ſome of them demur, and others plead to iſſue, the jury who try the iſſue ſhall aſſeſs the damages for the whole, or againſt all the defendants.

Tidd's Pr. 592.

But if in treſpaſs, one defendant lets judgment go by default, another demurs, and a third pleads to iſſue, and is acquitted, the plaintiff may aſſeſs ſeveral damages againſt the others.

2 Str. 1140. 1222.

If there be a demurrer to one count, and an iſſue on the other, and the plaintiff be nonſuited on the iſſue, contingent damages cannot be aſſeſſed on the demurrer.

Snow v. Como, 1 Str. 507.

(E) Where the Court may increaſe or mitigate the Damages.

(*So in treſpaſs*) In Auſtin v. Hilliars, Hardr. 408, it was adjudged, that the damages may be increaſed, if the word *maiherunt* be in the declaration, though the better way is to expreſs the

the manner of the maihem. And in another caſe, the court ſeemed to think a declaration that the defendant aſſaulted and maimed the plaintiff in his left hand, particular enough. Brown v. Seymour, 1 Wilſ. 6. If the wound be apparent, though it be not a maim, the damages may be increaſed by the court. Cook v. Beal, 1 Ld. Raym. 176.

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(*On the ſtatute*) But in actions upon promiſſory notes and bills of exchange, it is the practice, inſtead of executing writs of enquiry, to apply to the court for a rule to ſhew cauſe, why it ſhould not be referred to the maſter to ſee what is due for principal and intereſt; and why final judgment ſhould not be ſigned for that ſum without executing a writ of enquiry; which rule is made abſolute, on an affidavit of ſervice, unleſs good cauſe is ſhewn to the contrary. Shepherd v. Charter, 4 Term Rep. 275. Raſhleigh v. Salmon, 1 H. Bl. 252. Andrews v. Blake, *Id.* 539. Longman v. Fenn, *Id.* 541. This practice, however, is confined to actions upon promiſſory notes and bills of exchange, where the *quantum* of damages depends upon figures, which may be as well aſcertained by the maſter as before a jury: and, therefore, where the defendant had ſuffered judgment by default, in an action of *aſſumpſit* on a foreign judgment, the court refuſed to make the rule abſolute for a reference to the maſter; ſaying, this was an attempt to carry the rule further than had yet been done, and as there was no inſtance of the kind, they would not make a precedent for it. Meſſin v Lord Maſſareene, 4 Term Rep. 493. In a ſubſequent caſe viz. Maunſel v. Lord Maſſareene, 5 Term Rep. 87., the court refuſed to make the rule abſolute in an action on a bill for exchange for foreign money; the value of which is uncertain, and can only be aſcertained by a jury. Cuming v. Munro, 5 Term Rep. 87. Bagſhaw v. Playn, Cro. El. 536. Rends v. Peck, Cro. Ja. 617.

DEBT.

(A) In what Caſes an Action of Debt will lie.

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(*But if in an action*) Debt will lie on a foreign judgment, without ſtating in the declaration or proving the giving of the judgment. Walker v. Whitter, Dougl. 1.

Bonafous v. Walker, 2 Term Rep. 129. (*a*) 41 Aſſ. pl. 15. Dy. 322. a. b. 1 Roll. Abr. 921.—This action in Saund. 218. is referred to the common law: but in 2 Inſt. 38 and 2 Term Rep. 129., to ſtat. Weſtm. 2., 13 E. 1. c. 11., and 1 R. 2. c. 12.

If an officer entruſted with the cuſtody of a priſoner, againſt whom judgment has been obtained, permit his eſcape, he is liable to an action of debt, in which the very ſum for which the party is charged in execution is to be recovered. But againſt his executors the ſuit is not *originally* maintainable (*a*).

3 Wooddeſ. 96. (*b*) Co. Entl. 119. a. b. 120. a. Hardr. 332.

If an indenture of covenant contain a ſtipulated penalty for non-performance, the remedy is by an action of debt for ſuch ſpecifick ſum. By the ſame method the arrears of an annuity or rent-charge may be recovered (*b*).

(*c*) Stat. 4. Ann. c. 16. § 20. (*d*) Stat. 11 G. 2. c. 19. § 23.

Debt may be brought by the aſſignees of bail (*c*) and replevin (*d*) bond under particular ſtatutes.

(B) At what Time it ſhall be ſaid to have accrued.

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(*If a man*) Coates v. Hewit, 1 Wilſ. 81. *acc.*

(*So upon*) Rudder v. Price, 1 H. Bl. 547.

Cooke v. Whorwood, 2 Saund. 164. See too 1 H. Bl. 552.

(C)

(C) Who may bring Debt: And herein of the Privity of Contract and Eſtate.

Page 16

(*But the executor*) Evelyn v. Chicheſter, 3 Burr. 1717. *acc.*

Page 18

(*If the father*) Yet for the arrears of an annuity it is maintainable; d though by the deſcent of the land to the grantee, being heir to the antor, as well the annuity as the rent was determined, and the original ction was annexed to an inheritance, yet inaſmuch as the inheritance of th was determined by act of law, (which will do no wrong to any) election ſhall remain as to the arrears.

By ſtat. 8 *Ann. c.* 14., an action of debt is given for the recovery of Hawk. Abr. nts upon leaſes for a life or lives *during their continuance*, which the com- Co. Lit. 73. on law denied: on which ſtatute Mr. Serj. *Hawkins* queries, whether it ch not extend to leaſes of incorporeal hereditaments?

By ſtat. 5 *Geo.* 3. *c.* 17. § 3., which enables eccleſiaſtical perſons to ſe tithes and other incorporeal inheritances, debt is given for the reco- ry of rent on ſuch leaſes.

(D) Againſt whom it may be brought.

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(*For where*) 1 Ld. Raym. 368. S. C. cited. *Vide ſupra* 72, 73.

(E) Where Debt is the proper Action, and not Covenant, Caſe, &c.

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(*If it be recited*) That debt will lie for an indeterminate ſum, capable of being readily reduced certainty, hath been eſtabliſhed by other caſes. Bloome v. Wilſon, Sir T. Jones, 184. tch v. Weaver, 2 Keb. 225 ſo 80 Rands v Peck, Cro. Ja. 618. Nor is it now underſtood e neceſſary that the plaintiff ſhould recover the full ſum demanded. Aylett v. Lowe, 2 Bl. 1221. Walker v. Witter, Dougl. 6. Rudder v Price, 1 H. Bl. 550. And a declaration ebt upon a ſimple contract hath been holden good, though it ſpecified by the ſeveral counts a ſum than appeared to be demanded in the recital of the writ, and yet aſſigned as a breach the -payment of the ſum demanded in the writ. M'Quillin v. Cox, 1 H. Bl. 249.

(F) Of the Manner of bringing the Action; and where it muſt be brought in the *Debet* and *Detinet*.

Page 23

(*But if an action*) But ſee Cro. Car. 225.

Whether an executor can wave a term? 1 Mod. 185.

(G) Of the Extinguiſhment of the Debt, and pleading in Bar thereof.

(*In debt for rent*) The indenture is only inducement to the action; Page 24 ter of fact is the foundation of it.

(*b*) Waites v. Briggs, 2 Salk. 565. (*c*) Wheatley v. Lane, 1 Saund. 219.

So, in debt for an eſcape (*b*), or on a *devaſtavit* (*c*) againſt an executor, *nil debet* is a good plea; for the judgment is but inducement, and the eſcape and *devaſtavit* are the foundation of the action.

Warren v. Conſett, 2 Ld. Raym. 1500. 2 Str. 778. S. C.

So, in debt for a penalty upon articles of agreement, or on a bail-bond, *nil debet* is no plea, for in theſe caſes the deed is the foundation, and the fact but inducement.

1 Barnard. 15. S. C. 8 Mod. 106. 323. 382. S. C. Forteſc. 363. 367.

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(*In debt upon*) See 1 Term Rep. 462.

1 Ld. Raym. 566. 12 Mod. 376. S. C.

Under the plea of *nil debet*, the defendant may give in evidence a re leaſe, or other matter, in diſcharge of the action.

1 Ld. Raym. 394. S. P. Gilb. Debt, 434. 443. Semb. *contr.*

Draper v. Glaſſop, 1 Ld. Raym. 153. Anon.

And it has been holden, that as this plea is in the preſent tenſe, the ſtatute of limitations may be given in evidence under it.

1 Salk. 278. S P.

Bredon v. Harman, 1 Str. 701.

But in debt *qui tam*, the defendant was not allowed to give in evidence on *nil debet*, a former recovery againſt him by another perſon for the ſame cauſe.

Wilkins v. Wingate, 6 Term Rep. 62.

Debt will lie for uſe and occupation generally without ſetting forth the particulars of the demiſe.

DEODAND.

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(*As this forfeiture*) This practice, the court of King's Bench have impliedly ſanctioned, by refuſing to reform it on an application by the crown or its grantees. Foſt. 266. 2 Barnard. 82. Nor can ſuch inquiſitions be taken by the grand jury on default of the coroner. 1 Bac. 19.; and when taken by the coroner, they may be removed and traverſed. *Ibid.* 2 H. P. C. 416.

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DESCENT.

(A) Of Lineal Deſcent: And herein of the Exclusion of the aſcending Line.

Eaſtwood v. Vinke, 2 P. Wms. 614.

BUT if the father happen to be alſo couſin to the ſon, and as ſuch his heir, he may, in that remoter capacity, inherit immediately as the ſon.

(C)

(C) Of the Half-Blood, and the *Poſſeſſio Fratris*.

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(*If a father*) And ſee the caſes of Whitcombe v. Whitcombe, Pr. Ch. 280. Goodtitle v. ewman, 3 Wilſ. 516. So, the entry of a deviſee for years, it is ſaid, will make a *poſſeſſio fratris*. nk. 242.

(*There is poſſeſſio fratris*) *i. e.* Of a uſe *not* executed by the ſtatute; for uſes executed are legal tates. Co Lit. 14. b. note 5. 13th edit.

So, of a truſt (*d*) and (ſeemingly by the better opinion) of an equity (*e*) of redemption (*e*). (*e*) 1 Co. 121. b. 2 P. Wms. 713. Hardr. 488. (*e*) 1 Atk. 604. Co. Litt. 205. a. note (1), 19th edit.

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(*There can be*) Coll. Proc. on Claims of Bar. 195. But if it was of a feudal title of honour, as the earldom of Arundel, or barony of Berkeley, there *poſſeſſio fratris* ſhould hold well; becauſe e title is annexed to the land.—So, of an office of dignity, and *eâ ratione* the office of high-amberlain of England deſcended to the Earl of Lindſey of the whole blood, and departed from e line male of the Earl of Oxford; and adjudged accordingly in parliament. Hal. MSS. Coll. oc. on Claims of Bar. 173. Sir W. Jon. 96.

(D) Of Deſcents according to Cuſtom.

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(*If a rent*) 1 Freem. 105. 345. S. C. 3 Keb. 165. 214. S. C. 1 Vern. 489. S. C. cited.

(*If the cuſtom*) So, if the cuſtom be, that lands ſhall deſcend to the eldeſt ſiſter, where there neither a ſon nor a daughter, an eldeſt niece is not within it. Denn v. Spray, 1 Term ep. 466.

(E) Where a Perſon ſhall be ſaid to take by Purchaſe, and not by Deſcent.

If a copyholder ſurrender to the uſe of his will, and deviſe to his heir in fee, the heir ſhall be in by deſcent. Smith v. Triggs, 1 Str. 487. 8 Mod. 23. S. C.

If a perſon ſeiſed in tail *ex parte maternâ* ſuffer a recovery, the fee gained the recovery ſhall deſcend to his maternal heirs, as the eſtate-tail would ve done. Martin v. Strahan, 1 Wilſ. 66. 4 Br. P. C. 486. S. C. and Watk. on Deſc. c. 5. pag. 787. &c.

So, as to copyholds. Roe v. Baldwere, 5 Term Rep. 104.

A copyholder ſeiſed in fee by deſcent *ex parte maternâ* ſurrendered to e uſe of a perſon in fee by way of mortgage: the mortgage became for-feited: the mortgage-money was afterwards paid, and the mortgagor re-rendered the eſtate to the mortgagor and his heirs. The mortgagee on ſuch re-ſurrender took a new eſtate, and the heir on the part of the her muſt inherit. Benſon v. Scott, 12 Mod. 49. Doe v. Morgan, 7 Term Rep. 103.

(G) In

(G) In what Cases the Entry of the Disseisee may be lawful, notwithstanding a Descent.

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(He that hath) Qu. as the writ *causâ matrimonii prælocuti* extends to all degrees? see the writ in the register. Booth, 197. F. N. B. 205.

(*If a man seised*) The devisee, it seems, is not without remedy, for according to Co. Lit. 111. a., he may either enter, or have his writ *ex gravi querelâ*. But see Ow. 141. 1 Leon. 209.

(H) Whose Entry is preserved notwithstanding a Descent.

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(*If a descent*) F. N. B. 202. 2 Bl. Com. 291. Cro. Eliz. 398.

(*A descent cast*) But if he were at large when he was disseised, and the descent be cast during his imprisonment, this descent shall bind. Co. Lit. *ubi supr.*

(I) How the Entry may be preserved by continual Claim: And herein,

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(*But the law*) By stat. 21 Ja. 1. c. 16. No man shall make entry upon any lands, but within twenty years after his right shall first accrue. And by stat. 4 Ann. c. 16 § 16., no claim or entry upon any lands, &c. shall be sufficient to avoid a fine levied of such lands, or to satisfy the statute of limitations, unless an action be commenced within one year after, and prosecuted with effect.

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DEVISES.

A WILL and testament may be considered in two very distinct lights according to the different subjects upon which it operates, either as it disposes of real, or of personal property. A will of lands is a conveyance or donation *mortis causâ*, a limitation of the testator's estate by a revocable act: it constitutes no heir, creates no representation, but passes the estate merely of itself without any further act. On the contrary, the constitution of an heir is essential to a will of personal estate; for if there be no heir constituted, the instrument is not strictly and properly a will; and as no testamentary disposition of personal property can be administered without the interposition of the representative, or the appointee's refusing to act, takes upon itself to nominate one. The instrument in the latter case was borrowed from, and is framed upon, the *Roman* law; the instrument in the former case has no reference to that law; and not having the form of a will properly so termed, it has therefore been called a *devise*. However, as the restraint which the feudal law imposed upon testamentary alienations of lands, and which occasioned the above distinctions, is now taken off; and as the statutes of *H.* 8. have enabled mankind to dispose of real estates by will and testament, the term "will" seems now sufficiently comprehensive to be used in a general sense; and therefore the word "devises" may rather be applied to those parts or clauses of the will which convey

Domat, lib. 3 § 1.

convey a title to real eſtate, whilſt thoſe parts which relate to perſonal chattels may be diſtinguiſhed by the name of "bequeſts." Not that, though it be now allowed to convey both ſpecies of property by an inſtrument nominally the ſame, the old diſtinctions are therefore entirely obliterated; for the will is ſtill in effect a diſtinct inſtrument, as it relates to the one or to the other ſpecies. To a bequeſt or legacy, the aſſent of the repreſentative is required; not ſo to a deviſe, for a deviſe creates no repreſentative. So far as reſpects the perſonalty there is a probate of the whole inſtrument; and the probate is evidence for every legatee; but as to the real eſtate there is no probate, the ſpiritual court having no cognizance of the inſtrument as a deviſe; the will may be void as to one deviſe, and good as to the others; and every ſeveral deviſee muſt make out his title in a diſtinct cauſe. Nay, ſo diſtinct and independent on each other are the ſeveral parts of the will conſidered with reference to theſe different kinds of property, that a perſon may affirm the will as to one, and diſaffirm it as to the other; he may impeach the will *quoad* the deviſes, and yet inſiſt upon taking a benefit under it *quoad* the perſonalty. Again, the will, as to perſonals, does not ſpeak till after the teſtator's death; whilſt, as to real eſtate, it refers to the date. Hence, it will paſs after-gotten property of the former ſort, but not of the latter.

(A) Who may deviſe Lands, and to whom.

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(*Alſo, a huſband may*) Where the huſband ſtipulates, that perſonal property ſhall be enjoyed by the wife ſeparately, it muſt be ſo enjoyed with all its incidents, and the *jus diſponendi* is one of them. Fettiplace v. Gorges, 3 Br. Ch. Rep. 8. And where ſhe has this power over the principal, ſhe muſt neceſſarily have it alſo over its produce and accretions. Gore v. Knight, 2 Vern. 535. Pr. Ch. 255. S. C. Herbert v. Herbert, Pr. Ch. 44. When a feme covert is empowered to make a writing in nature of a will, a writing executed during the coverture will operate as ſuch, Gotten v. Layer, 2 P. Wms. 624. Oke v. Heath, 1 Vez. 139. Duke of Marlborough v. Lord Godolphin, 2 Vez. 75. Southby v. Stonehouſe, *id.* 612.

But although it may not operate ſtrictly as a will, but as an appointment, yet it is of a teſtamentary nature, and therefore muſt be proved in the ſpiritual court, elſe the legatee cannot entitle himſelf to the bequeſt in a court of law. And the regular courſe in the ſpiritual court is, not to give probate of the will, but adminiſtration, with the will, as a teſtamentary paper, annexed. Stone v. Forſyth, Dougl. 707. Roſs v. Ewer, 3 Atk. 156. Jenkin v. Whitehouſe, 1 Bur. 431. Cothay v. Sydenham, 2 Br. Ch. Rep. 392.

It was formerly thought, that the power of a feme covert over her ſeparate eſtate muſt be confined to ſuch part of it as was perſonal; for that of her real eſtate ſhe could make no diſpoſition during her coverture, unleſs by fine, or unleſs ſhe had, before marriage, reſerved to herſelf ſuch right by way of truſt, or of a power over a uſe; that unleſs one of theſe methods were taken, her will of real eſtate would be void, as an inſtrument or conveyance, and could not bind her heirs. But the contrary hath been ſince adjudged; for where by articles entered into prior to the marriage of a woman who was entitled to the truſt of a reverſion in fee of lands, expectant on the death of her uncle, and on failure of his firſt and other ſons, and the heirs male of their bodies, it was ſtipulated by the huſband, that all her eſtate which ſhe then had, or which at any time thereafter ſhould deſcend or devolve upon her, ſhould be conveyed to her own uſe, and ſubject to her appointment; and under theſe articles ſhe executed an ap-

Peacock v. Monk, 2 Vez. 191.

Wright v. Lord Cadogan, 6 Br. P. C. 156. See too Doe v. Staple, 2 Term Rep. 684.

appointment in favour of her husband, and her children by him; it was holden, that this was a good and valid appointment as against her heir at law, although no conveyance of the reversion was ever executed, nor any fine thereof levied.

Com. Dig. tit. Devise, (H. 3.) It is said by Lord C. B. *Comyns*, that, by the custom of *London*, a feme covert may devise to her husband, but without citing any authority.

(*A wife may be*) This was allowed for settled law so early as the time of Ed. 2. 4 E. 2. Fitz. tit. Devise, pl. 23.

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(*If there be two*) But it is now settled that a subsequent severance of the jointure, whether by partition or by the death of the companion, will not effectuate a devise made during the jointure; for the statute of 34 and 35 H 8. c. 5. § 4 requires that the devisor should *have a sole* estate in fee-simple, or should be seised in fee in coparcenary or in common, at the time of making the will, in order to be capable of devising. Even at common law such a will would have been bad, for before the statute a man could only devise lands which he was *then* seised of: and a will cannot operate as a severance of the jointure. Swift v. Roberts, 3 Burr. 1488. Butler and Baker's case, 3 Co. 30. b. Poph. 87. S. C.

(*But all agree*) The universal concurrence in this point must close the question: for a devise to an infant *in ventre sa mere* necessarily implies a future disposition to take effect at its birth, as much as if the words "*when he shall born*" were added; for surely it cannot be imagined, that the child should take the estate before it was born. Fearne's Conting. Rem 428. And that a devise to an infant *in ventre sa mere* is good, see Taylor v. Bydall, 1 Freem. 243 Anon. *Id.* 295. Gulliver v. Wicket, 1 Wilf. 106. Chapman v. Blisset, Ca. temp. Talb. 145. And that an infant *in ventre sa mere* is within the description of "*children living at the time of the testator's decease*," see Doe v. Clark, 2 H. Bl. 399.

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(*A devise to an*) The devise to an alien, it seems, would not be void; for there does not appear to be any rule of law to prevent an alien from taking by devise: the only consideration would be for whose benefit he may take. Knight v. Du Pleslis, 2 Vez. 360. Godfrey v. Dixon, Godb. 276. Noy, 137.

Plowd. 261. Swinb. 106. The will of a *felo de se* (though void as to his personal estate, because that is forfeited to the king) seems to be effectual as to lands.

At Rome, suicide did not invalidate a will, and it was common with those who were apprehensive of being exposed to capital punishment, to prevent the confiscation of their property by a voluntary death. "*Eorum qui de se statuebant, humabantur corpora, manebant testamenta, pretium festinandi.*" Tacit. Annal. lib. 6. § 29. But this *pretium festinandi*, this temptation to suicide was taken away by the laws of the later emperors, and the will was allowed to be good only where the party destroyed himself from impatience of pain, or derangement of mind. *Quod si futuræ pœnæ metu voluntarii mortis supplicium antevertit, ratam voluntatem ejus conservari leges vetant.* Cod. l. 2. *Qui testam. fac.*

(B) Of what Estate or Interest in the Devisor he may dispose.

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(*The statute of* 32 *H.*) The law is the same whether the lands be freehold or copyhold. Spring v. Biles, M. 24 Geo. 3. B. R 1 Term Rep. 435. The rule of law in this case does not depend upon the word "*having*;" but upon the will's being in nature of a conveyance; an appointment of the specifick estate. 2 Vez jun. 427. Cowp. 90.

(*So, where a man*) In this case of Bunter v. Cook, the court of King's Bench doubted, whether a chattel real, acquired after the making of the will, would pass by it; but that doubt seems to have been since done away; for in Wind v. Jekyll, P. Wms. 575. Lord Parker held, that such an interest would clearly pass, and stated the difference between freehold and personal interests, acquired subsequent to the making of the will, to be, "that with regard to the real estate, bought after the making of the will, supposing *that* not to pass, still there is one in law capable of taking it, *viz.* the heir; but with regard to the personal estate, if the executor, though made before the acquitting thereof, does not take it, it is uncertain who shall."
3 Burr. 1496.

(*If*

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(*If A. makes bis*) Qu. Whether this point would not be differently determined ſince the rea-ning of ths court in Jones v. Perry, 3 Term Rep. 93.?

(*A. agrees with B.*) This point that lands contracted for at the time of making the will, will s by the will, and under general and ſweeping words is eſtabliſhed by ſeveral caſes. Milner v. ills, Moſel. 123. Allen v Allen, *Id.* 262 Potter v. Potter, 1 Vez 437. Gibſon v. Lord ontfort, *Id.* 474 Nor will it make any difference, though the day, agreed upon for the exe-tion of the contract, be ſubſequent to the date of the will, Greenhill v. Greenhil, Prec. Ch. 0. if the articles were actually entered into before the making of the will, 2 P. Wms. 629., and y be ſuch as a court of equity would enforce in ſpecie. Potter v. Potter, 1 Vez. 437.
Potter v. Potter, 1 Vez. 437.

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(*A man ſeiſed in*) This caſe of Biſhop and Fountaine is now not law: It ſeems to be finally ſet-d, that a poſſibility clothed with an intereſt, is not only deſcendible, but deviſable. Selwin Selwin, 2 Burr. 1131. 1 Bl. Rep. 222. 251, Roe v. Jones, 1 H. Bl. 30. 3 Term Rep. 88.

An eſtate that is turned to a right, as a reverſion diſcontinued, is not with- Baker v. the purview of the ſtatutes of wills. Thus *A.* being tenant in tail, the Hacking, verſion to *B*, they joined in a leaſe for life by deed: *B.* afterwards, dur- Cro. Car. g the leaſe for life, deviſed the reverſion, and died, and then tenant in 387. 403. l died without iſſue. The queſtion was, whether this deviſe were good not? and this depended upon, whether, if tenant in tail join with him reverſion in a leaſe for life, not warranted by the ſtatute, ſo that it be greater eſtate than tenant in tail can make, it be a diſcontinuance of the l only, or a diſcontinuance of the reverſion alſo; It was holden to work diſcontinuance in both, and then the deviſor having nothing more than a ht in the reverſion, the deviſe was void.

(C) What Words paſs a Fee in a Will.

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(*If lands are*) Str. 798 S. C. by the name of Shaw v. Weigh. Fitzg. 7 S. C. Oates v. Cooke, urr. 1685. 1 Bl. Rep. 543. S. C. Gibſon v. Lord Montfort, 1 Vez. 485. Chapman v. ſlett, Ca. temp. Talb. 145.

(*If A. deviſes land*) Wellock v. Hammond. Cro. El. 204. Yet even in this caſe C. ſhall have the fee, if a contrary intention manifeſtly appear. Bacon v. Hill, Cro. El. 497.

(*But if A. deviſes*) But there is a diſtinction, it ſeems, between a deviſe to truſtees to pay "out of rents and profits, and out of the *annual* rent: in the former caſe they have a power of ing the eſtate, but not in the latter. *Per* Buller, J. Doe v. Richards, 3 Term Rep. 359, 60. Ca. Abr. tit. Deviſes (J), pl. 7, 8.
From which caſe it appears that it would not paſs a fee-ſimple.

(*So if the*) But notwithſtanding words to the effect in this and the preceding paſſage in the t, if there are circumſtances in the will from which it can be collected, that the deviſor inten-d that the deviſee ſhould take a larger eſtate, ſuch intention ſhall prevail. Webb v. Hearing, . Jac 415. Moore, 852. S. C. Baddely v Leppingwell, 3 Burr. 1533. Frogmorton v. Hol-ay, *Id.* 1618. Doe v Woodhouſe, 4 Term Rep. 89. Lee v. Withers, Sir T. Jones, 107. And on the other hand, where lands are charged with a groſs ſum, yet ſuch charge will not carry eſtate in fee without any words of limitation, if an expreſs eſtate for life, or an expreſs eſtate-l is given in terms by the will. Doe v. Fyldes, Cowp. 840. Denn v. Slater, 5 Term Rep. .

But a deviſe of a houſe to *A.*, "paying yearly, and every year, out Goodright the ſaid houſe, the ſum of 15*s.* to *B.*," will paſs a fee. v. Stocker, 5 Term Rep. 13.

So, a deviſe of teſtator's lands to *W.*, and all his intereſt in the eſtates Andrew. v. *J. C.* deceaſed, to *L. A.* for life, and after *L. A.*'s deceaſe, to *E. S.*, Southouſe. arged with an annuity to *J. T.* for life, gives a remainder in fee to 5 Term *S.* Rep. 292.

So, a deviſe of all the reſt, reſidue, and remainder of the deviſor's Doe v. ds, hereditaments, goods, chattels, and perſonal eſtate, "his legacies Richards, "and 5 Term Rep. 356.

" and funeral expences being *thereout* paid," conveys the fee to the devisee, by reason of the words THEREOUT *paid*.

Villiers v. Villiers, Barnard. Can. 307.

A. having a fee-simple in a light-house, and a term for 99 years in lands adjoining to it, devised to his son *H.* and his assigns, all his estate and interest in the light-house, messuages, lands and tenements, and appurtenances thereunto belonging, upon trust, that he pay out of the rents and profits of the term, during the remainder thereof, 200*l. per annum. H* takes a fee-simple in such parts of the premises wherein the testator had a fee, and a term in the other part.

Canning v. Canning, Mosel. 240.

Where the words of a will were, " all the rest, residue and remainder " of my messuages, lands, or hereditaments, whatsoever or wheresoever " unbequeathed, after my just debts, legacies, and funeral expences are " fully satisfied and paid, I give to my executors, in trust for my daughters;" it was adjudged that the executors took only an estate for life; the words " *all the rest*," &c. comprehending the particulars only, not the estate; and the subsequent words amounting to no more than a charge in equity: that the court were not necessarily called upon to enlarge the estate to the trustees; for the trust being only for daughters, it may be understood to be only for the lives of the trustees.

Denn v. Mellor, 5 Term Rep. 558. The parties being dissatisfied with this decision, another ejectment was brought and a special verdict found, in order that the case might go up to the House of Lords. But the facts being the same, the court of H. B. gave judgment as here, without argument. 6 Term Rep. 175.

So, where the words were, " all the rest of my lands, tenements, and " hereditaments, either freehold or copyhold, whatsoever and wheresoever, " and also all my goods, chattels, and personal estate, of what nature or " kind soever, after payment of my just debts and funeral expences, I " give, devise, and bequeath the same unto my wife *S. C.*; and I hereby " nominate and appoint her my said wife sole executor of this my will," it was adjudged, that the wife took an estate for life only; for though the real estate be charged with the payment of debts and funeral expences, if the personalty be insufficient for that purpose, yet there are no words charging the estate in the hands of the wife with the payment of those debts.

Merson v. Blackmore, 2 Atk. 341.

So, where a testator gave " all his lands, tenements, and messuages " whatsoever, after debts and legacies paid, and funeral expences were " discharged, to his brother-in-law," it was holden, that only an estate for life passed; for though it be true, that where a gross sum is to be paid out of lands, it gives a fee to the devisee of those lands; yet, here, the debts are not in all events charged upon the real estate, but only contingently, if the personal estate should be deficient; and therefore it does not come up to those cases where a gross sum is to be paid out of land, and consequently, gives no more than an estate for life to the devisee.

(*If a man devises*) Spicer v. Spicer, Cro. Ja. 527. S. P. In the case of Hopewell v. Ackland it was settled, that the *hereditaments* will not pass a fee in a will, for that in the statute of wills it is evidently opposed to an estate of inheritance, the words of the statute being " any person having manors, lands, tenements, and *hereditaments* of estate of inheritance." See acc. Canning v. Canning, Mosel. 242. Denn v. Miller, 5 Term Rep. 558.

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(*So where the*) The words " *all my tenant-right estate*" pass a fee. Wilson v. Robinson, 1 Lev. 91. 1 Mod. 100. 3 Keb. 180. 245. So, all the rest of his estate. Cliffe v. Gibbons, 1 Ld. Raym. 1324.

And the opinion of the court in this case of Bridgewater v. Bolton, that the word " estate" in a will *of itself* passes a fee, has been confirmed by several subsequent cases. So far indeed from its being necessary to insert words of inheritance in order to give it this operation, words of restraint must be added in order to carry a less estate; for it is *genus generalissimum*. Barry v. Edgworth

worth, *infra*. Ibbetſon v. Beckwith, Ca. temp Talb. 157. Tanner v. Morſe, *Id.* 283. 3 P. Wms. 295. S. C. by the name of Tanner v. Wiſe. Tuſſnel v. Page, Barnard. 9. 2 Atk. 57. Ridout v. Pain, 3 Atk. 486. 1 Vez. 11. S. C. Baillis v. Gale, 2 Vez. 48. Scott v. Alberty, Com. Rep. 337. Macacree v. Tall, Ambl. 181. Stiles v. Walford, 2 Bl. Rep. 938. Hurſt v. Earl of Winchelſea, 2 Burr. 872. Holdfaſt v. Marten, 1 Term Rep. 411. Fletcher v. Smiton, 2 Term Rep. 656. Doe v. Chapman, 1 H. Bl. 223. And the word "eſtate" is equivalent to "eſtate." Fletcher v. Smiton, 2 Term Rep. 656. Tilley v. Simpſon, *Id.* 659. n. Under a ſweeping clauſe of "all the remainder and reſidue of the teſtator's effects, both real and perſonal," a fee in lands will paſs. Hoganv. Jackſon, Cowp. 239. So, a deviſe of "all I am worth" will carry a fee. Huxtep v. Brooman, 1 Br. Ch. Rep. 437.

(*A., a young lady*) Lord C. Talbot ſaid, he remembered this caſe very well and that no ſuch diſtinction as this was made in it. Ca temp. Talb. 160. See 1 Vez. 226.

So, where a deviſe was in theſe words, "All thoſe my freehold lands "and hop-grounds, with the meſſuages or tenements, barns, *&c.* now in "the tenure or occupation of the widow *L.*, and all other the reſt, reſi- "due and remainder of my eſtate, conſiſting in ready money, jewels, "leaſes, judgments, mortgages, *&c.* or in any other thing whatſoever or "whereſoever, I give unto *A. H.* and her aſſigns for ever; Lord *Hard-wicke* held, that the word *eſtate* in this clauſe would not paſs the reſidue of the real eſtate, for that being coupled with things that are perſonal, it muſt be reſtrained to perſonals. Timewell v. Perkins, 2 Atk. 102. Dilly v. King, 1 H. Bl. 2. S. P. Semb. However, where a teſtator has already mentioned both real and perſonal property, a deviſe "of all the reſt and reſidue of his eſtate, of what name or kind ſoever," will include real as well as perſonal eſtate, though accompanied with limitations peculiarly applicable, and uſually applied to the latter only. Doe v. Chapman, 1 H. Bl. 223.

A teſtator wills that his lands ſhall go to his two younger brothers *R.* and *M*, to be divided between them; and if *R.* ſhould have no iſſue male, then his whole lands and eſtate ſhall go to *M.* in tail male, he paying 200*l.* to the daughters of *R.* after the ſame eſtate ſhall fall to him; and if *M.* ſhall have no iſſue male, then his lands ſhall go to his nephew *T.* and his heirs, he paying 200*l.* to the daughters of *R.* and *M.* reſpectively after the eſtate ſhall fall to him; and if *T.* have no iſſue male, then "*his ſaid eſtate*" ſhall go to the daughters of *R.* and *M.*; and if they have none, then to the daughters of *T.*; and if he have none, then to the teſtator's heirs. An eſtate for life only paſſes to the daughters of *R.* and *M.*, the word "*eſtate*" being here deſcriptive only. Rogers v. Briggs, Andr. 210.

By this deviſe, *viz.* "I give and demiſe to *A.*, her heirs and aſſigns "for ever, all my lands at *B.*, and I give and bequeath to *A.* aforeſaid all "my lands at *C.*" *A.* only takes an eſtate for life in the lands at *C.*, and the reverſion deſcends, although the will begin with theſe introductory words, "For thoſe worldly goods and eſtates wherewith it hath pleaſed "God to bleſs me," and contain a legacy of 1*s.* to the heir at law. Right v. Sidebotham Dougl. 759.

So, though a will begin with like introductory words, and then the teſtator gives all his freehold tenement lying in *G.* to *A.*, *B.*, and *C.*, "*to them my ſiſter's ſons*," and then, among ſeveral pecuniary legacies, leaves 10*s.* to his heir at law, *A*, *B.*, and *C.* take only for life, and the reverſion deſcends. Denn v. Gaſken. Cowp. 657.

So, where there are ſimilar introductory words, and the teſtator gives his houſe to a younger ſon *S.*, and after the death of *S.* to *A.* and *B.*, ſons of *S.*, and a legacy of one ſhilling to the huſband of his heir at law, *A.* and *B.* take only for life, and the reverſion deſcends. Right v. Ruſſell, Scac. Hil. 1 Geo. 3. cited in Dougl. 761.

So, if, after a ſimilar introduction, the teſtator gives all his real eſtate to his wife for life, and to his ſon *P.* after his wife's death, all his land at Roe v. Bolton, 2 Bl.

W.,

Rep. 1045. and Dougl. 761. *W.*, and, among ſeveral legacies, 5*s.* each to all his grandchildren, among whom was his heir at law, *P.* ſhall only take the land at *W.* for life, and the reverſion ſhall deſcend.

Frogmorton v. Wright, 5 Wilſ. 414 So, if after the like words in the preamble, the teſtator gives to *W. W.* his nephew two houſes at *S.*, with a croft and appurtenances belonging to them, now in the occupation of *A* and *B.*, and further directs that the ſaid houſes ſhould not be entered upon by the deviſee till after the deceaſe of his executor, *W. W.* takes only an eſtate for life.

Ibbetſon v. Beckwith, Ca. temp. Talb. 160. And yet introductory words to this effect are material in the conſtruction of ſubſequent deviſes.

Maudy v. Maudy, Ca. temp. Hardw. 143. Goodright v. Stocker, 5 Term Rep. 13. Gulliver v. Poyntz, 3 Wilſ. 141. Hogan v. Jackſon, Cowp. 306.

Loveacres v. Blight, Cowp. 352. One deviſes thus, "*As touching my worldly eſtate*, I deviſe the ſame as follows: I give to my wife *E. M.* 5*l.* to be paid yearly out of my eſtate at *G.*, and alſo one part of the dwelling-houſe, with as much wood croft home at her as ſhe ſhall have need of, by her executors hereafter named. *Item*, to my ſon *T. M.* and daughter *E.* 5*l.* each, to be paid twelve months after my deceaſe. *Item*, to my ſons *T. M.* and *R. M.* whom I make my —— and ordain my ſole executors, all my lands and tenements, freely to be enjoyed and poſſeſſed alike." *T. M.* and *R. M.* are tenants in common, and take a fee.

Grayſon v. Atkinſon, 1 Wilſ. 333. So, where after introductory words to that effect. a teſtator gave ſeveral legacies to *A.*, and directed him to ſell all or any part of his real or perſonal eſtate for the payment of his debts and legacies, and deſired three perſons to aſſiſt him in the ſale thereof, and to be ſupervisors of his will; and after giving ſome pecuniary legacies to others, concluded with this reſiduary deviſe: "As to all the reſt of my goods and chattels, real and perſonal, moveable and immoveable, as houſes, gardens, tenements, my ſhare in the copperas works, *&c.* I give to the ſaid *A.*"; It was holden that a fee paſſed to *A.*

Smith v. Coffin, 2 H. Bl. 444. So, where a teſtator reciting, "As to ſuch worldly eſtate as God has pleaſed to bleſs me with." made a proviſion for his heir at law, and deviſed "all the reſt and reſidue of his goods and chattels, rights, credits perſonal and teſtamentary eſtate whatſoever to *B.*, for his own uſe, benefit, and diſpoſal," it was holden, that *B.* took an eſtate in fee in the lands of the teſtator, for the reſiduary clauſe is commenſurate with the introductory clauſe.

Doe v. Buckner, 6 Term Rep. 610. We have already ſeen that general words in the introductory part of a will, will not of themſelves paſs a fee, or include real eſtate, where the will does not in the ſubſequent clauſes point to a diſpoſition of it. So in a late caſe, where a teſtator having given 4000*l.* to *A.* and *B.* in truſt for certain perſons, by a reſiduary clauſe gave "all the reſt of his eſtate and effects, of what nature ſoever to *A.* and *B.* their *executors and adminiſtrators*, in truſt to add the *intereſt* to the *principal*, ſo as to accumulate the ſame, it being his will that the reſidue ſhould not paſs, but at the time and manner as the principal ſum of 4000*l.* was directed to be paid;" it was holden, that a houſe, the only freehold of which the teſtator was ſeiſed, did not paſs the will, notwithſtanding there were general words in the introductory clauſe, "as to all his *eſtate* and effects, *both real* and perſonal" In this caſe the force of the introductory words is taken off by the deviſe to the truſtees, their executors and adminiſtrators, terms applicable only to a perſonal intereſt; and by the direction that the intereſt

d principal were to make one conſolidated ſum, which could not poſſibly fer to real eſtate.

D) What Words create an Eſtate-Tail, or for Life.

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(*A ſeiſed of lands*) Note, Raymond has reported merely his own argument.

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(*A deviſed lands*) 2 Eq. Ca. Abr. 305. pl. 2. Ca. temp. Talb. 1. Dougl. 254. Ambl. 363. 3 em Rep. 488. n. 491. 1 Vez. 89. 3 Atk. 617.

(*So, where A. deviſed*) Morgan v. Griffiths, Cowp. 234. S. P.

So, where *A.* deviſed lands to his ſon for life, then to his ſon *A.* for life, remainder to his ſon *G.*, and his heirs for ever, and if he ſhould die *without heirs*, then to his two daughters; this was determined to be an eſtate-tail in *G.*; for it was impoſſible he ſhould die without heirs whilſt his ſiſters were living; conſequently, the teſtator by *heirs*, could only mean *heirs of the body*. Ca. temp. Talb. 1. Tyte v. Willis.

The rule holds the ſame where the remainder is limited to the heirs of the teſtator himſelf, if ſuch heirs muſt alſo be heirs to the firſt deviſee. As, where *A.* deviſed to his ſecond ſon and his heirs for ever; and for want of ſuch heirs then to the teſtator's right heirs; here, though the deviſe to the teſtator's heirs was a mere nullity, as ſuch heirs muſt be in by deſcent, yet it was held ſufficient to manifeſt the intent, and aid the conſtruction of an eſtate-tail. 1 P. Wms. 23. Nottingham v. Jennings.

But where there was a deviſe to one and his heirs, and if he die without heirs, then to a *charity*; lord chancellor ſaid, the deviſe being to one and his heirs, and if he die without heirs, then over, ſuch deviſe over was void, and the word heirs ſhould not be conſtrued to ſignify heirs of the body, where the deviſee over is not inheritable. Attorney General v. Gill. 2 P. Wms. 369.

So, where the teſtator deviſed to his ſon *and his heirs*, and if he ſhould die *without heirs*, remainder over to another who was half brother to the firſt deviſee; upon a queſtion made, whether the firſt limitation was in fee or in tail? Lord *Hardwicke* ſaid, it was a plain caſe, and one of thoſe points which the court would not ſuffer to be argued, as having been determined before. This was a deviſe over to a ſtranger, as the law conſiders him, and who could not in any event inherit as heir to his brother. 1 Vez. 89. Tilburgh v. Barbut. 3 Atk. 617.

A teſtator gave and bequeathed to his grandſon *S.* all that his meadow, &c. to hold unto *S.* and the heirs of his body lawfully begotten, *and their heirs for ever*, chargeable nevertheleſs, and charged with the payment of eight pounds a year unto *M.* during her natural life: but in caſe *S. ſhould die without leaving iſſue of his body*, then he gave and deviſed the ſame to *G.*, to hold to him and his heirs for ever; chargeable as aforeſaid, and alſo chargeable with and ſubject to the payment of 100*l.* unto his the teſtator's niece, within one year after *G.* or his heirs ſhould be poſſeſſed of the ſame premiſes. *S.* entered and died ſeiſed, leaving iſſue a ſon, who alſo died ſeiſed, having previous to his death, made his will, and deviſed the ſame to his mother, and her heirs and aſſigns. And the queſtion was, what eſtate *S.* took under this will? And it was contended, on behalf of the mother, that the ſon of *S.* took a fee-ſimple, the words "heirs of the body" operating as words of purchaſe to anſwer the intent; and it was ſaid that a ſtrong Denn v. Shenton, Cowp. 410.

circumſtance

circumſtance was, the legacy of 100*l.* deviſed to the teſtator's niece, in caſe *S.* ſhould *die without iſſue;* of neceſſity therefore the teſtator muſt mean a dying without iſſue, at the time of his death; for if he intended ſhe ſhould wait till a *total failure of iſſue*, ſhe might wait for 100 years, or for ever. But Lord *Mansfield* ſaid the diſtinction was, between a deviſe of lands and perſonal eſtate: in the latter caſe, the words were taken in their vulgar ſenſe; that was, *dying without leaving iſſue at the time of his death.* The queſtion was, whether the grandſon took an eſtate-tail or an eſtate in fee? The deviſe was to *S.* and the *heirs of his body*, and *their heirs for ever*, but the words "*their heirs for ever*" were qualified by the ſubſequent words "in caſe he ſhall die *without leaving iſſue*," which clearly ſhewed it an eſtate-tail; and then the teſtator gave it over to the mother. It was too clear to admit of a doubt. And the other three judges concurred.

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(*Upon a ſpecial*) S. C. cited by Lord Mansfield in Cowp. 380.

Driver v. Edgar, Cowp. 379.

A teſtator deviſed lands to his daughter *E.* to hold the ſame after the death of the teſtator's wife, to his ſaid daughter and *the heirs of her body* lawfully begotten; and to his daughter *M.* other lands, to hold from and after his wife's deceaſe, to the ſaid *M.* and to the heirs of her body lawfully begotten; and declared his further mind and will to be, that in caſe either of his ſaid daughters ſhould happen to die ſingle, married, or widow, without leaving children or child *living at their deceaſe*, lawfully begotten, then the *eſtate* given her by his will, ſhould be void as to the *inheritance* of *heirs*, and of none effect, and the lands ſo given her ſhould go to his heir male, and his heirs male, he and they paying to the ſurviving daughter an annuity during her life. *E.* after the deceaſe of her mother, ſuffered a common recovery of the lands ſo deviſed to her, and afterwards deviſed them, and died unmarried. Upon a queſtion, whether the recovery had barred the remainder over; it being contended on behalf of the claimant in remainder, that upon the whole of the will the intention of the teſtator was not to give his daughter an immediate eſtate-tail, but an eſtate for *life* only with remainder to her children in tail, if ſhe left any, and if not, then to the teſtator's heir male, *&c.*; but if not ſo, ſtill, that in providing for the event that had happened, he expreſsly revoked the eſtate of inheritance; the court ſaid, the validity of the recovery depended on the point, whether the daughter was tenant in tail, or tenant for life only; and that it was neceſſary for the plaintiff to ſupport the propoſition, that, at the death of the teſtator, *E.* was, during her own life, tenant for life only; that the eſtate was given *to her and the heirs of her body*, which was an eſtate-tail; that if ſhe was tenant in tail to the hour of her death, nothing was ſo clear, as that all conditions limited upon ſuch eſtate-tail, were avoided by the common recovery, which had been ſuffered. And the court were of opinion, that ſhe was tenant in tail.

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(*One by will*) And ſee acc. Doe v. Reaſon, 3 Wilſ. 244.

White v. Collins. Com. Rep. 289.

A teſtator deviſed lands to his ſon *F.* to enjoy the rents and profits thereof during the term of his natural life, with power to make a jointure of all or part, and after his death and jointure, if any were made, *to the heirs male of his body lawfully begotten, during the term of his natural life, and for want of ſuch heir male*, he gave the ſame lands to another ſon. It was adjudged, that *F.* took only an eſtate for life.

Again,

Again, where a deviſe was to *B.* and his heirs lawfully to be begotten, *that is to ſay, to his firſt, ſecond, third, and every ſon and ſons ſucceſſively, lawfully to be begotten of the body* of the ſaid *B. and the heirs of the body of ſuch firſt, ſecond, third, and every other ſon and ſons ſucceſſively*, lawfully iſſuing as they ſhould be *in ſeniority of age and priority of birth*, the eldeſt always, and the heirs of his body to be preferred before the youngeſt, and the heirs of his body, remainder over; it was adjudged, that *B.* took only an eſtate for life; for that the ſubſequent clauſe was not *contrary* to the preceding general limitation to *B.*'s heirs lawfully to be begotten, but explanatory of what heirs, *&c.* were meant. Law v. Davis, 2 Ld. Raym. 1561.

Gavelkind lands were deviſed to *A. and the heirs of her body* lawfully begotten or to be begotten, as well females as males, and to their heirs and aſſigns for ever, to be divided equally, ſhare and ſhare alike, as tenants in common, and not as jointenants. It was holden, that the words *heirs of her body* did not operate as words of limitation, nor, conſequently, create an eſtate-tail in *A.* For here, theſe words did not ſtand independent and unqualified, but were corrected and explained, very expreſsly, by the words which followed and were coupled with them; the words *as well females as males*, annexed to the words *heirs of the body*, were incompatible with and expreſsly broke the deſcent, becauſe gavelkind lands cannot deſcend in that manner; and the deviſe expreſsly created a tenancy *in common*, which was impoſſible *by deſcent*, as that muſt have been *in coparcenary*; and beſides, there were words of limitation *in fee* grafted on the words *heirs of the body*, which could not have been ſatisfied by an eſtate-tail in the anceſtor. Doe v. Laming, 2 Burr. 1100. 1 Bl. Rep. 265.

W. Williams, being ſeiſed in fee of a plantation in *Jamaica*, deviſed in the following words:—"Should my wife be enſeint with child, at any "time hereafter, and it be a female, I give and bequeath unto her the ſum "of 2000*l.* *&c.*; if it be a male, I give and bequeath my eſtate, real and "perſonal, equally to be divided between the ſaid infant and my ſon *J. W.*, "when the ſaid infant ſhall attain the age of 21. *Item*, It is my intent and "meaning, *that none of my children ſhould ſell or diſpoſe of my eſtate for longer "time than his life; and to that intent* I give, deviſe, and bequeath all the "reſt and reſidue of my eſtate to my ſon *J. W.* and the ſaid infant, for and "during the *term of their natural lives*; the remainder to my brother-in-"law *J. G.* and his heirs, for and during the lives of my ſaid ſon *J. W.* "and the ſaid infant; the remainder to *the heirs of the body of my ſaid ſon "J. W.* and the ſaid infant, lawfully begotten or to be begotten; the re-"mainder to my daughters, *&c.*" No other ſon was born, and the queſtion was, what eſtate *J. W.* took under this will? The court of King's Bench (*Yates*, J. *diſſent.*) determined, that he took only an eſtate for life. This judgment was reverſed in the Exchequer-chamber, from which an appeal was lodged in the Houſe of Lords. The judgment of that Houſe, however, was never had; for after the appeal had depended a conſiderable time, the parties compromiſed the diſpute, and the plaintiff obtained leave to withdraw his writ of error. Perrin v. Blake, 4 Burr. 2579. 1 Bl. Rep. 672. Dougl. 329. note.

J. N. deviſed his eſtate to his two daughters, equally to be divided between them, not as jointenants, but as tenants in common, *viz* the one moiety or half part thereof to his daughter *E. N.*, and her heirs for ever; and the other moiety to his daughter *S.* the wife of *W. H.* during the term of her natural life, and after her deceaſe *to the iſſue of her body lawfully begotten, and their heirs for ever*. It was adjudged, that *S.* the ſecond daughter took only an eſtate for life, with remainders to her children, as purchaſers. For if the deviſe of the ſecond moiety were conſtrued to give an eſ- Roe v. Collis. 4 Term Rep. 294.

tate

tate-tail to this daughter, the deviſor's eſtate would not be equally divided, for then the ultimate reverſion of the ſecond moiety would be again ſubdivided between the heirs of the two daughters; and the firſt daughter and her heirs would take a moiety of this reverſion over and above what they take under the deviſe of the firſt moiety of the whole.

Allanſon v. Clitherow, 1 Vez. 24.

Where the deviſe was to *A.* for life, with power to truſtees to ſettle a jointure, if he married a gentlewoman, and, ſubject to ſuch jointure, a direction to limit the eſtate on the iſſue of the marriage in ſtrict ſettlement; but if *A.* died without iſſue of his body, then over; Lord *Hardwicke* held that the latter words gave *A.* an eſtate-tail by implication.

Letheullier v. Tracey, 3 Atk. 774. Ambl 204. 220. S. C.

Sir *W. D.* deviſed all his manors, meſſuages, lands, *&c.* to his daughter *M. D.* for life, remainder to truſtees to preſerve, *&c.* remainder to her firſt ſon in tail *male*, remainder to every other ſon in tail *general*; and gave all his perſonal eſtate to truſtees, to be laid out in land; and ſettled upon his daughter and her iſſue, in ſuch manner as he had deviſed his manors, *&c.* and *in caſe his ſaid daughter ſhould die without iſſue of her body living at her deceaſe*, then he deviſed to truſtees his manors, *&c.* and alſo all his perſonal eſtate, to be laid out as aforeſaid; upon truſt, to receive the rents and profits thereof annually, as well of the lands ſo to be purchaſed, as of all other the premiſes ſo as aforeſaid deviſed to them, and lay out the ſame in the purchaſe of lands of inheritance in the county of *G.* or ſome adjacent county, and alſo the rents thereof, until his couſin, Sir *H. N.* ſhould attain his age of 21 years. And then the will goes on in theſe words: "*Item*, I give "and deviſe all my manors, *&c.* unto my couſin, Sir *H. N.* after he ſhall "have attained the age of 21 years, (taking the name of *D.*) for life, "without impeachment of waſte; with remainder to his firſt, *&c.* ſons in "tail male, remainder to his daughters in tail. And in default of ſuch iſ"ſue, or in caſe the ſaid Sir *H. N.* ſhall happen to die before he attain the "ſaid age of 21 years, and without iſſue, then to *S. L.* (taking the name "of *D.*) for life, with remainders to his ſons in tail male; and for default "of ſuch iſſue"——And then there was a blank, without any farther diſpoſition. Lord *Hardwicke* held, that *M. D.* the teſtator's daughter, was not entitled to an eſtate tail by implication; for that the words "if my ſaid "daughter *ſhould die without iſſue living at her deceaſe*," are to be conſidered as if he had added *during the minority of Sir* H. N., and do not give the eſtate-tail to the daughter, but her iſſue take by purchaſe.

A teſtator deviſed all his real eſtate to *L. H.* for and during the term of his natural life, *and no longer*; provided that he altered his name, and took that of *R.* and live at his houſe at *B*, and after his deceaſe to *ſuch* ſon he ſhould have, lawfully to be begotten, taking the name of *R.*: and for default of *ſuch iſſue*, then he bequeathed the ſame to his couſin *W.* and his heirs for ever: And he further willed, that the ſaid *W. R.* have

Robinſon v. Robinſon, 1 Burr. 38.

liberty to preſent whom he pleaſes to any vacancy that ſhould happen in any of his (the ſaid teſtator's) preſentations, during his life; and in case any of his children ſhould take or be deſigned for holy orders, then it was his (the ſaid teſtator's) deſire, that in caſe of any vacancy in either of his preſentations, bonds of reſignation be taken to ſuch child or children, if the vacancy happen before he or they attain ſuch orders; and after the ſame ſhould be diſpoſed of as aforeſaid, then he gave *the perpetuity of the ſaid preſentations to the ſaid* L. H. *in the ſame manner, and to the ſame uſes*, as he had before given his eſtate. The court of King's Bench certified; that on the true conſtruction of this will, the ſaid *L. H.* muſt, by neceſſary implication, to effectuate the manifeſt general intent of the teſtator, be conſtrued

ſtrued to take an eſtate in tail male, he and the heirs of his body taking the name of *R.*; notwithſtanding the expreſs eſtate deviſed to the ſaid *L. H. for his life, and no longer.*

Sir *S. D.* deviſed all his manors, *&c.* to *S. D.* ſon of *C. D.* during his natural life, and the heirs male of his body lawfully to be begotten; and for want of ſuch iſſue, to *C. D.* another of the ſons of the ſaid *C. D.* during his natural life, and the heirs male of his body lawfully to be begotten; and for want of ſuch iſſue, to *J. D.* another of the ſons of the ſaid *C. D.* during his natural life, and the heirs male of his body lawfully to be begotten; and for want of ſuch iſſue, then to every ſon and ſons of the ſaid *C. D.* which ſhould be begotten on the body of *Sarah* his then wife; and for want of ſuch iſſue, then to *W. H.* for his natural life, and the heirs male of his body lawfully to be begotten; and for want of ſuch iſſue, to *S. G.* for and during his natural life, and the heirs male of his body lawfully to be begotten; and for want of ſuch iſſue, to *J. G.* for and during his life, and the heirs male of his body lawfully to be begotten; with the reverſion to the teſtator's right heirs. There was a proviſo annexed to the deviſe to the ſaid *S. D. and others*, that if the eſtates deviſed to him or them and their deſcendants, ſhould come to him or them and be in poſſeſſion, then and thereupon he and they and their deſcendants to whom the premiſes ſhould come and be in poſſeſſion, ſhould procure an act of parliament to take his name and arms; otherwiſe their eſtates ſhould determine. The teſtator alſo deviſed ſeveral things to go, as heir-looms, along with the eſtate; and he gave powers to make leaſes and jointures. The three ſons of *C. D.* viz. *S. D*, *C. D.* and *J. D.* all died without iſſue. But *C. D.* had a fourth ſon, named *W.* born after the making of the will, who became ſeiſed, and took the name and arms according to the directions of the will. It was adjudged, that this ſon took an eſtate-tail, for that the teſtator evidently intended the ſame eſtate for the after-born ſons, as he had given to the others. Evans v. Aſtley, 3 Burr. 1570.

J. B. deviſed, after the death of his nephew *W. B.*, eldeſt ſon of his brother *R. B.* without iſſue, to the ſecond ſon of his ſaid brother *R. B.* for and during the term of his natural life; and after the death of the ſaid ſecond ſon of his ſaid brother *R. B.* then to the firſt ſon of the body of ſuch ſecond ſon of his ſaid brother *R. B.* lawfully begotten or to be begotten, and to the heirs male of the body of ſuch ſecond ſon lawfully to be begotten; and for want of ſuch iſſue, to the third, fourth, fifth, and every younger ſon or ſons of the ſaid ſecond ſon of the ſaid *R. B.* (according to their ſeniority) and to the heirs male of the bodies of the ſaid third, fourth, fifth, and other ſons of the ſaid ſecond ſon of the ſaid *R. B.*, with remainders over. At the time of making the will, *R. B.* had no other ſon but *T. B.* His ſecond ſon *T. B.* was born after the making of the will, and after the teſtator's death. The queſtion being, whether *T. B.* the ſecond ſon of *R. B.* took an eſtate-tail under this will, or an eſtate for life only? It was preſſed upon the court in order to make it an eſtate for life only, to change the limitation to the heirs male of the body of ſuch ſecond ſon, to the heirs male of the body of ſuch firſt ſon of ſuch ſecond ſon, and to inſert a limitation to the ſecond ſon of the ſaid ſecond ſon; but the court ſaid, that they could not ſupply a contingency omitted in the moſt favourable caſe that could exiſt; that adding theſe words in this caſe would introduce a void limitation, for that a poſſibility could not be deviſed upon a poſſibility; that it would defeat the intention of the teſtator; that that intention could not be anſwered but by giving the ſecond ſon of *R. B.* an Chapman v. Brown, 3 Burr. 1626.

eſtate-tail; and that, as the words ſtood in the will, he took an eſtate-tail.

Hay v. Earl of Coventry 3 Term Rep. 83.

An eſtate was deviſed to *A.* for life, remainder to truſtees to preſerve, &c. remainder to his firſt and other ſons in tail male, remainder to *B.* for life, remainder to truſtees to preſerve, &c. remainder to his firſt and other ſons in tail male, remainder to the uſe of all and every the daughters of *A.* and *B.* as tenants in common; and in default of ſuch iſſue, to the uſe of the right heirs of the deviſor. After the death of *A.* and *B.* without any ſon, an only daughter of *B.*, it was adjudged, took only an eſtate for life, for that here the teſtator has uſed no words teſtifying his intention to give an eſtate of inheritance to the daughters, and the court could not ſupply them.

Do v. Applin, 4 Term Rep. 82.

A teſtator deviſed to his nephew *W. D.* all his eſtate at, &c. to hold to him during his natural life, and after his deceaſe *to and amongſt his ſons* and *in default of ſuch iſſue*, he gave the eſtate over. The court ſaid, that in this caſe, as in that of *Robinſon* v. *Robinſon*, they muſt, to anſwer the deviſor's general intention, defeat ſome particular intent: that his general intent was to give *W. D.* an eſtate-tail; and that to effectuate that intent they muſt reject the words "*to and amongſt.*"

Attorney General v. Sutton, 1 P. Wms. 754. 2 Br. P. C. 282. S. C. Vin. Abr. tit. Deviſe, (B. b.) pl. 22. S. C. Fort. 66. S. C. cited

J. S. being ſeiſed in fee of a legal eſtate in *L.*, and of a truſt or equitable eſtate in *S.*, by his will directed *B.* his nephew and truſtee in the land in *S.* to convey his land in *S.* to the uſes of his will; which if he refuſed to do, or to acknowledge the truſts of his will in manner therein mentioned, then "all the gifts, legacies, and bequeſts in the ſaid will given, deviſed "and bequeathed to the ſaid *B.* and the heirs male of his body ſhould be "void." He then deviſed all his lands in *L.* and *S.* to *B.* for life, and afterwards to the firſt ſon, or iſſue male of his body lawfully to be begotten, and to the heirs male of the body of ſuch firſt ſon, remainder to the ſecond ſon, and his iſſue male in tail, (not carrying over the limitations to his third or other ſon,) ſubject to a proviſo, "that the ſaid *B.* or his "ſigns and the heirs male of his body ſhould not commit waſte upon "ſaid premiſes, and ſhould not impeach, queſtion, or endeavour to "feat, avoid, deſtroy, invalidate, or obſtruct the payment of all or "the annuities, legacies, or charitable bequeſts in the ſaid will." And from and after the death of the teſtator's wife, and of the ſaid *B.* without iſſue male of his body, or after the death of ſuch iſſue male, he deviſed all his ſaid premiſes to truſtees for charities. Afterwards *A.* ſuffered a recovery, and died without iſſue; and the queſtion was, whether the recovery barred the charities? As to which, on an appeal from the court of Exchequer to the Houſe of Lords, it was agreed by all the Lords, that the recovery was good of the lands in *L.*, of which the teſtator had a legal eſtate, and that the charities were barred by it; but as to the lands in *S.* the order of the court of Exchequer was reverſed by a majority; the effect of which being only to reverſe the plea allowed by the Exchequer, it only put the reſpondent to anſwer over, without determining the right any way againſt him. However, in conſequence of this order the Barons decreed, that the recovery of the truſt eſtate was void, as contrary to the truſts created by the will; and there having been no conveyance of the lands in *S.* to truſtees, purſuant to the directions in the will, they directed ſuch a conveyance, and a perpetual injunction for quieting poſſeſſion. As to the lands in *L.*, in which the teſtator had the legal eſtate, the court, after a trial at law, and a ſpecial verdict found, gave judg-

for the leſſors of the plaintiff, being of opinion that the nephews took an eſtate-tail in thoſe lands, and they ordered the tenants to attorn.

Lands were deviſed to truſtees and their heirs, in truſt, until the marriage or death of the teſtator's grand-daughter, to receive the rents and profits, and pay her an annuity for her maintenance, and as to the reſidue to pay his debts and legacies, and after payment thereof, in truſt for his grand-daughter; and if ſhe married a proteſtant, after her age, or with conſent, &c. then to convey the eſtate after ſuch marriage to the uſe of her for life, without impeachment of waſte, remainder to her huſband for life, remainder to the iſſue of her body, with ſeveral remainders over. Lord *Talbot* held, that the grand-daughter was *tenant for life*, only, with remainders over in ſtrict ſettlement. Lord Glenorchy v. Bosville, Cas. temp. Talb. 4

An eſtate was deviſed to truſtees to convey to the uſe of the teſtator's daughter, for the term of her natural life, and ſo as ſhe alone, or ſuch perſon as ſhe ſhould appoint, ſhould take and receive the rents and profits thereof, and ſo as her huſband was not to intermeddle therewith; and from and after her deceaſe, in truſt *for the heirs of the body* of the ſaid daughter for ever. Lord *Hardwicke* ſaid, that it was plainly the intention of the teſtator, that the huſband ſhould have no manner of benefit from the eſtate either in the lifetime of the wife, or after her deceaſe, (for immediately upon her deceaſe it was to be conveyed in truſt for the heirs of her body); the wife therefore could only take an eſtate for life; for if ſhe were entitled to an eſtate-tail, the huſband muſt be entitled to be tenant by the curteſy. Roberts v. Dixwell, 1 Atk. 607.

A. M. deviſed all his lands in *B.* and *C.* to truſtees, in truſt, to ſell the ſame, and with the money ariſing by the ſale, to purchaſe other freehold lands, or long annuities, or ſtock, or ſome other publick fund; and then to permit the defendant and his aſſigns to receive the intereſt and profits thereof during his life; and he further directed that the defendant ſhould receive the rents and profits of the eſtates until ſold to his own uſe; and after the defendant's deceaſe, then in truſt to permit the plaintiff and his children to receive the intereſt and profits of the ſaid money as aforeſaid, or the rents and profits of the ſaid land, if unſold, or ſuch other lands as ſhould be purchaſed, during his natural life; and after his deceaſe, then in truſt for the uſe of the iſſue of the body of the plaintiff lawfully begotten; and in default of ſuch iſſue, the eſtates were deviſed over in fee. One of the truſtees in the will died before the eſtates were ſold, but after the will had proved the will. On a bill brought by the plaintiff to have the eſtates ſold by a decree of the court, and that the money ariſing thereby might be diſpoſed of according to the will; the queſtion was, whether an eſtate-tail was to be limited to the plaintiff in the lands to be purchaſed, or an eſtate for life only? By the Maſter of the Rolls:—Where lands are ſettled to one for life, and to the heirs of his body, there is no caſe where ſuch a limitation has not been held to be an eſtate-tail: on the other hand, there is no caſe where they are to be ſettled to one for life, and after the death to the iſſue of his body, that ſuch a limitation hath been conſtrued an eſtate-tail. In *Sweetapple* v. *Bindon*, 2 *Vern.* 536. there was an eſtate for life particularly given before the word *iſſue*, which differs it from the preſent caſe; and yet Lord Keeper *Wright* ſaid, upon the like words in marriage articles it would not have been conſtrued an eſtate-tail, for there it appeared the eſtate was intended to be preſerved for the iſſue. And in the caſe of *Bale* v. *Coleman* it is laid down, that there is a difference between a deed and a will, as to conſtruction. There is ſomething in the will Mayne v. Mayne, 2 Atk. 265.

will that denotes the intention of the teſtator, that the plaintiff ſhould only take an eſtate for life, for there is a diſtinction between the wording and framing of the limitations: in the firſt place, the eſtate is during the lives of the defendant and the plaintiff to continue in the truſtees; and when the teſtator limits it to the plaintiff for life, it is to permit the plaintiff to receive the rents and profits, *&c.*; and when the limitation is to the iſſue, it is to their uſe and behoof, and the court ſhould, as near as they can, preſerve the intention of the teſtator. The words, *in default of ſuch iſſue* to *A. F.*, ſhew the teſtator intended, that *F.* the remainder-man ſhould not take while there was iſſue of the plaintiff: iſſue of his body takes in both male and female, and there muſt be croſs remainders to the iſſue female. Lord *Glenorchy* v. *Boſville* is in point, and I ſhall in this caſe make my decree accordingly.

Bagſhaw v. Spencer, 2 Atk. 246. 570. 577. 1 Vez. 142. See obſervations on this caſe in Jones v. Morgan, 1 Br. Ch. Rep. 206. Fearne's Conting. Remainders 4th Ed. 177. &c.

A. deviſed lands to five truſtees, their heirs and aſſigns, in truſt, by rents and profits, ſale or mortgage, to pay his debts, *&c.*; and after payment thereof, he deviſed the ſame eſtates to three of the ſame truſtees, their executors, *&c.* for 500 years upon truſt to pay his legacies, and an annuity of 200*l. per annum* to his ſiſter for life: and after the determination of the ſaid eſtate for years, he deviſed the ſame premiſes to all the ſaid truſtees and their heirs, in truſt, as to a moiety, to the uſe of *T.*, his nephew for life, without impeachment of waſte, and after the determination of that eſtate, to the truſtees and their heirs during the life of *T.*, to ſupport contingent remainders, and after his deceaſe, to the uſe of the heirs of the body of *T.* lawfully begotten, and for want of ſuch iſſue, then to the uſe of his nephew *B.* for the term of his natural life, without impeachment of waſte, and after the determination of that eſtate, to the ſame truſtees during the life of *B.*, to preſerve contingent remainders; and after his deceaſe then to the uſe of the heirs of the body of *B.* lawfully begotten, with like remainders to other nephews. The firſt deviſee *T.* died without iſſue, upon whoſe deceaſe *B.* the next in remainder filed his bill, praying, among other things, to be let into poſſeſſion of a moiety of the eſtates: afterwards *B.* dying pending the ſuit, his widow and deviſee brought a bill of revivor and ſupplemental bill, charging, that *B.* in his lifetime, by bargain and ſale enrolled, conveyed this moiety of the eſtates to two perſons and their heirs, to make them tenants of the freehold, and ſuffered a recovery thereof (in which he was vouched) to the uſe of himſelf in fee; and afterwards deviſed his ſaid moiety to his widow in fee, and died without iſſue. The general queſtion between the parties was, whether an eſtate-tail, or an eſtate for life only, paſſed by the will of *A.* to *B.*? It was inſiſted for the plaintiff, that it was an eſtate-tail, upon the general rule, that where lands are limited to a man for life, with a limitation in the ſame deed or gift to the heirs of his body, that this makes an eſtate-tail; and that a deviſe of lands in the ſame way paſſed the ſame eſtate; that the limitation was either a legal eſtate, or a truſt veſted or executed, and not executory. On the other hand, it was contended, that thoſe rules were artificial, not founded in juſtice, but for ſupport of the feudal tenures, and therefore the judges ought to ſhew themſelves *aſtuti* in ſupporting exceptions to ſuch rules. The Maſter of the Rolls, however, held it to be a *truſt*, and not a *legal eſtate*; but decreed that *B.* was entitled to an eſtate *tail* in the moiety ſo deviſed to him; as it was the caſe of an immediate deviſe, and not a deviſe of lands *to be ſettled*. Upon an appeal to Lord *Hardwicke* from this decree, he agreed, that this deviſe was only a truſt in equity; but that this being the caſe of a truſt, the court was bound to

ry it into execution according to the intent of the teſtator; that the intent was clear that the words "heirs of the body" ſhould be taken as words of purchaſe, from the clauſe, *without impeachment of waſte*, and the limitation to truſtees to *ſupport contingent remainders*: that there was no diſtinction between truſts executed and executory; that all truſts were in notion of law executory, and to be carried into execution by the court. His Lordſhip therefore reverſed ſo much of the decree at the Rolls as gave B. an eſtate-tail under the will.

J. A. deviſed 6000*l.* South-ſea ſtock, and 1200*l.* to truſtees, to ſell and lay out in the purchaſe of lands, to convey to *G. J. A.* for life, and afterwards to the iſſue of his body: in default of ſuch iſſue, then over. *G. J. A.* brought a bill for performance: the queſtion was, whether he had an eſtate for life, or in tail? It was inſiſted for him, that if it had been a deviſe of land, he would be tenant in tail; and there ſhould be the ſame conſtruction in this caſe: but the court held it an eſtate for life only of the lands to be purchaſed. Aſhton v. Aſhton, 1 Ves. 149.

Perſonal eſtate was bequeathed to truſtees, in truſt, to lay out the ſame in land to be ſettled and aſſured as counſel ſhould deviſe, unto and upon the truſtees and their heirs, upon truſt, and to and for the uſe of *P. and the heirs male of his body*, to take in *ſucceſſion* and *priority of birth*, and for default of ſuch iſſue male, then, upon further truſt, and to and for the uſe of *B. and the heirs male of her body*, to take in ſucceſſion and priority of birth, remainder over. And the teſtator ordered the truſtees to pay the remainder of the intereſt, dividends and profits, after deducting the expences of the truſt, until the purchaſe or purchaſes made, to *P.* and *B.* reſpectively, and to their *reſpective ſons and iſſue male*, who ſhould be *reſpectively entitled* to the rents and profits of the eſtates to be purchaſed. Upon the queſtion, whether the lands to be purchaſed ſhould be ſettled on *P.* as tenant in tail, or in ſtrict ſettlement upon him for life, with remainder to his firſt and other ſons in tail-male, Lord *Northington*, on hearing, directed the ſettlement to be made on him for life, with remainder to his firſt and other ſons in tail male. Upon a re-hearing, Lord *Camden* was clearly of opinion to confirm the decree, and took a diſtinction between the caſe where a teſtator has given complete directions for ſettling his eſtate with perfect limitations, and where his directions are incomplete, and are rather minutes or inſtructions: in the former caſe, he ſaid, the legal expreſſion ſhould have legal effect, though perhaps contrary to his intention, as in *Garth* v. *Baldwin*; in the latter, the court would conſider the intention, and direct the conveyance according to it. Here, the intention was very plain; the teſtator directed the ſettlement to be made by *advice of counſel*, and *in ſucceſſion and priority*. He meant ſomething different from an eſtate-tail, when he wanted the aſſiſtance of counſel; and though the words *in ſucceſſion and priority* might have effect in caſe *P.* took an eſtate-tail, yet they were meant to give an intereſt to the ſons after the death of *P.*; the latter clauſe put it out of doubt; he there explained his meaning by making uſe of the words *ſons* and *iſſue*. White v. Carter, Ambl. 670.

P. P. deviſed "to *A. B.* and *C.* and their heirs and aſſigns for ever, to the uſe of them, their heirs and aſſigns for ever, all his manors, lands, &c. in the county of *D.* and elſewhere, upon truſt, to ſet the ſame out in ſuch manner as they ſhould approve, for the benefit of his (the teſtator's) daughter *J.*, and the rents and profits thereof, to lay out and apply for her moſt advantage, until ſhe ſhould attain her age of 21," Baſtard v. Proby, 2 Ves. Wms. 478. note.

" 21, or be married; and on her attaining that age, that the ſaid truſtees " or the ſurvivor of them, or the heirs of ſuch ſurvivor, *ſhould, as counſel* " *ſhould adviſe, convey, ſettle, and aſſure* the ſaid manors, lands, &c. unto, " *or to the uſe of, or in truſt for the ſaid* J. *for her life, and after her* " *death, then on the heirs of her body lawfully iſſuing;* but in caſe his ſaid " daughter ſhould die without leaving iſſue of her body lawfully begotten, " then he deviſed all his ſaid real eſtates to his brother *J. P.*, his heirs and " aſſigns for ever." On a bill filed by the daughter and her huſband to have the truſts of this will carried into execution, Sir *Lloyd Kenyon*, M. R. declared, that on the true conſtruction of the will, in the events which had happened, the real eſtates ought to be ſettled on Mrs *Baſtard* for life, with remainder to her firſt and other ſons ſucceſſively in tail general, remainder to her daughters in tail general, as tenants in common, with croſs-remainders in tail general, with remainder in fee to *J. P.* And his Honour ordered, that the Maſter ſhould ſettle proper conveyances according to ſuch directions, and that the defendants, the truſtees, ſhould execute

Page 61 the ſame.

(*A. makes a ſettlement*) Lady Laneſborough v. Fox, Ca. temp. Talb. 262. S. P. Doe v. Fonnereau, Dougl. 487, S. P. Habergham v. Vincent, 5 Term Rep. 92. 2 Vez. jun. 204 S. P. ; an equitable eſtate for life cannot unite with a legal eſtate-tail, nor *vice verſâ* Shapland v. Smith, 1 Br. Ch. Rep. 75. Knight v. Ellis, 2 Br. C. Rep. 570.

(*A. deviſed the ſurplus*) Though P. Williams ſays the parties agreed, yet in 2 Vez. 657 Lord Hardwicke ſays, that Lord Cowper thought himſelf bound to agree with the three judges, and ſo decreed.

Bale v. Coleman, 1 P. Wms. 142. 2 Vern. 670. S. C. 3 in Abr. tit. Deviſe (D. b), pl. 7. S. C. more fully reported.

A. deviſed lands, in truſt, for *B.* for life, with a leaſing power, and after his deceaſe, in truſt, for the heirs male of his body. Lord Keeper decreed an eſtate tail to be conveyed to *B.*, although he admitted, that upon articles of marriage, founded upon an agreement, *B.* might in ſuch caſe be made only tenant for life; but in a will (he ſaid) *you muſt take words as you find them.*

Garth v. Baldwin, 2 Vez. 646.

Lands were deviſed to a truſtee, in truſt, to pay the rents and profits to *S.* for her ſeparate uſe during her life as if ſhe were ſole, and after her deceaſe, to pay the ſame to *E.* her ſon for life, and afterwards to pay the ſame to the heirs of his body, and for want of ſuch iſſue, to pay the ſame to all and every other ſon or ſons of the body of *S.* begotten, &c. Lord *Hardwicke* decreed a conveyance in tail to *B.* of the eſtate ſo deviſed.

Wright v. Pearſon, Forne's C. R. 137. Ambl. 358. S. C.

A teſtator deviſed to truſtees and their heirs, upon truſt, after his death by and out of the rents and profits to raiſe 500*l.* with intereſt, and pay the ſame to his five grandchildren; and ſubject to the raiſing and payment of the ſaid 500*l.*, and the intereſt thereof, to the uſe of his nephew for life; ſubject nevertheleſs to his nephew's qualifying himſelf according to a proviſo thereinafter contained, with remainder to the ſaid truſtees and their heirs to preſerve contingent remainders, with the remainder to the uſe of the heirs male of the ſaid *T. R.* and their heirs, provided that, in caſe the ſaid nephew *T. R.* ſhould die without having any iſſue male of his body living at his death, then he charged the premiſes with 100*l.* a-piece for two nieces, if then living, at their reſpective ages of 21 years; if either died, her part to go to the ſurvivor; And he empowered his ſaid truſtees

as ſoon as conveniently could or might be after the death of the ſaid *T. R.* without iſſue male as aforeſaid, by and out of the rents and profits of the premiſes, to raiſe and pay to his ſaid two nieces, the ſaid 100*l.* a-piece; and for default of ſuch iſſue male of the ſaid *T. R.* then he deviſed the premiſes (ſubject to the payment of the ſaid 500*l.* and 200*l.*) to the uſe of all and every his ſaid five grandchildren, or ſuch as ſhould be living at the time of failure of iſſue male of the ſaid *T. R.*, to take as tenants in common, and to their reſpective heirs and aſſigns equally to be divided between them, ſhare and ſhare alike, provided that the ſaid *T. R* ſhould, immediately after the teſtator's death, be placed out an apprentice to a ſurgeon, or ſome other good trade, for ſeven years, or elſe be ſent to ſome college in *Cambridge*, there to continue till he was qualified to be ordained a clergyman; and in caſe he ſhould refuſe or neglect to be put out, and continue ſuch apprenticeſhip, or qualifying himſelf to be ordained a clergyman, then his will was, that the eſtate ſo before limited to the ſaid *T. R. for his life*, ſhould ceaſe and determine and be void, as if he had been dead, and that the ſaid premiſes ſo limited to the ſaid *T. R. for his life, and his iſſue male* as aforeſaid, ſhould thenceforth revert over, and go and remain to the uſe of ſuch of his five grandchildren as ſhould be living, to be equally divided amongſt them, and to their reſpective heirs, as tenants in common. Lord Keeper *Henley* determieed, that *T. R.* took an eſtate-tail.

A teſtator, after giving certain lands to truſtees and their heirs, in the firſt place to the intent his ſiſters ſhould reſpectively have an annuity, or rent-charge of 80*l.* for their lives, with power of diſtreſs and entry; and ſubject thereto in truſt for *P.* for life, remainder to truſtees to preſerve, *&c.*, remainder to the heirs of the body of *P.*, remainder to his own right heirs; gave the reſidue of his perſonal eſtate to truſtees, in truſt, to buy lands in fee-ſimple; which he directed ſhould remain, continue, and be to, for, and upon ſuch and the like eſtate and eſtates, uſes, truſts, intents, and purpoſes, and under and ſubject to the like charges, reſtrictions, and limitations, as were by him before deviſed, limited, and declared of and concerning his lands and premiſes thereinbefore laſt deviſed, or as near thereto as might be, and the deaths of perſons would admit. It was adjudged by Lord Keeper *Henley*, that *P.* was entitled to an eſtate-tail in the lands to be purchaſed. Auſten v. Taylor, Ambl. 376.

A teſtator deviſed his eſtate to truſtees, to raiſe money (in aid of his perſonal eſtate) for payment of debts; and after payment of debts, and after limitations to the uſe of his youngeſt ſon, and the heirs male of his body, in the ſame manner as thoſe following to his eldeſt ſon *W.*, *to the uſe of his ſon* W. *for and during his natural life, without impeachment of waſte, and from and after his deceaſe to the uſe and behoof of the heirs male of the body of his ſaid ſon lawfully begotten, ſeverally, reſpectively, and in remainder, the one after the other, as they and every of them ſhould be in ſeniority of age and priority of birth, with remainder over.* Powers were given to the teſtator's ſons, whilſt in poſſeſſion, of leaſing, making jointures for wives, and raiſing portions for younger children. Upon a claim by the perſonal repreſentative of *W.*, to the amount of an incumbrance which *W.* had paid off in exoneration of the eſtate, one point inſiſted upon in anſwer to it was, that *W.* was tenant in tail; and therefore his paying off the incumbrance was an exoneration of the eſtate. And Lord *Thurlowe* was of opinion, that *W.* took an eſtate-tail. The deciſion of the cauſe, however, did not depend merely on the point of the deviſee's taking Jones v. Morgan 1 Br. Ca. Ca. 206.

taking an eſtate-tail; but the complexion of the chancellor's arguments, and the inferences from them, leave little room to doubt that his decision would have been the ſame, if it had turned on that point.

Goodtitle v. Otway, 2 Wilſ. 6. *A.* deviſed to his daughter *B.* for life, and after her death to her lawful iſſue, and if ſhe ſhould have no iſſue, that ſhe ſhould have power to diſpoſe of the eſtate at her will and pleaſure. *B.* was the teſtator's heir at law, and died without iſſue. She took an eſtate-tail, and a contingent fee by the will, and had a fee by deſcent.

Miller v. Seagrave, Rob. Gav. 96. Lands were deviſed to *M.* and his wife for their lives, remainder to the next heir male of their two bodies. It was holden a deviſe in tail; for that a deviſe to the heir male was a deviſe in tail, unleſs there are words of limitation ſuperadded, ſo as to bring it within the reaſon of *Archer*'s caſe, and that the words firſt, next, or eldeſt made no difference.

Goodright v. Pullyn, 2 Ld. Raym. 1437. 2 Str. 729. S. C. 1 Barnard. 6. S. C. 2 Eq. Ca. Abr. 315. S. C. A teſtator deviſed lands to *N for his life*, and after the deceaſe of *N.*, *to the heirs male of the body of* N. lawfully to be begotten, and *his heirs* for ever; but if the ſaid *N.* ſhould happen to die without ſuch *heir male*, then he deviſed the lands to *B.*, *&c.*: The queſtion was, whether *N.* took an eſtate-tail, or for life only, by the will? It was contended on one ſide, that the teſtator intended him only an eſtate for life, by his deviſing to him expreſsly for life; and then here were ſuperadded words, *his heirs for ever*, engrafted on the words *heirs male*; that though theſe words *heirs male* were in the plural, yet the ſubſequent words *his* and *for default* of ſuch *heir male* qualified them, ſo as to make them ſignify the ſame thing as *next heir male* in *Archer*'s caſe. But the judges were all unanimous in opinion, that *N.* took an eſtate-tail, that the rule was ſettled ſo firmly that it was not to be diſputed. They held that the ſubſequent words *his* and if he dies without *ſuch heir male*, were not ſufficient to reſtrain and alter the operation of the words *heirs male* and ſo qualify them as to make them a deſcription of the perſon.

Morris v. Le Gay, cited 2 Burr. 1102. 2 Atk. 249. A deviſe to *L. for life*, then to *the heirs of the body of* L., *and their heirs*, and if ſhe died without *ſuch heir* of her body, then over, was holden to be an eſtate-tail.

Dubber v. Trollope, Ambl. 453. A deviſe was to the teſtator's eldeſt ſon *W.* for life, remainder to his firſt ſon for life, remainder to the right heirs male of his body; remainder to other ſons of *W.* and the heirs male of their bodies; remainder to the teſtator's ſon *T.* for life, and after to the *firſt heir male* of his body; remainder over. The court of *C. B.* held, that the words *heir male* were to be underſtood collectively, and gave an eſtate-tail to *T.*, it being diſtinguiſhed from *Archer*'s caſe, by no limitation being ſuperadded to the words *firſt heir male*, and the word *firſt* ſignifying *firſt* in order of time. And the court of *K. B.* affirmed the judgment of *C. B.*

Minchull v. Minchull, 1 Atk. 411. Again, a deviſe was to *R. M.* and the firſt heir male of his body, and the heirs male of his body; and in default of ſuch iſſue, to *E. M.* and the heirs male of his body, and their iſſues, remainder over. Lord *Hardwicke* held, that *R. M.* took an eſtate-tail.

Coulſon v. C[illegible]on, 2 Str. 1125. 2 Atk. 246. Again, a deviſe was to *C. for life*, remainder to truſtees *to ſupport contingent remainders* during the life of *C.*, remainder to *the heirs of the body of C.* lawfully begotten. Upon a queſtion, whether *C.* took an eſtate-tail or for life? a caſe was ſtated for the opinion of the judges of *B. R.*, who certified, that by reaſon of the remainder interpoſing between the deviſe to *C.* for life, and the ſubſequent limitation to the heirs of his body, [illegible]

took an eſtate for life, not merged by the deviſe to the heirs of his body, but by that deviſe an eſtate-tail in remainder veſted in *C.*

A teſtator deviſed lands to his nephew, to hold to him during the term of his natural life, and from and after his deceaſe to the uſe of *the iſſue male of his body* lawfully begotten, and the *heirs male* of the body of ſuch *iſſue male*; and for want of ſuch *iſſue male*, remainder over. The deviſee had no iſſue at the time. The court of *C. P.* held, that he took an eſtate-tail; and one judge ſaid, he thought too great regard had been paid to the words, "heirs male of the body of ſuch iſſue." Roe v. Grew, 2 Wilſ. 322.

A deviſe was in the following words: "After the deceaſe of my ſaid "brother *E. S.*, and on failure of iſſue as aforeſaid, I give the ſaid ſeve-"ral eſtates and farms to my brother *G. S.*, and *the heirs of his body, the* "*males having preference as aforeſaid*, and ſucceeding according to *their* "*births*, and to *preſerve the contingent remainders from being barred during* "*the life of the ſaid* G. S., *I give the ſaid eſtates and farms to my ſaid friend* "*Dr.* R.; and on failure of iſſue of the ſaid *G. S.*, I give the ſaid eſtates "and farms to my ſaid niece *M. C.*" On the death of *E. S.* without iſſue, the queſtion was, whether *G. S.* took an *eſtate tail*, or an eſtate for *life* only, under the will? The court held, that the whole inheritance was not veſted in the truſtee in this caſe; that he took only a deſcendible freehold during the life of *G. S.*, for the word *eſtates* there meant only the thing and not the intereſt, it being coupled with the word *farms*: that by inſerting the limitation to the truſtee next after the limitation to *G. S.*, the caſe would be like *Coulſon* v. *Couſon*, with this difference, that it would not be quite ſo ſtrong; becauſe the eſtate was not given expreſsly to *G. S.* for life. They referred to Lord *King*'s opinion in *Papillon* v. *Voice*, that the limitation to truſtees did not control the eſtate-tail; and the court declared, that *G. S.* was entitled to an eſtate-tail. Sayer v. Maſterman, Ambl. 344. Fearne C. R. 250. C. R. 250. S. C.

A teſtator deviſed, after his wife's death, and failing iſſue of her body, a meſſuage, *&c.* in *A.* to *J. H.* for life, remainder to the iſſue male of *J. H.*, and to his and their heirs, ſhare and ſhare alike; and for want of ſuch iſſue, to the iſſue female of *J. H*, and her and their heirs; and for want of ſuch iſſue, to *W. B.*, his heirs and aſſigns for ever. He alſo gave other houſes at *R.* to his wife, remainder to *J. H.* for life; and from and immediately after the determination of that eſtate, to the *iſſue male* of the body of *J. H.* and to *their heirs*; and for want of ſuch iſſue, to *W R.*, his heirs and aſſigns for ever; with a proviſo, that the bequeſt and limitation of all the premiſes limited to *J. H.*, and ſuch *iſſue male and female*, was upon a ſpecial conſideration, that if *J. H. or his iſſue*, or any of them, ſhould alienate, mortgage, or incumber, or commit any act or deed to alter, change, charge, or defeat the bequeſts, they ſhould pay, *&c.*; and he did thereby charge the premiſes with the payment of 2000*l.* unto ſuch perſon or perſons, his or their heirs, as would, ſhould, or ought to take next by virtue of any of the bequeſts or limitations. *J. H.* having no ſon, but two daughters, who were heirs at law of the teſtator, he joined with his daughters, in ſuffering a recovery of the eſtate in *M.*: Upon, which, the plaintiff brought his bill for payment of the 2000*l.* But Lord Keeper *Henley*, after conſideration, gave his opinion, that *J. H.* took an eſtate-tail, and that the proviſo was repugnant to the eſtate. King v. Burchell, Ambl. 378, 2 Term Rep. 496 note. S. C.

C. V. deviſed to the defendant, and the iſſue of his body lawfully to be begotten, *living at his death*; and for want of ſuch iſſue, to the Univerſity Univerſity of Oxford v. Cliftons, Ambl. 384.

versity of *Oxford*, to be disposed of in such manner as by the will directed. Lord Keeper *Henley* held, that it was a clear estate-tail.

Hodgson v. Ambrose, Dougl. 337. judgment in B. R. affirmed in the House of Lords, Feb. 14, 1781.

A devise was to *A.* for life, remainder to trustees to preserve contingent remainders during *A.*'s life, and from and after his decease, then to the heirs of his body. It was adjudged that *A.* took an estate for life, with a vested remainder to himself in tail, the words "heirs of the body" being words of limitation.

Wharton v. Gresham, 2 Bl. Rep. 1083.

A testator devised all the rest and residue of his estate, both real and personal, to his nephew *A. W.* and his sons in tail male; and for want of such issue male, to his brother *J. W.* and to his sons in tail male; and in failure of such issue male, then to his (the testator's) right heirs. Neither *A W.* nor *J. W.* had any issue at the time of making the will, or at the death of the testator. Upon the death of *A. W.* without issue, the question was, what estate *J. W.* took in the premises under the will? And the court of *C. P.* held, that, upon the will and circumstances above stated, he took an estate in tail male.

Heny v. Purcel, 2 Bl. Rep. 1002.

A. devised all his lands, *&c.* to a trustee and his heirs, in trust, as to part, to suffer the testator's wife *Rebecca* to receive the rents and profits for her life; and as to the said part after his wife's decease, and the residue after his own decease, to other trustees for 100 years, to raise 200*l* thereout for the use of his daughter *Mary*, and subject thereto, in trust, to pay the rents and profits to his daughter *Rebecca*, the wife of *P. Barry*, for her separate use during her natural life; and after her decease, "to the use "and behoof of the heirs of the body of the said *Rebecca Barry* lawfully "issuing; the elder of such issue, and his, her, and their heirs to inherit "and take place before the younger of such issue, his, her and their heirs, with remainders over in default of such issue. Both the daughters survived the testator, and his wife, and on the death of the latter, *Rebecca Barry* entered on the residue, and afterwards died, leaving two daughters, the defendant *Mary Anne*, the wife of *Ignatius Purcel*, and the plaintiff *Jane*, the wife of *Francis Heny*, and no other issue. The question was, whether *Jane Heny* took any and what estate in any and what part of the premises? And the court of *C. P.* certified, that the defendant *Mary Anne Purcel* took in the first place an estate-tail in the whole of the premises, and that the plaintiff *Jane Heny* took an estate-tail in remainder, expectant on the determination of the precedent estate-tail, in the whole of the same premises, with remainders over in default of the heirs of her body.

Doe v. Lord Mulgrave, 5 Term Rep. 320.

Lord *Mulgrave* devised his estates real and personal, in these words, *viz.* "in trust to *T. &c.* for my first and every other son in tail male; "failure of such issue, to my brother *H.* and his first and every other son "in tail male; failure of such issue, to my brother *E.*, and his first and "every other son in tail male; failure of such issue, to my brother *J.* "and his first and every other son in tail male; failure of such issue, to "my daughter *C.*, and her first and every other son in tail male; and "failure of such issue, to her eldest daughter, and her first and every "other son in tail male; failure of such issue, to her daughters respectively in succession; failure of such issue, to the last surviving Lord "*Mulgrave:* in all the foregoing cases without impeachment of waste "other than wilful." Then, after making a provision for his daughter he proceeded, "My will is, that the money lodged at *Child*'s to pay "the purchase of the *Lyth* rectory, be applied to that purpose as soon

" Sir *J. S* can complete the title; and the renewals to be made by the " tenant for life."—" I name the executors in truſt of this my will Mrs. " *A. J.*. my brother *H. P.*, or whichever of my brothers may ſucceed " to the eſtate." It was adjudged, that *B.* took only a life eſtate, with remainder in tail to his iſſue.

A teſtator appointed his couſin *Solomon Fell* ſole executor of his will, and heir for life of all his eſtates (except, *&c.*), and after his death to his ſon *Thomas Fell*, and his heirs male for ever; but if ſaid *Thomas* ſhould die without iſſue, then to his next heir male for ever, the elder to be preferred before the younger; and if no iſſue male left behind ſaid *Solomon*, then the eſtate to devolve to the females; and if no females, then my ſaid couſin *Solomon* to give and diſpoſe of the ſame as he ſhall think fit. The teſtator died without iſſue, leaving *Solomon Fell* (the father of the defendant *Solomon Fell*, the deviſee named in the will) his couſin and heir at law, who afterwards died, leaving the defendant *Solomon Fell* his only ſon and heir at law. The defendant *Solomon Fell* had, at the time of the teſtator's death, and at the time the ſaid will and codicil were made, *Thomas* his eldeſt ſon, and the plaintiff his only daughter, and no other children living; but he had had another ſon named *Solomon*, who was dead when the will was made; but the teſtator, though he knew that the defendant had had ſuch a ſon *Solomon* born, did not then know that he was dead. *Thomas Fell*, the ſon of the defendant, died ſoon after the teſtator, and the plaintiff was the only ſurviving child of the defendant. A bill being filed by the plaintiff to reſtrain the defendant from cutting down timber and committing waſte on the eſtates deviſed, a caſe was ſent out of Chancery for the opinion of the judges of the court of *C. P.* as to what eſtate the defendant took in the premiſes under the will; and whether the plaintiff took any, and what eſtate in them. And the judges certified, that the defendant took an eſtate for life; and his ſon *Thomas* dying without iſſue, his daughter, the plaintiff, took an eſtate in tail general, and that a remainder in fee-ſimple was veſted in the defendant. Fell v. Fell, 3 Wilſ. 399.

A Teſtator, after giving different annuities to an only ſon, increaſing at different ages till 30, and to be paid him until he married, deviſed thus: " In caſe my ſon ſhall happen to marry before he attains the age of 30 " then I give and deviſe to him and the heirs of his body all my real and " perſonal eſtates, *&c.*; and if my ſon ſhall happen to die without leaving " iſſue of his body, then I give and deviſe the ſame to my brother *B.*" It was holden, that the ſon took an eſtate-tail in the real eſtates, and the perſonal eſtate abſolutely. Daintry v. Daintry, 6 Term Rep. 307.

(E) Of Terms for Years, and uncertain Intereſts by Deviſe.

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(*If a man deviſes*) See acc. Lancaſter v. Thornton, 2 Burr. 1027. Yates v. Compton, 2 P. Wms. 308.

(F) Of Deviſes for the Payment of Debts.

A Man ſeiſed of copyhold lands ſurrenders them to the uſe of his will, and then by his will ſays, *viz.* *My debts and legacies being firſt deducted,* Newman v. Johnſon, 1 Vern. 45.

ducted, I deviſe all my eſtate, both real and perſonal, to *J. S.* It was holden by the Lord Chancellor, that this ſhould amount to a deviſe to ſell for payment of his debts.

Bowdler v. Smith, Pr. Ch. 264.

One deviſed in theſe words: *As to my temporal eſtate, wherewith God hath bleſſed me, I give and diſpoſe thereof as follows:* Firſt, *I will that all my debts be juſtly paid, which I ſhall at my death owe or ſtand indebted in to any perſon or perſons whatſoever; alſo I deviſe all my eſtate in* G. *to* R. B. —This eſtate in *G.* was all the real eſtate the teſtator had. *Per* Lord Keeper, this will creates a charge on the real eſtate for payment of his debts.

Lumley v. May, *Id.* 36.

R. M. ſeiſed of freehold and copyhold land, ſurrenders to the uſe of his will, and then deviſes to his wife all his goods, chattels, and eſtate whatſoever, upon condition that ſhe paid his debts and legacies; and by the will bequeathed 600*l.* to the defendant his eldeſt ſon and heir, and 400*l.* to the plaintiff his daughter, and other legacies to other people, and the ſurplus of his eſtate, after his wife's death, to be equally divided between his four children, and made his wife executrix, and died, leaving the defendant, his ſon, an infant; and the wife died before probate. This bill was brought by the creditors and legatees to have the eſtate ſold to pay them; and the court was of opinion, that the words *goods, chattels, and eſtate whatſoever*, with all the other circumſtances of the caſe, and the perſonal eſtate falling ſhort, would paſs the teſtator's lands well enough, and decreed a ſale, and the heir to join when he came of age; but he being an infant, they gave him a day to ſhew cauſe, when he came of age.

Harris v. Ingledew, 3 P. Wms. 91.

So, where a will began, "As to all my worldly eſtate, *my debts being "firſt ſatisfied*, I deviſe the ſame as follows:" the real eſtate was holden to be charged, nothing being deviſed till the debts are paid.

Legh v. Earl of Warrington, 4 Br. P. C. 90, Hatton v. Nicholls, Ca. temp. Talb. 110. Lypet v. Carter, 1 Vez. 499.

So, where a will began, "As to my worldly eſtate, which it hath "pleaſed God to beſtow upon me, I give and diſpoſe thereof in manner "following; that is to ſay, *Imprimis*, I will that all my debts which I "ſhall owe at the time of my deceaſe be diſcharged and paid." Lord *King* decreed, that theſe words created a charge upon the real eſtate for ſuch debts as the perſonal eſtate was not ſufficient to pay; and this decree was affirmed in the Houſe of Lords.

Earl of Godolphin v. Penncok, 2 Vez. 271, ſimilar deciſions on almoſt the ſame words.

Thomas v. Britnell, 2 Vez. 313.

J. J. by his will, firſt, orders all his debts and funeral expences to be honourably paid after his deceaſe. In a ſubſequent clauſe he deviſes particular premiſes, (enumerating them,) excepting *H.* and *R.*; all which enumerated premiſes, except *H.* and *R.*, he deviſes to truſtees, by and out of the money ariſing by ſale, and out of the rents and profits thereof in the mean time, in the firſt place to pay and diſcharge his debts, funeral expences, and all legacies given by this will, or by other writing under his hand. He afterwards goes on and ſays, that *H.* and *R.* ſhall be in the firſt place for payment of the legacies mentioned in his will. On a bill by creditors to have the real eſtate by the will ſubjected to the payment of their debts, in aid of the perſonal, ſo far as that proved deficient, inſiſting, that the whole real eſtate was by the will eſtabliſhed as a fund for that purpoſe; Sir *J. Strange*, M. R. ſaid, that though on the firſt part of the will the court might take the whole real to be charged with debts, yet as there is no expreſs lien on the real by theſe general words, and afterwards

the teſtator diſtributes ſuch part of his real eſtate for debts, and ſuch for legacies, it is too much to lay hold on the general words to ſay, the whole ſhould be charged with payment of debts. It can be done only by implication on the general words, which may be explained afterwards, and that implication deſtroyed. Conſequently, the plaintiffs can only have a decree for an account of the perſonal eſtate in courſe of adminiſtration, and then the other parts of the real eſtate, except *H.* and *R.*, for payment of their debts.

But where there is a clear, full charge of the whole real eſtate in aid of the perſonal for the payment of debts and legacies, this ſhall not be reſtrained by a ſubſequent deviſe of a particular part of the real eſtate for that purpoſe, unleſs negative words are added. Elliſon v. Airey, 2 Vez. 568.

A will began thus: *As to my worldly eſtate, I diſpoſe of the ſame as follows, after my debts and legacies paid*; and then gives ſeveral legacies and portions to the teſtator's daughters; and then ſays, that "*after all my "legacies paid,*" the ſurplus of the perſonal eſtate ſhall go to the ſon. After which follows a deviſe of land to the ſon; but if he dies without iſſue in the life of any of the daughters, then to the daughters. There was a ſufficiency out of the perſonal eſtate to pay great part, though not all of the legacies. It was holden, that the land was not chargeable to ſupply the deficiency. Davis v. Gardiner, 2 P. Wms. 187.

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(*If lands are*) But where the introductory words were, "First, I will and direct that all my "legal debts, *legacies*, and funeral expences ſhall be fully paid;" it was holden, that they did not authoriſe the raiſing of pecuniary legacies out of the real eſtate to the loſs and diſappointment of ſpecifick deviſees. Keightley v. Keightley, 2 Vez. jun. 328.

But notwithſtanding theſe caſes, a court of equity will not decree a ſale of the lands, if no time for payment (*b*) be appointed; or if any other mode is preſcribed to ſatisfy the charge (*c*), as if the inſtrument contain a power of leaſing, or of mortgaging the premiſes; or if it diſtinctly appear, that the rents and profits were excluſively intended to ſatisfy the charge (*d*). And ſo much do courts of equity reſpect the intention, that Lord *Hardwicke* ſaid, (*e*) that "where a man creates a truſt for payment of debts, and "declares the truſt of the term to be by perception of rents and profits, "or by leaſing or mortgaging, to raiſe ſufficient money for payment of his "debts, it reſtrains it merely to a payment of rents and profits. But if "it had been a truſt of the rents and profits, the term might have been "ſold for the ſatisfaction of creditors."—"But where there are other "limiting words following rents and profits in a truſt for payment of debts, "his Lordſhip obſerved, he did not remember any caſe which would "authorize a ſale." And this opinion ſeems ſupported by Lord *Loughborough* in the following caſe (*f*): *T. B.* by his will directed all his debts to be paid out of his eſtate with all convenient ſpeed, and ordered his perſonal eſtate to be converted into money, and applied in aid of his real eſtate, in payment of funerals and debts, as far as the ſame would extend. In caſe he ſhould die without iſſue, he deviſed his eſtate of *B.* (ſubject to the charge) to truſtees in truſt to pay the yearly rents and profits as follows, *viz.* in diſcharge of his wife's jointure, and his ſiſter's annuity, and in payment of ſuch of his debts, and the intereſt thereof, as his perſonal eſtate ſhould fall ſhort of ſatisfying, and ſubject thereto, to pay his brother *H. B.* an annuity of 100*l. per annum*, to continue till after his debts affecting his lands ſhould be paid off by the rents and profits of his eſtate; and

(*b*) Ivy v. Gilbert, Pr. Ch. 583. 2 P. Wms. 13. S. C. Evelyn v. Evelyn, 2 P. Wms. 669. Okedin v. Okedin, 1 Atk. 550.

(*c*) Ivy v. Gilbert, *ubi ſupra.* Mills v. Banks, 3 P. Wms.

(*d*) Small v. Wing, 3 Br. P. C. 503.

(*e*) Ridout v. Earl of Plymouth, 2 Atk. 104.

(*f*) Lingard v. Earl of Derby, 1 Br. Ch. Rep. 311.

and immediately after the payment of his debts, then 200*l.* in lieu of the 100*l.*, and an additional annuity of 50*l.* to his ſiſter. And as to the reſidue of the rents and profits, he gave them to the firſt and other ſons of *H. B.*, with remainders over. On a bill filed by the ſpecialty creditors and annuitants againſt Lord *Derby* a mortgagee, and the other parties, praying an account of the perſonal eſtate, and that if it ſhould prove inſufficient to pay the debts, the deficiency might be made up by ſale of the real eſtate; the Maſter of the Rolls had ordered the money for the payment of debts to be raiſed by mortgage; but it appearing that a ſufficient ſum could not be raiſed by that means, the queſtion was, whether the court could, under the will, decree a ſale?—By Lord *Loughborough*: Where the deviſe is to pay the debts out of the *profits* of the eſtate, it is equivalent to a deviſe to the truſtees to ſell, and a decree for a ſale is only an execution of that truſt. But I am afraid you will find, that both by the words and conſtruction of the ſtatute of fraudulent deviſes, where there is a deviſe for the payment of debts, it takes the caſe out of the ſtatute, and it ſtands as it would have done before the ſtatute was made: the creditor can come only as the will directs. I take it to be the clear intent of the teſtator here, that not an acre ſhould be alienated for the payment of his debts; therefore, there cannot be a ſale.—But it is to be obſerved, that Lord *Thurlowe* was of opinion in a ſubſequent caſe, that in order to take a deviſe of real eſtate for the payment of debts out of the ſtatute againſt fraudulent deviſes, it muſt be effective; and therefore where a teſtator, after generally charging his real eſtate with his debts, had deviſed a particular eſtate to truſtees for that purpoſe, excepting the manſion-houſe, his Lordſhip ſaid, that if the maſter reported that the debts could not be paid by the means provided in the deviſe, he ſhould either here or in the Houſe of Lords (unleſs the Houſe over-ruled him) order the eſtate to be ſold, notwithſtanding the ſtatute; and conſider it ſo far as fraudulent: that in the preſent caſe, he ſhould order the deviſed eſtate to be ſold, without including the capital manſion-houſe, if, without it, the eſtate was ſufficient for the payment of the debts; if not, the manſion-houſe muſt be ſold.

Hughes v. Doulben, 2 Br. Ch. Rep. 614.

In what caſes a deviſe for payment of debts will make the eſtate either legal or equitable aſſets, ſee tit. *Executors and Adminiſtrators*, vol. iii. p. 59.

(G) Of Deviſes by Implication.

Tyte v. Willis, Ca. temp. Talb. 1.

SO, on the other hand, if an eſtate is deviſed to *A.* and his heirs, it ſhall not be controlled and cut down to an eſtate-tail in reſpect of the words, "and if he die without heirs, remainder to *B*," if *B.* is a ſtranger and cannot be heir to *A.*

Higham v. Barker, Cro. Eliz. 16. Moor, 124.

If an eſtate be deviſed to *A.* and the heirs male of his body, and if he die without iſſue of his body, remainder over; and *A.* die without iſſue male, having iſſue *female*; no eſtate will ariſe to ſuch iſſue *female* by implication.

Lady Laneſborough v. Fox, Ca. temp. Talb. 262. Bodens v. Watſon, Ambl. 478.

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(*Another rule*) Although the rule here laid down, that an eſtate expreſsly defined by the teſtator ſhall not be enlarged by implication, be generally true; yet if the manifeſt general intent

of the teſtator require it, courts of juſtice will, in order to effectuate ſuch general intent, diſregard the particular intent, however expreſsly declared, if inconſiſtent with the general intent. See the caſe of Doe v. Applyn, 4 Term Rep. 82. Robinſon v. Robinſon, 1 Burr. 44. and other caſes *ſupra* D. and ſee 2 Eq. Tr. 58. note (*b*) by Mr. Fonblanque.

(*B having iſſue*) That when expreſs and diſtinct eſtates are limited to two or more, and their ſeveral and reſpective iſſues, and for want of ſuch iſſue over, croſs remainders ſhall not be implied; the words *ſeveral* and *reſpective* ſevering the title; ſee Davenport v. Oldis, 1 Atk. 579. Williams v. Browne, 2 Str. 996. Pery v. White, Cowp. 777. Phipard v. Mansfield, *Id.* 800.—With reſpect to croſs remainders in a will, it may be obſerved, that the preſumption is in favour of them, where they are to be raiſed between *two*; but where between *more than two*, it is againſt them. But it being only a preſumption, it may, of courſe, be rebutted in either caſe by circumſtances of plain, manifeſt intention. The words "*in default of ſuch iſſue*," and a deviſe over of all the teſtator's eſtates, have been holden to raiſe croſs remainders. Phipard v. Mansfield, *ubi ſupra*. Comber v. Hill, 2 Str. 969. Atherton v. Pye, 4 Term Rep. 710. Wright v. Holford, Cowp. 31. S. C. by the name of Wright v. Englefield, Ambl. 468 and by the name of Wright v. Lord Cadogan, 6 Br. P. C. 156. Holmes v. Willett, 1 Freem 483. Marryatt v. Townly, 1 Vez. 102. The preſuming againſt croſs remainders between more than two, was for a technical reaſon, becauſe the law avoids the ſplitting of tenures. 1 Vez. 104-5 *per* Lord Hardwicke.

Where an expreſs eſtate-tail is given by the will, it will not be enlarged to a deviſe in fee by implication, from the land's being charged with the payment of annuities, or of a groſs ſum, not even if it be a charge in fee; for the charge in ſuch caſe ſhall iſſue out of the whole eſtate, and not out of the particular eſtate only; and being governed by the directions of the will, it ſhall take effect according to the limitations thereof, and affect the whole inheritance. Doe v. Fyldes, Cowp. 833. Denn v. Slater, 5 Term Rep. 335. Dutton v. Engram, Cro. Jac. 427.

(I) Of executory Deviſes of Lands of Inheritance: And herein of Contingent Remainders, and Croſs Remainders, as far as they relate to this place. Page 71

THIS is the definition commonly given of an executory deviſe. But it has been objected to as defective in point of accuracy and preciſion, inaſmuch as it is not confined to executory deviſes only, but embraces every kind of contingent intereſt in lands given by deviſe, and ſome contingent intereſts by deviſe are contingent remainders. An executory deviſe is, ſtrictly, ſuch a limitation of a future eſtate or intereſt in lands or chattels (though in the caſe of chattels perſonal, it is more properly an executory *bequeſt*) as the law admits, in the caſe of a will, though contrary to the rules of limitation in conveyances at common law. It is only an indulgence allowed to a man's laſt will and teſtament, where otherwiſe the words of the will would be void; for wherever a future intereſt is ſo limited by deviſe, as to fall within the rules which the law has preſcribed for the limitation of contingent remainders; ſuch an intereſt is not an executory deviſe, but a contingent remainder. Fearne's Executory Deviſes, 4th ed. 1, 2, &c.

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(*Yet in a will*) Doe v. Holmes, 3 Wilſ. 237. 241. 2 Bl. Rep. 777. S. P. Goodtitle v. Billington, Dougl. 753. Doe v. Morgan. 3 Term Rep. 763. S. P. Walter v. Drew, Com. Rep. 372. S. P. Wealthy v. Boſville, Ca. temp. Hardw. 258. S. P. Carwardine v. Carwardine, Fearne's Executory Deviſes, 4th edit. 5.

A teſtator deviſed lands to his wife for life, and after her death to ſuch child as ſhe was then ſuppoſed to be *enſient* with, and to the heirs of ſuch child Gulliver v. Wickett, 1 Wilſ. 105.

child for ever; provided that if ſuch child as ſhould happen to be born, ſhould die before the age of 21 years, leaving no iſſue of its body, the reverſion ſhould go over. The court held it to be a deviſe to the wife, remainder to the child in contingency in fee, with a deviſe over, which they held a good executory deviſe, as it was to commence within twenty-one years after a life in being; and that if the contingency of a child never happened, then the laſt remainder was to take effect upon the death of the wife: that the number of the contingencies were not material, if they were all to happen within a life in being, or a reaſonable time after.

1 Wilſ. 225. Doe v. Carleton. So, where a teſtator deviſed to his wife for 3 years, remainder to his ſon for 99 years, if he ſhould ſo long live, remainder to him for 99 years, if ſuch wife as he ſhould marry ſhould ſo long live, remainder to the *heirs* of his ſon's body, and the heirs of their bodies; the court held the deviſe to the *heirs* of the ſon's body good, as an executory deviſe, being to take place *in futuro*, within the compaſs of a life in being.

Harris v. Barnet, 4 Burr. 2157. Again, where a teſtator deviſed his lands to *C.*, for the term of 90 years from his (the teſtator's deceaſe) if he ſhould ſo long live, and after the determination of that term, he deviſed the lands to the *heirs of the body of the ſaid* C. remainder over; upon a queſtion referred to the judges of *K. B.* whether the heirs of the body of *C.* took any and what eſtate under the will, they certified their opinion, that the clear manifeſt intent of the teſtator was to give an eſtate-tail to ſuch perſon *as ſhould be heir of the body of* C. *at his death*, (the only determination of the 90 years term in the teſtator's view,) *to him and to the heirs of the body of the ſaid* C. with remainder over as in the will; which intent of the teſtator might by law take effect as an executory deviſe, for the contingency muſt happen within the compaſs of a life in being; and the freehold in the mean time being undiſpoſed of, deſcended to the heir at law.

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(*If A. deviſes*) It is inaccurate to call it a remainder, for the reaſon aſſigned for the judgment proves the limitation was allowed to operate as an executory deviſe. Fearne's E. D. 4th ed. 25

(*One deviſes*) Thruſtout v. Denny, 1 Wilſ. 270. S. P.

2 Vez. 243. Brownſword, v. Edwards. A deviſe was to two truſtees and their heirs to receive the rents until *A.* ſhould attain 21; and if *B.* ſhould attain 21 or have iſſue, then to *B.* and the heirs of his body, but if *B.* ſhould happen to die before 21 *and* without iſſue, remainder over; *B.* attained his age of 21, and afterwards died without iſſue: Lord *Hardwicke*, conſidering the word *and* as uſed for *or*, and the condition as diſjunctive inſtead of copulative, decreed that the remainder over ſhould take effect, upon the apparent intent of the teſtator, that it ſhould take place, either in default of *B.*'s attaining 21, or on his dying without iſſue.

Southby v. Stonehouſe, 2 Vez. 610. A *feme covert*, purſuant to a power, left her huſband the profits of certain eſtates for life, and after his death her eſtates to her children, if ſhe ſhould *leave any to ſurvive her*; but in caſe ſhe ſhould leave no ſuch child or children, nor the iſſue of ſuch child or children, after the deceaſe of her huſband, ſhe gave the eſtates to *J. K.* making him her ſole heir in *default of iſſue left by her*. Lord *Hardwicke* held, that the children took eſtates tail, and not in fee, and that the deviſe to *J. K.* was a *veſted remainder*, and not a limitation to take effect only on the event of the teſtatrix's dying without *leaving* any child or the iſſue of any *living* at her deceaſe. He ſaid the teſtatrix had only expreſſed the double contingency, which the

is in the caſe of every limitation in remainder after an eſtate-tail, *viz.* there being no iſſue at all, or all ſuch iſſue dying without iſſue.

But where a teſtator deviſed to *B.* his ſon and heir, and if he died before 21, *and* without iſſue of his body *then living*, the remainder over, *&c.* and *B.* ſurvived the 21 years; it was held, that he had a fee-ſimple immediately, and that the eſtate-tail was to ariſe upon a contingency which never happened, as he attained 21. So, where the teſtator deviſed land to his wife till his ſon came to his age of 21 years, and then that his ſon ſhould have the lands to him *and his heirs*, and if he died without iſſue *before* his ſaid age, then to his daughter and her heirs; it was held to be an executory deviſe to the daughter, if the contingency happened; and that in the mean time the fee deſcended to the ſon, and if he attained 21, though he afterwards died without iſſue, or if he ſhould leave iſſue, though he died before 21, yet the daughter was not to have the lands; becauſe he was to die without iſſue, *and* before 21, to entitle her.

Collinſon v. Wright, 1 Sid. 148. 1 Eq. Abr. 188. pl. 8. And *vide* Barker v. Suretees, 2 Stra. 1175.

Where *A.* deviſed his lands to truſtees for 500 years upon truſts, and after the determination of that term to the firſt ſon, *&c.* of *B.* (who had no ſon born at the teſtator's death), this executory deviſe to the unborn ſon of *B.* was held good; becauſe it was clear the freehold muſt veſt, either on the birth of ſuch ſon, or on *B.*'s death without having had any ſon.

2 P. Wms. 28. Gore v. Gore.

So, where one deviſed all his lands after the death of his executor, to *A.* his executor's ſon, and his heirs for ever, but if *A.* died *leaving* no ſon, then to that ſon of his executor, to whom he ſhould think fit to give them by his will; and for want of a ſon of his executor, then to *B.*; it was held a good executory deviſe to *B.* as confined to the period of a life in being.

Prec. Chan. 67. Fairfax v. Heron.

Where lands were limited by marriage ſettlement to the uſe of *A.* and his wife, for their lives, remainder to truſtees and their heirs during the lives of *A.* and his wife, to preſerve contingent remainders; remainder to the firſt and other ſons of the marriage ſucceſſively in tail-male, remainder to the right heirs of *A.*; with a proviſo, that if the heirs of the wife ſhould within twelve months after the death of the ſurvivor of the huſband and wife, pay 4000*l.* to the heirs or aſſigns of the huſband, that then the fee ſhould remain to the uſe of the heirs of the wife: the Houſe of Lords held the executory limitation of the uſe to the heirs of the wife to be good.

Loyd v. Carew. Chanc. Prec. 72. Show. Parl. Caſ. 137.

So, where a teſtator deviſed to his wife for life, remainder to *C.* his ſecond ſon in fee, provided if *D.* his third ſon ſhould, within three months after his wife's death, pay 500*l.* to *C.* his executors, *&c.* then he deviſed the ſame lands to *D.* and his heirs; it was adjudged a good executory deviſe to *D.*

10 Mod. 419. Marks v. Marks. Strange, 129.

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(*If a man having*) S. C. cited and relied upon by the judges in Ca. temp. Talb. 232.

So, where the teſtator deviſed lands to his grandſon *W.* and his heirs, and if *W.* ſhould die under age, then to his grandſon *T.* and if *T.* ſhould die under age, then to ſuch other ſon of the body of his daughter *M. S.* by his ſon-in-law *T. S.* as ſhould happen to attain his age of 21 years, remainder to *T.*; and the teſtator died leaving two grandſons *W.* and *T.* who both died under age; afterwards another ſon *A.* of the body of *M. S.* by *T. S.* was born; it was decreed a good executory deviſe to this after-born ſon *A.* if he ſhould attain his age of 21 years.

Caſ. temp. Talb. 229. Stephens v. Stephens.

Where *A.* deviſed to *B.* his ſon all his eſtate until *C.* ſhould attain his age of 21 years, and no longer; and afterwards ſaid, *Item*, I give and bequeath unto *C.* all my meſſuages in *H.* and *T.* for ever, that is, if he have a

Heath v. Heath, 1 Br. Ch. Rep. 147.

ſon or ſons (who ſhall attain 21); but if my kinſman *C.* ſhall chance to die without ſon or ſons to inherit, my will is, that the ſon of my ſon *B.* ſhall inherit; *C.* took an eſtate in fee at 22 years of age, ſubject to be defeated by an executory deviſe over, which was not confined to veſt on the death of *C.* if he left iſſue, but awaited the event of that iſſue dying under 21, which could not be decided until a period of 21 years after a life in being.

Madox v. Staines, 2 P. Wms. 421.

It is the ſame in regard to perſonal eſtate. For where the teſtator bequeathed the reſidue of his perſonal eſtate to his niece *A.* for life, and after her death the intereſt to be applied for the maintenance of ſuch children as ſhe ſhould have, until the ſons had attained 21, and the daughters 18 years of age, and at ſuch their ages, to be paid their portions, and *for want of ſuch iſſue*, then to the children of *S.*; the niece died without iſſue, and it was contended that the bequeſt over to the children of *S.* was too remote; for if the words *for want of ſuch iſſue* ſhould ſignify for want of ſuch children of *A.* as ſhould attain the ſaid ages, yet it would exceed the rule which had confined theſe ſort of bequeſts (eſpecially of mere perſonal eſtates) to lives in being: but Lord Chancellor *King* held it to be a good executory deviſe, and cited the caſe of *Maſſenburgh* v. *Aſh*, where the like executory deviſe of a term for years was held good.

Maſſenburgh v. Aſh, 1 Vern. 234. 257. 304.

Ca. temp. Talb 245 Sabbarton v. Sabbarton.

So, where the money in the orphan's fund and bank ſtock was limited by the teſtator in truſt for ſuch of his brother's children then unborn ſhould attain their ages of 21; it was adjudged a good executory deviſe.

Beachcroft v. Broome, 4 Term Rep. 440.

An eſtate by way of executory deviſe may be ſo limited, as that its taking effect or not may depend upon the act of the owner of the fee, which precedes it. Thus, *W.* by will deviſed his eſtates in *B.* except &c. to his ſon *F.* and his heirs, &c. and the reſt of his eſtates to his ſon *C.* and his heirs, &c.; and if either *F* or *C.* ſhould die without having ſettled or otherwiſe diſpoſed the eſtates ſo deviſed, or without leaving iſſue of his or their reſpective body or bodies lawfully begotten, or having ſuch iſſue, ſuch iſſue ſhould die before his or their age or ages of 21, and without leaving lawful iſſue, he willed that the premiſes ſo given to ſuch of his ſons *F.* and *C.* dying, ſhould go, and he gave the ſame unto the ſurvivor of them, his heirs, &c. for ever; and if the ſurvivor ſhould die without having ſettled or otherwiſe diſpoſed thereof, or of the eſtates thereby originally deviſed to him, &c. and his ſon *W.* ſhould then be dead without iſſue, then he gave all of the ſaid deviſed premiſes as ſhould not have been ſettled or diſpoſed of aforeſaid, unto the right heirs of *G.* then deceaſed, in fee. *F.* died without iſſue, *C.* by leaſe, releaſe, and recovery, conveyed part of the eſtates limited as above mentioned to *I. S.* in fee, and then died; after which *C.* died without iſſue. And the queſtion was, whether under the deviſe to *C.* and the conveyance by him, *I. S.* took an abſolute and indefeazable eſtate of inheritance in fee-ſimple? And it was held, firſt, that, on failure of the firſt limitation, the ſecond might have taken effect, as an executory deviſe. Secondly, that the teſtator had in expreſs terms given one eſtate to one ſon and his heirs, and another to another ſon and his heirs, and if either of them died, without having ſettled or diſpoſed of his eſtates and without iſſue, then that it ſhould go over; that this was a lawful intent, and that *C.* having ſettled and diſpoſed of the eſtate given to him, thereby defeated the limitation over.

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(*C. ſeiſed in fee*) In the caſe of a future limitation to the unborn children of the teſtator's grandſon, Lord Talbot thought its being limited *per verba de præſenti* no objection to its taking effect as an executory deviſe. Chapman v. Blillett, Ca. temp. Talb. 150.

Tenant for life, remainder to his wife for life, remainder to his own right heirs, deviſed in manner following: "*Item*, My lands at *W*. my wife is to "enjoy for her life; after her deceaſe, of right it goeth to my daughter *E*. "for ever, provided ſhe hath heirs; if my ſaid daughter *E*. ſhould die be- "fore her mother, *or* without heirs, and my ſaid wife ſhould marry again "and have an heir-male, I bequeath him all my right to that eſtate; not "thinking I can ſufficiently reward her love: if my ſaid wife marrieth "again and fails of heir-male, after her deceaſe and my daughter's, ſhe "failing of heirs, I bequeath 50*l. per annum* of that eſtate to my brother "*J*. and his heirs for ever." The teſtator died, the wife married again, and had iſſue-male, afterwards the daughter died without iſſue. Upon a queſtion whether the heir at law of deviſor, or the heir-male of the wife was entitled to the eſtate? the court held the former part of the will to be no deviſe, but only a declaration how the eſtates were ſettled; and therefore there being no particular eſtate to ſupport the limitation to the heirs-male of the wife, it could not enure as a contingent remainder; if it were an executory deviſe, it muſt either be to take effect on the daughter's dying before her mother, *and* without heirs (by taking the word *or* for *and*, and ſo conſtruing it copulatively), in which caſe the condition had not happened, becauſe the daughter ſurvived the mother; or elſe it was to take effect in either of the events of the daughter's dying before the mother, *or* her dying without heirs: now one of theſe events had failed, becauſe the daughter ſurvived the mother, and the limitation upon the other, *viz*. of the daughter's dying without heirs, was too remote.

Wright v. Hammond. 1 Str. 427. 2 Eq. Abr. 338. pl. 11. Vin. vol. 8. p. 110. pl. 32.

A. upon the marriage of her niece *B*. covenanted to ſettle lands (at or after ſuch time as *C*. the huſband of her niece ſhould ſettle his eſtate to the ſame uſes) to the uſe of herſelf for life, remainder to truſtees for 200 years, remainder to *C*. for life, remainder to truſtees to preſerve contingent uſes, remainder to *B* for life, remainder to the firſt and other ſons of *C*. upon the body of *B*. in tail ſucceſſively, remainder to the firſt and other daughters of *C*. upon the body of *B*. in tail ſucceſſively, remainder to the right heirs of *A*. Afterwards, and before any ſettlement was made, *A*. by her will reciting the articles, and that ſhe had agreed to ſettle the lands in manner aforeſaid, deviſed the ſaid lands, *&c*. and the *abſolute inheritance* thereof, to the uſe and behoof of *the heirs of the body* of the ſaid *B*. by any other huſband to be begotten, and for *want of ſuch iſſue*, to the uſe of her nephew *L*., and the heirs of his body, with ſeveral remainders over; remainder to her own right heirs. *A* died ſeiſed; *C*. and *B*. his wife entered and ſuffered a common recovery, in which they were vouched; the uſes of the recovery were to *C*. for life, remainder to *B*. for life, remainder to truſtees to ſupport contingent remainders, remainder to the firſt and other ſons of *C*. and *B*. ſucceſſively in tail-male, remainder to the daughters in like manner, remainder to the uſes to be jointly appointed by *C*. and his wife, remainder to the right heirs of *B*. *B*. died without iſſue, afterwards *C*. died; and the queſtion was betwixt the heir at law of *B*. and the daughter of *L*.

2 Burr. 873. Goodman v. Goodright.

The points upon which this queſtion depended were; 1*ſt*, Whether the will was to be taken as an execution of the articles? 2*dly*, If not, whether the eſtate to the *heirs of the body of* B. by another huſband ſhould be tacked to the eſtate given her by the articles? 3*dly*, Whether the deviſe to the *heirs of the body of* B. *by* any other huſband was not abſolutely void, being a deviſe in *verbis de præſenti* to a perſon not *in eſſe*; and if ſo, whether *L*. did not take immediately, as much as if there had been no preceding deviſe; or at leaſt, whether the preceding deviſe to the heirs of the body of *B*.

by any other husband, ought not to be laid out of the case, having become void in the event, since the event of her having issue by any other husband never happened?

(a) It appears from a note in Dougl Rep. 507 extracted from a copy of Lord Kenyon's note of this case, that this decision in the case of Goodman v. Goodright, went upon the alternative, either of the niece having taken an estate-tail by implication, or of the first devise (to the heirs of the body of the niece by any other husband) being too remote, and, of course, the second. The court thought it unnecessary to determine, whether the niece took an estate by implication; and according to Lord Kenyon's note, Lord Mansfield in giving judgment said, "the whole of the case comes to this; whether the testatrix intended by the devise *to give the heirs of the body of the niece* A. L. *by a second husband*, the remainder, or reversion, or estate, (whatever it is called), after the deaths of herself *E. W.* and *A. L.*, and failure of issue between them, or whether she meant to give an estate in possession to the issue of *A. L.* by a second husband;" his Lordship, therefore (being clear that it was not an immediate devise,) put the case *entirely* on the remoteness of the first devise.

After this case had been very fully argued, the court resolved, that if the will should be taken as an execution of the articles, and as an actual devise of the particular estates, according to the limitation contained in the articles, then the subsequent limitation to the heirs of the body of *B.* by a second husband, would vest in her as an estate-tail (in remainder), and, consequently, the recovery by her and her husband had barred the subsequent limitation to *L.* But that it was unnecessary to enter into the question, whether the articles and the will could be *tacked together?* because if a devise of the particular estates expressed in the articles could not be implied by construction, *supposing the devise to the heirs of the body of* B. *by a second husband to be void*, the limitation to *L.* and the heirs of his body could not be a contingent remainder (for want of a preceding estate). And it was too remote as an executory devise; being not to take place after an indefinite failure of issue of the body of *B.*; and being too remote in its creation, the event could not vary the construction: so that the death of *B.* without issue could make no difference in the case. Therefore either way, *L.* could have no title, unless it were considered as *a present immediate devise* to him. But the court held that neither the words nor the nature of the provision would admit of that construction; and that it could not be imagined that *A.* intended to exclude the issue of her favourite niece *B.*, in order to prefer *L.* and his issue (*a*).

We have seen above that an executory devise is, properly, a future devise to take effect at a period subsequent to the decease of the testator; but if the devise take effect upon a contingent event, to be decided at or before death, it is then a *conditional devise.*

French v. Cadell, 1 6 Br. P. C. 58.

A. seised of divers estates in several counties of *G.*, *R.*, and *S*, in Ireland, by virtue of a settlement made by his mother, to the use of himself for life, with remainder in strict settlement, with a remainder in fee-simple vested in himself as right heir of his mother, made his will, in manner following, reciting that he had, by his marriage settlement, settled a jointure of 400*l.* a-year upon his wife, and being desirous to make a better provision for her, he thereby devised to her all the fortune he was entitled to in her right, provided she should be content and satisfied therewith, and with 200*l.* a-year out of his real estate, during her life; "*and upon default of*" "*of issue male and female of his own body,*" he devised all his estate in the counties of *G.*, *R.*, and *S.* to trustees, in trust, in the first place *to pay all his just debts and legacies*, and after payment thereof, and securing the provision made for his life, he limited his estates in the counties of *G.* and *S.* to the use of his brother *K.* for life, remainder to his first and other sons in strict settlement, with divers remainders over: and as to his estates in the county of *R.*, *upon default of issue of his body, and after*

ment *of his debts and legacies*, he deviſed the ſame to his nephew *C.* for life, remainder to his firſt and other ſons in ſtrict ſettlement, with divers remainders over. And he thereby bequeathed *annuities* to his *ſiſters*, and ſome *ſmall legacies* to his *nieces* and other *nephews*, and deviſed his real eſtate, *in default of iſſue*, to his daughters ſucceſſively, and the heirs of their bodies; and if there ſhould be any younger daughter or daughters, who ſhould live to marry, to have ſuch portions on the eſtate as the truſtees and their heirs ſhould appoint. And by a codicil, after making ſome alterations with regard to the life annuities, and legacies bequeathed by his will, he revoked the bequeſt of the money and ſecurities that he had, or was entitled to, as his wife's portion, and bequeathed the ſame to the appellants and their heirs, to be laid out in lands, in truſt, for his grand nephew *K.*, with ſuch remainders as were limited of his eſtates in the counties of *G.* and *S.* The caſe aroſe on an appeal from a decree in favour of the deviſees, by the Lord Chancellor of *Ireland*, and the queſtion, material to the preſent ſubject in conſideration was, as to the validity of the deviſe of the lands in the counties of *G.*, *R.*, and *S.* It was contended on one ſide, that the deviſe of them was void, for want of a particular eſtate to ſupport it as a remainder, and too remote, after a general failure of iſſue, to take place as a future or executory deviſe. On the other ſide it was argued, that the deviſe to the remainder-men, under the will of *F.*, was, at his death, a deviſe in *poſſeſſion*, and not an executory deviſe. No eſtate was limited to the iſſue by the will; but it was plain he meant a failure of iſſue, *living at the time of his death*. The contingency was determined the inſtant the will took place, *viz.* at his death. The firſt truſt was to pay debts, legacies, and annuities to his ſiſters for their lives; and he could not have intended that thoſe truſts ſhould take place one hundred or two hundred years after his death. The legacy given by the codicil to *J. C.*, of which the firſt payment was to be made on the 1ſt of *May* or *November*, which ſhould firſt happen *after his death*, ſhewed what he meant by dying without iſſue, *viz.* if he ſhould have no iſſue, *when his will ſhould take effect*. And the codicil was expreſſed to be an addition to the will, and directed, that the will ſhould ſtand in all points not thereby altered; and therefore the legacies were, by the will and codicil, payable only on the event of his dying without *leaving* iſſue at his death. And by this conſtruction, none of thoſe dangers could ariſe, which prevent the effect of executory deviſes; nor was any rule of law broken. And the appeal was diſmiſſed, and the decree therein complained of confirmed.

So, in the caſe of *Wellington* v. *Wellington*, which aroſe on a deviſe to the following effect, *viz.* "*Item*, *in* DEFAULT *of iſſue of my own body*, I give, deviſe, and bequeath," *&c.* and ſo gives all his eſtates in ſeveral counties unto truſtees and their heirs, in truſt, to pay out of the rents, iſſues, and profits unto the teſtator's ſiſter an annuity during ſuch time, and until all his juſt debts, funeral expences, and legacies (other than annuities) ſhould be fully paid and ſatisfied, and alſo other annuities and ſeveral legacies. Then the teſtator willed that, immediately from and after ſuch time as all his juſt debts, funeral expences, and the legacies given by his will (other than annuities) ſhould be fully paid and ſatisfied, by his ſaid truſtees, from and out of the rents and profits of his ſaid eſtates; and ſubject to the annuities before given, he gave and deviſed all his eſtates, as to which the will is mentioned. A queſtion was ſent out of the court of Chancery, for the opinion of the court of King's Bench: whether the truſtees by the will took *any*, and *what* eſtate under the ſaid will? It was argued, 4 Burr. 2165.

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on the part of the plaintiff that they took a *baſe* fee determinable upon the payment of debts, legacies, and annuities; that the default of iſſue of his body was only a condition precedent. The teſtator was a batchelor; his will was to take no effect, if he married and had children. That this deviſe being conditional, the court would ſupport the intention of the teſtator. That the expreſſion "in default of iſſue of my own body," differed from ſaying "on failure of iſſue of my own body"; the latter expreſſion ſuppoſed that iſſue would exiſt; the former did not. That it was conſiſtent with the event of ſuch iſſue never exiſting, as well as of their dying in his lifetime. That was not too remote for an executory deviſe. It was to take no effect, if the teſtator ſhould have children at his death. He had only expreſſed what the law would have implied. *E contra*, it was contended on behalf of the defendants, that the words, "in default "of iſſue of my own body," meant an indefinite failure of iſſue, and was therefore too remote in point of law. That though the teſtator was a batchelor, and might think it probable that he ſhould remain ſo, and therefore, in that event, might mean his deviſee over to take, yet, the ſame intention for them to take was as probable, in caſe a different event had happened, namely, that of his marrying and having iſſue, and that iſſue afterwards failing; both diſpoſitions were equally reaſonable and proper and might (for aught that he knew to the contrary) be equally legal. That the teſtator did not mean to give his truſtees a baſe fee. He only meant to give them an eſtate "*on failure of his own iſſue*", whenever they ſhould become extinct. Then, and not till then, his deviſees over were to take. But that was a period too remote for ſupporting it as an executory deviſe. That there was no foundation to ſupport this deviſe, as an immediate deviſe. *Sed per* Lord *Mansfield*, when a deviſe muſt take effect at the death of the teſtator, it is not properly an executory deviſe. Such a deviſe is a deviſe upon a contingent event, which muſt happen at or before the death of the teſtator; an executory deviſe is a deviſe that is to take place *in futuro*. And the court certified that they were of opinion that the truſtees took a *fee*, determinable when the purpoſe of paying the teſtator's debts, legacies, and funeral expences, out of the rents, iſſues and profits of the deviſed premiſes, in aid of the perſonal eſtate, ſhould be performed.

(K) Of Executory Deviſes of Leaſes for Years. And herein of the Limitation of the Truſt of a Term as far as it relates to, and agrees with the Deviſe thereof.

2 Freem. 210. Burford v. Lee.

SO, where a leſſee for 1000 years without impeachment of waſte deviſed to *L.*, and if he ſhould die without iſſue, then to *B.*; the court held, that the remainder was void, and that the whole veſted in *L.*, his executors and adminiſtrators. And where a perſonal eſtate was

2 Freem. 287. Anon.

deviſed to *A.*, and in caſe ſhe ſhould die without iſſue, then to *B.* it was reſolved that the deviſe over to *B.* was void, and the whole decreed to *A.*

Fitzgib. 68. Green v. Rod.

Again, where *A.* poſſeſſed of a perſonal eſtate, appointed by will that it ſhould be ſold, and the money ariſing from the ſale be to the uſe of

ſiſter *M.*, and if ſhe ſhould die without iſſue, it ſhould go equally between his other ſiſters; and in a ſubſequent clauſe it was ſaid, *then after the death of* his ſiſter *M.* in *manner aforeſaid, &c.*; there, it was contended, that although the firſt limitation to *M.* contained nothing to reſtrain the generality of the meaning, *of dying without iſſue;* yet the words in the ſubſequent clauſe *then after the death* amounted to a reſtriction, which confined it to a dying without iſſue *living at the death of* M. But the court obſerved that the words in *manner aforeſaid*, prevented ſuch a conſtruction; becauſe they referred to the firſt limitation, and were tantamount to a repetition of it; which being a dying without iſſue generally, the limitation over was too remote, and therefore void.

And ſo in a caſe of later date, where the teſtator ſaid, *M. D. I make my ſole heir and executrix, and if ſhe die without iſſue*, then to go to *L. B.*; Lord *Hardwicke* held, that no authority came up to ſupporting the point, that *ex vi termini* ſuch a limitation of a perſonal eſtate ſhould be confined to a dying without iſſue *living* at the death of the firſt taker; and that as the limitation was general, and not reſtrained by any circumſtance in the will, the deviſe over was void. And his lordſhip was of the ſame opinion in a ſubſequent caſe, when he ſaid, "Where "there is a deviſe of a leaſe for years to a man, and if he die without iſſue, "remainder over; there is no doubt but the whole intereſt veſts in the "firſt taker." 2 Atk. 308. Beauclerk v. Dormer. 2 Atk. 376. Saltern v. Saltern.

One deviſed money to be laid out in a purchaſe of freehold eſtates to be ſettled on his wife for life; and alſo gave his wife freehold and leaſehold eſtates for her uſe; and from and immediately after her deceaſe, he bequeathed the ſame, and every part thereof in the following manner, *viz.* to his ſon *R.* and *his iſſue lawfully begotten*, or to be begotten, *to be divided among ſt them as he thinks fit:* and if my ſaid ſon ſhall happen to die, without iſſue lawfully begotten, my will is, that as well my preſent freehold and leaſehold eſtates, as the eſtates hereby directed to be purchaſed, ſhall be ſold, and the money ariſing therefrom ſhall be equally divided between my brother *T. R.*'s children, my ſiſter *W.*'s children, and my ſiſter *P.*'s children. And I hereby order and direct, neither the eſtate directed to be purchaſed, nor any of my preſent freehold or leaſehold eſtates may be ſold or diſpoſed of during the life of my wife or my ſon. One queſtion was, Whether the deviſe to the brother and ſiſter's children was or was not too remote, as depending upon the ſon's dying without iſſue? And it was held to be a contingency with a double aſpect; in one event a gift to the children of the ſon, if he ſhould have any; and if he ſhould not have any child, that then the eſtate ſhould be ſold for the purpoſes of the will. That he did not mean the eſtate to go as an eſtate-tail, but that the children ſhould take diſtributive'ly, in which caſe they muſt take as purchaſers, and the conſequence was that *R.* took only an eſtate for life. He had a power to divide, and it was ſufficient that the diviſion muſt take place at the death of *R*, which was within the rules. Two events were provided for, *1ſt*, There being children of *Richard*, in which caſe they would take. *2dly*, There being no children, in which caſe the eſtates veſted in the perſons deſcribed. Hockley v. Mawbey, 3 Br. Ch. Rep. 82.

A teſtator deviſed a term to his brother *John* for life, then to ſuch perſon as he ſhould marry, for her jointure; and after her death to the heirs of the body of his brother *John, and the executors, adminiſtrators, and aſſigns* of ſuch heirs, during the reſidue of the term; and for default of ſuch iſſue of his brother *John*, then to *Henry Donne;* the limitation to *Henry* was held good; the words being taken to be heirs living at his death. Donne v. Merrifield, at the Rolls, 22d October 1730, cited in Ca. temp. Talb.

Where

1 P. Wms. 534. Hughes v. Sayer. Chan. Prec. 528. Nicholls v. Skinner.

Where *C.*, having two nephews *A.* and *B.* deviſed the ſurplus of his perſonal eſtate to them, and if either of them ſhould die without children, then to the *ſurvivor:* It was held, that dying *without children* muſt in this caſe be taken to be dying without *children then living*; becauſe the immediate limitation over was to the *ſurviving* deviſee.—So, where *A.* deviſed portions to his four children, payable at their reſpective ages of 21 or marriage, and in caſe any of them ſhould die before the time of payment, or *without iſſue*, then his or their portion to go to the *ſurvivors or ſurvivor*, and his heirs: it was held, this could not be a dying without iſſue, generally, but ſo as the *ſurvivor* might take; which muſt be during the life of ſome or one of them, and ſo was good.

Pinbury v. Elkin, 1 P. Wms. 563. *Vide* Paine v. Stratton. 3 Br. P. C. 257. *et* Brooks v. Taylor, Moſel. 188.

And where the teſtator made his wife executrix, and gave her all his goods and chattels, provided that if ſhe ſhould die *without iſſue* by the teſtator, *then after* her deceaſe 80*l.* ſhould remain to the teſtator's brother; the words *then after* were taken to mean *immediately after*, and, conſequently, to reſtrain the dying without iſſue to the time of her death.

3 P. Wms. 258. Atkinſon v. Hutchinſon. *Vide* ſame point, 1 P. Wms. 663. Forth v. Chapman. Martin v. Long, Prec. Chan. 15. 2 Atk. 642. Read v. Snell. *Vide* Fairfax v. Heron, *ſupra* S. P. as to freehold.

So, where a term was deviſed to *A.* for life, remainder to ſuch children as the teſtator ſhould leave at the time of his death, and if all ſuch children ſhould die without *leaving* any iſſue, then to *B.*: this was a good executory deviſe to *B*, and the words "Without *leaving* any iſſue" were underſtood to mean "*leaving any iſſue* at the time of their deaths." Again, where one deviſed a perſonal eſtate, in truſt, to be ſettled on his daughter *or the heirs* of her body, but in caſe his ſaid daughter ſhould die *leaving* no heirs of her body, then over to others; Lord *Hardwicke* decreed the limitation over good, upon the contingency of the daughter's dying without iſſue *living* at her death; as he conſidered the word *living* as relating to that time. So in another caſe, where the teſtatrix gave to her two nieces *F.* and *L.* each one half of the produce of bank ſtock, and to *their iſſue*, and if either of them ſhould happen to die before the legacy became due to her, and leave no iſſue, the ſhare of her ſo dying ſhould go to the ſurvivor: the words *and leave no iſſue* were conſtrued "leave no iſſue *living* at the time of her death."

3 Atk. 356. Lampley v. Blower.

Goodtitle Pagden, 2 Term Rep. 720.

So, where one poſſeſſed of premiſes for a term for years "gave them to "his grandſon *P.* ſon of *D.* and his wife, and the heirs lawfully of him "for ever, but in caſe he ſhould happen to die and *leave* no lawful heir "then and in that caſe, he gave them after the death of his ſaid grandſon "*O.* to the next eldeſt ſon or heir of *D.* and his wife; and ſo on to the "next eldeſt ſon or heir, if the laſt ſhould die without heirs;" *P.* took poſſeſſion and died without iſſue, and on his death the next eldeſt ſon of *D.* and his wife brought an ejectment, and Lord *Kenyon*, without hearing the argument ſaid, that on conference with the reſt of the court, they were clearly of opinion, that the limitation over was good. This was a chattel intereſt limited to *P.* and the heirs lawful of him for ever, but in caſe he ſhould happen to die and leave no lawful heir, then over, *&c.* now it was apparent on the will, that the teſtator "by lawful heirs" meant "heirs of the body," and "leaving no lawful heir" muſt be confined to "leaving no iſſue at the "time of his death."

Longhead v. Phelps, 2 Bl. Rep. 704.

But the truſt of a term for raiſing portions on either of two contingencies, of which one is within the allowed limits, will be good *in that event*.

Thus, a term of 1000 years was created in a marriage ſettlement, upon truſt, "that *in caſe the ſettlor ſhould happen to die, without iſſue male of his body*

body, on the body of his intended wife begotten, or if all the iſſue male between them ſhould happen to die without iſſue, and there ſhould be iſſue female of the marriage, which ſhould arrive reſpectively at the age or ages of eighteen years, or be married; then, from and after the death of the ſurvivor of the ſettlor and his wife without iſſue male, *or* in caſe at the death of the ſurvivor, there ſhould be iſſue male, *then* from and after the death of ſuch iſſue male, without iſſue, the truſtees ſhould raiſe 500*l.* for one daughter, 1000*l.* for two, and in caſe of three or more, ſhould aſſign the whole term to their uſe. There was iſſue of the marriage one ſon and four daughters, who all lived to eighteen, and were married. The father died, then the ſon died without iſſue. Afterwards the mother died, and then the four daughters entered, againſt whom an ejectment was brought by a deviſee of the ſon. And in ſupport of the ejectment it was argued, that the truſts of the term were void: being on too remote a contingency, viz. the dying of the iſſue of the marriage without iſſue generally. But the court were clear, that the firſt part of the contingency was good, *viz.* "in caſe the ſettlor and his wife died without *leaving* iſſue male;" and as that happened in fact to be the caſe, the court would not enter into the conſideration, how far the other branch of the contingency might have been ſupported, which could only come in queſtion, in caſe the ſon had ſurvived both his parents.

W. C. left and bequeathed, unto his daughter and only child, all his worldly ſubſtance, lands, ſtock, corn, debts, and houſehold goods, provided ſhe married by the conſent of his executors *therein mentioned*: but in caſe ſhe married without the conſent of his executors, ſhe was to have only twenty cows and a horſe for her whole fortune: and after naming *A.* and *B.* his executors, he appointed, that in caſe his ſaid daughter ſhould die *without iſſue*, all his ſaid ſubſtance ſhould *return back to his executors*, to be diſtributed as he ſhould thereafter direct.—And laſtly, in caſe his daughter ſhould marry without conſent, or die *without iſſue*, he appointed that all his ſaid ſubſtance, *&c.* ſhould return back *to his executors* to be *by them* diſtributed in manner following, *viz.* to his nephew *J. D.* 50*l.* to *H. G.* 50*l.* to each of his *executors aforeſaid* 50*l.* to his daughter twenty cows and a horſe only, and the remainder to be equally divided amongſt the children of his ſiſter *E. F.* Keiley v. Fowler, 6 Br. P. C. 309.

The queſtion was, Whether the limitation over of the perſonal eſtate after the death of the teſtator's daughter *without iſſue* was good? The Court of Chancery in *Ireland* held it was: and their decree was confirmed by the Houſe of Lords here, upon the opinion of the judges, that the bequeſt over was to take effect on the death of the daughter without iſſue *then living*.

H. directed that his perſonal eſtate ſhould be ſold, and turned into money, and put out at intereſt; that his wife *Ann* ſhould have 30*l.* a year out of the produce of it, and that, when and ſo ſoon as his only daughter and child *Ann* ſhould attain her age of 21 years, then his wife ſhould have 25*l. per annum* inſtead of 30*l.* Then the will goes on, *Item*, I give and bequeath to my daughter *Ann*, all my perſonal eſtate whatſoever, ſhe paying the ſaid 30*l.* a year, and the legacies therein bequeathed, and I make my wife her guardian, and ſhe is to receive the reſidue of the intereſt maintaining my daughter thereout; but if my ſaid daughter die before her age of 21 years, then my will is that my wife ſhall have 400*l.* and that on payment of the ſame, ſhe ſhall give a diſcharge for her ſaid legacy, and that then and immediately from and after my ſaid daughter's deceaſe Balguy v. Hamilton Moſel. 1.

deceaſe "*without iſſue of her body*" I give and deviſe all my perſonal eſtate to my brother *J. H.*, *he paying* the ſaid ſum of 400*l.* to my wife, if then living. The teſtator died, and *Ann*, the daughter, died an infant without iſſue, and then the wife died. And the only queſtion was, Whether the deviſe over to the brother was good, or whether the whole perſonal eſtate veſted in the daughter? *Et per cur.* A deviſe of perſonalty, after a dying without iſſue, is *certainly* void; and it is as certainly good after a dying without iſſue in a limited time; now the words of this will can bear no other conſtruction, but if the daughter die without iſſue before 21. Firſt, the whole eſtate is deviſed to the daughter, and the whole intereſt to the wife, part as an annuity for herſelf, and part for the daughter's maintenance. The firſt contingency is general, if ſhe (the daughter) die before 21 years of age the wife is to have 400*l.*, but who is to pay this 400*l.*? The brother; ſo that the latter words muſt have the ſame conſtruction and the will is to this purpoſe, if my daughter die without iſſue before 21, my brother is to have the whole eſtate he paying my wife 400*l.* the wife is to have the 400*l.* if the daughter die under 21, and the brother being to pay it, if ſhe die without iſſue, the eſtate muſt come to him at the ſame time, as a fund out of which it is to be paid.

Lyde v. Lyde, 1 Term Rep. 593.

One poſſeſſed of premiſes for a term of years, gave them by will to his ſon *G. L.* for life, and after his deceaſe to *M.* his wife for life, and after the deceaſe of the ſurvivor, to the *children* of *G. L. ſhare and ſhare alike*; but if *G. L.* ſhould die "without iſſue of his body," then to his ſon *R. L.* for life, and after his deceaſe to *N.* his wife, with divers limitations over; *M.* died, and then *R. L.*, and the queſtion was, whether the limitation to *N.* was good? And the court held, that it was; for here was no ſuch expreſs legal limitation as, if applied to a freehold, would create an eſtate-tail; and therefore they were at liberty to conſider the intention of the teſtator, and that was obvious.

Attorney-General v. Bayley, 2 Br. Ch. Rep. 553.

One ſeiſed in fee of certain eſtates, and alſo of part of a tenement called *A.*, and poſſeſſed of other parts of the ſame tenement called *A.* for a long term of years, made his will, and after deviſing ſo much of the eſtate as was freehold to truſtees, their heirs and aſſigns, and ſo much whereof he was poſſeſſed for a term of years to his executors, *&c.* declared that *concerning thoſe parts called M.* and *B.* whereof he was poſſeſſed of a long term of years, his will was, that his brother *W. T.* ſhould have the thereof, *&c.* for ſo many years of the term as ſhould expire in his lifetime, and after his deceaſe, his will was, that his executors ſhould permit all and every the child and children of the ſaid *W. T.* their executors *&c.* reſpectively, to hold and enjoy the ſame for his and their proper uſe during the remainder of the ſaid term, *in ſuch manner as the ſaid W. ſhould, by his will or deed in writing, &c. direct, and for* want of ſuch appointment, then equally, ſhare and ſhare alike, without benefit of ſurvorſhip; but if it ſhould happen that the ſaid *W. T.* ſhould *die without iſſue*, in the lifetime of the ſaid *J. T.* and *T. T.* or either of them, then his will was, that the ſaid *J. T.* and *T. T.* if they both ſurvived the ſaid *W. T. dying without iſſue as aforeſaid*, ſhould equally have the benefit and advantage thereof for ſo many years of the term as ſhould expire in the lifetime of the ſaid *J. T.* and *T. T.*, and if only one of them ſhould happen to ſurvive the ſaid *W. T. dying without iſſue as aforeſaid*, or if both ſhould happen to ſurvive the ſaid *W. T.* ſo dying *without iſſue as aforeſaid*, and one of them ſhould happen to die before the other of them, leaving iſſue behind him, then the teſtator's will was, that ſuch ſurvivor ſhe

have but one half of the benefit and profits of the ſaid leaſehold premiſes, and the other half ſhould go to be divided among all and every the child and children of him ſo dying, ſhare and ſhare alike, during ſo many years of the term as ſhould expire in the lifetime of the ſaid *J. T.* and *T. T.*, and if he ſo dying ſhould leave no iſſue behind him, the teſtator's will was, that the benefit thereof ſhould devolve upon the ſurvivor, for ſo many years of the term as ſhould expire in the lifetime of the ſurvivor, and after the deceaſe of the ſurvivor of them the ſaid *J. T.* and *T. T.* (in caſe they or the ſurvivor of them ſhould ſurvive the ſaid *W. T. dying without iſſue as aforeſaid*), the teſtator's will was, that all and every the child and children of the ſaid *J. T.* and *T. T.* (though one of them might or ſhould happen to die before the ſaid *W. T. dying without iſſue as aforeſaid*) and the executors, adminiſtrators, and aſſigns of ſuch child and children ſhould have the ſaid leaſehold premiſes, ſhare and ſhare alike, for and during the remainder of the term, and " in default of ſuch iſſue," " *or if the ſaid* " *W. T. ſhould happen to ſurvive, and die without iſſue*," after the death of the ſaid *J. T.* and *T. T.*, then the teſtator's will was, that the ſaid leaſehold premiſes ſhould go to and be applied towards the benefit of *T.* new church and charity ſchool as aforeſaid. The teſtator died. *W. T.* died unmarried and without iſſue. *J. T.* and *T. T.* both died *in the lifetime* of *W. T.*, *T. T.* without iſſue, and *J. T.* leaving iſſue one daughter *M.* The queſtion was, Whether *W. T.* having ſurvived *J. T.* and *T. T.*, and died without iſſue, as in the laſt limitation mentioned, the premiſes, on his death, became ſubject to the charitable bequeſt, for the benefit of *T.* church and ſchool? The cauſe was firſt heard at the Rolls, when his Honour was of opinion, upon the conſtruction of the will, that the intereſt of the teſtator was not well diſpoſed of thereby in favour of the charity. From this decree the charity appealed.

Per Lord *Thurlowe* Chancellor, If a man gives an eſtate in general to *A.* for life, and adds, " but if he dies withous iſſue, I then give it to *B.* *B.* has no immediate gift, *but only a contingent intereſt upon A's dying without iſſue;* and it would counteract the intention of the teſtator, if *B.* took it immediately after upon the death of *A.*, therefore *ex neceſſitate rei*, the true argument in both *real and chattel intereſts*, is, that in fact theſe words operate to an enlargement of the eſtate *for life*, for otherwiſe the iſſue of *A.* would not take at all, and *B.* would take the whole; and therefore the neceſſary implication muſt take effect, namely, that *A.* ſhould have an eſtate, which muſt devolve upon his iſſue. Upon that ground, the court has extended the eſtate beyond an eſtate for life, and in a freehold intereſt has deemed it an eſtate-tail, and in chattel intereſts an abſolute property; but *that* ariſes from the *neceſſity of the conſtruction.*

In this caſe after an expreſs eſtate for life to *W. T.* (ſo that he may take as a purchaſer) the teſtator proceeds, *&c.* (ſtating the limitations in the will); here, no ſuch neceſſity ariſes from the words " dying without " iſſue," as the words are referable to dying without iſſue, *ſo provided* for. It is ſo well ſettled that no diſpute could ariſe. If the *T*'s had no intereſt, that they could take, it would go to the charity. In the events which have happened, this caſe reſults to the ordinary one I have ſtated, and the charity muſt have a decree. And the decree at the Rolls was reverſed.

One bequeathed all his perſonal eſtate to his wife *F.* to hold to her, *her heirs, executors, adminiſtrators, and aſſigns* for ever, and appointed her ſole executrix, *but in caſe of the death* of *F. without iſſue*, then he gave the whole

Bigge v. Benſley, 1 Br. Ch. Rep. 190.

whole to the *eldeſt* ſon of his brother *R.* his heirs, executors, adminiſtrators, and aſſigns, and if there ſhould be *no ſuch ſon*, then to his ſaid brother *R.* The wife ſurvived the teſtator, and died without iſſue. And the queſtion was, Whether the deviſe over was valid? It was contended in ſupport of the deviſe over, that the "dying without iſſue" was not general, but controlled by the event of having no ſon, in which caſe the deviſe was in favour of *R.* himſelf; that therefore if the teſtator meant a dying without iſſue, indefinitely, it could not affect the ſon of a perſon then living, much leſs that perſon himſelf. Therefore the event muſt be decided on the death of *F.*, when if he, *R.* had a ſon, it would veſt abſolutely in that ſon, if not, it would veſt in *R.* *Et per* Lord *Thurlowe*, The firſt queſtion is, what, *abſtracted from little points and circumſtances*, would be the effect of the gift to *F.*? There was not a ſingle caſe, not even that of *Atkinſon* and *Hutchinſon*, which did not hold *that ſuch a limitation after theſe general words was too remote.* His lordſhip ſhould only notice *Dormer* v. *Beauclerk*. The general words were to be varied only *by circumſtances ariſing upon fair demonſtration.* To call dying without leaving iſſue, the natural ſenſe of dying without iſſue, was againſt all the caſes. In this caſe there was no circumſtance which had occurred in the others. In *Dormer* and *Beauclerk*, it was held, that the word *then* could not, and never did make the difference. It was merely a word of relation, not an adverb of time. Upon Lord *Hardwicke*'s authority, he muſt hold the word *then* did not make a difference. As to the gift to the brother, *Dormer* and *Beauclerk* was a ſtronger caſe as to that point. It was argued there, upon the circumſtance of the 5000*l.* being meant as a portion; that being a maintenance, and given after a dying without iſſue, it muſt mean dying without leaving iſſue.

(L) Of void Deviſes: And herein,

1. Of deviſing what the Law already gives, or what the Policy of the Law will not admit.

Haynſworth v. Pretty, Cro. El. 833. 916. Moor, 644. S. C.

I. P. ſeiſed of lands in fee, and having iſſue *R.*, *S.*, *I.*, and *M.* ſons, and *N.* a daughter, deviſed to *S.*, *I.*, *M.*, and *N.*, 20*l.* to be paid to them when they attained the age of 21 years; and deviſed all his lands to *R.* his eldeſt ſon, to hold to him and his heirs, *upon condition he ſhould pay to his* (the teſtator's) *other children the ſaid ſums appointed unto them according to the intent of his will; and if he refuſed payment of any of the ſaid ſum or ſums of money, that then neither he nor his heirs ſhould have or enjoy the ſaid lands, any deviſe, title, deſcent, or intereſt to the contrary notwithſtanding; but that the ſaid ſons and daughter ſhould have it to them and their heirs.* It was holden, that the firſt deviſe to the ſon and his heirs in fee, being no more than what the law gave, was void.

Clarke v. Smith, Com. Rep. 72. 1 Salk. 241. S. C.

One, ſeiſed in fee, deviſed lands to his wife for life, and after her deceaſe to his next heir at law, and to his or her heirs, provided ſuch heir ſhould pay 100*l.* to ſuch perſon or perſons as his wife, by will or other legal writing ſhould appoint, and that his lands ſhould ſtand charged with the ſaid 100*l.* The deviſor died, leaving a daughter who had one ſon and died. The wife died without making any appointment to whom the 100*l.* ſhould be paid. The ſon of the daughter entered, and died without iſſue; and on a diſpute between the heir maternal of the ſon, and the heir paternal, the queſtion was, whether the ſon took by purchaſe under the will, or by deſcent? And it was reſolved by the whole court, that

the heir took by deſcent, and not by the will; for it would be miſchievous, if every little legacy ſhould alter the courſe of deſcent, and thereupon the heir might plead to the obligation of his anceſtor, *riens per deſcent*.

So, where a teſtator deviſes lands to his heir for payment of debts, or charged with an annuity, the heir, notwithſtanding ſuch charge, is in by deſcent, for the tenure is not altered. Allam v. Heber, 2 Str. 1270. 1 Bl. Rep. 22. S. C. Emerſon v. Inchbird, 1 Ld. Raym. 728.

The Duke of *Marlborough* deviſed his real eſtates to truſtees, in truſt, for ſeveral perſons for life, with remainder to their firſt and other ſons in tail-male ſucceſſively; but directed his truſtees upon the birth of a ſon of each tenant for life, to revoke the uſes before limited to the reſpective ſons in tail-male, and to limit the premiſes to ſuch ſon for his life, with immediate remainders to the reſpective ſons of ſuch ſon in tail-male. It was holden, that this clauſe of revocation and re-ſettlement, was void, as tending to a perpetuity, and repugnant to the eſtate itſelf. Spencer v. Duke of Marlborough, 5 Br. P. C. 592.

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(*A. deviſed*) 1 P. Wms. 332. S. C. Godolphin v. Godolphin, 1 Vez. 21. S. P.

A teſtator, after other deviſes, gave his eſtates to his nephew *William Brown*, eldeſt ſon of his brother *R.*, and his aſſigns for life, remainder to his firſt and other ſons in ſtrict ſettlement, and for want of ſuch iſſue, then to the ſecond ſon of his ſaid brother for life, and after the death of the ſaid ſecond ſon of his ſaid brother *R.*, then to the firſt ſon of the body of ſuch ſecond ſon of his brother, then lawfully begotten, or to be begotten, and to the heirs male of the body of ſuch ſecond ſon lawfully to be begotten, and for default of ſuch iſſue, to the third, fourth, and fifth, and every other ſon and ſons of the ſaid ſecond ſon of the ſaid *R.* (according to their ſeniority), and to the heirs-male of the bodies of the ſaid third, fourth, fifth, and other ſons of the ſaid ſecond ſon of the ſaid *R* lawfully to be begotten, the eldeſt, *&c.* to be preferred before the younger, *&c.* and for want of ſuch iſſue, then, *&c.* And the teſtator did declare, that the reaſon of his ſettling and limiting his eſtates as aforeſaid was, *becauſe he deſired to have the ſame continue in his name and blood*, ſo long as it ſhould pleaſe God to preſerve the ſame. The teſtator's brother had only *one* ſon *W.* born *in the teſtator's lifetime*, but he had a *ſecond* ſon *T.* born after the teſtator's death, and in the lifetime of *W.* *W.* died without iſſue, and then the ſecond ſon entered and ſuffered a recovery. And the queſtion was, Whether *T.* the ſecond ſon, who was not born till after the death of the teſtator, took an eſtate-tail, or only an eſtate for life? And it was contended by thoſe who argued againſt the recovery, that *T.* the ſecond ſon was only entitled to an eſtate for life, for that though there was an ambiguity in wording the deviſe, to take place immediately after the death of *R.*'s ſecond ſon, it evidently aroſe from a line being inadvertently left out by the perſon tranſcribing the will. The deviſe immediately after the death of *R.*'s ſecond ſon, was "to the *firſt ſon* of the body of ſuch ſecond ſon, and to the heirs male of the body of ſuch;" thus far the tranſcriber copied right, but here he plainly omitted the following words, "firſt ſon lawfully to be begotten, and for want of ſuch iſſue, then to the ſecond ſon of the body of ſuch ſecond ſon of my ſaid brother *R.* lawfully to be begotten, and to the heirs male of the body of ſuch;" if theſe words had been inſerted, the clauſe they ſaid had been quite clear, ſenſible, and methodical. Theſe words they contended ought to be ſupplied on the evident intention. On the other ſide it was contended that, as the deviſe Chapman v. Brown, 3 Burr. 1626.

ſtood

ſtood " to the *ſecond ſon* of *R.* for life; and after his deceaſe, to the firſt ſon of his body, and the heirs male of the body *of ſuch ſecond ſon*," it was unqueſtionably an eſtate-tail. But the court, conſiſting of Lord *Manſfield* and Mr. Juſtice *Wilmot*, the other judges being abſent, held, that *T.* the ſecond ſon took an eſtate-tail; that they could not inſert the limitations ſuppoſed to be left out, and as the will ſtood, there was no queſtion in the caſe. But they ſaid, if the omitted limitations could have been ſupplied by conſtruction, they thought the *unborn* ſon of an *unborn* ſon *could not have taken;* and that, *to effectuate the general intention of the teſtator*, the word " *ſon*" ſhould be conſtrued a word *of limitation*, and *an eſtate-tail* given to the ſecond ſon of *R.*

Nichol v. Nichol, 2 Bl. Rep. 1152.

A. deviſed all his real eſtates to truſtees to the uſe of the *ſecond ſon* of *B.* begotten or to be begotten during the life of ſuch ſecond ſon; and after the death of ſuch ſecond ſon, or in caſe he ſhould inherit his paternal eſtate by the death of his elder brother, then to *his ſecond ſon* lawfully to be begotten, and his heirs male; and for default of ſuch iſſue, to the third, fourth, and other ſon and ſons of the ſaid *B.* ſeverally and ſucceſſively, according to the priority of birth, and the heirs male of the body of ſuch third, fourth, and other ſons reſpectively: and in default of ſuch iſſue, to the ſame truſtees and their heirs, to the uſe of the eldeſt ſon of *C.* during his life, and the heirs male of his body, remainder to the ſecond ſon of *C.*, and the heirs male of ſuch ſecond ſon lawfully iſſuing, remainder to the uſe of the third, fourth, and other ſon and ſons of the ſaid *C.* ſeverally and ſucceſſively, *&c.* and to the heirs male of their reſpective bodies; and for default of ſuch iſſue, he deviſed all his freehold eſtates before mentioned to *D.* and his heirs for ever. He alſo gave and bequeathed all his cuſtomary land to the ſaid *D.*, and for default of ſuch iſſue, to the heirs male of the ſaid *D*, and for default of ſuch iſſue to the cuſtomary heirs of the teſtator: the court certified unanimouſly that the eſtate veſted in the ſecond ſon of *B.* (when any ſuch ſhould be) by way of executory deviſe, and would in the mean time deſcend to the heir at law of the teſtator, and alſo that in order to effectuate the general intent of the deviſor ſuch ſecond ſon would take an eſtate *to him and the heirs male of his body* determinable on the acceſſion of the paternal eſtate.

Pitt v. Jackſon, 2 Br. Ch. Rep 51.

Money was, previous to a marriage, covenanted to be laid out in the purchaſe of lands, to be ſettled to the uſe of *A.* for life, without impeachment of waſte, remainder to *B.* for life, in bar of dower, remainder to the uſe of the children of the marriage, *ſubject to ſuch powers, limitations and proviſions* as *A.* by deed or will ſhould appoint, and for want of ſuch appointment, then as *B.* ſhould appoint, and in default of ſuch appointment, to the uſe of their children, and in default of iſſue, to *A.* in fee. *A.* had ſeveral children by *B.*, but two daughters ſurvived them. *A.* by his will, in execution of the power in the ſettlement, directed part of the ſum of money to be laid out in the purchaſe of eſtates, to be conveyed in truſt for his daughter *M. during her life*, for her ſeparate uſe, remainder to truſtees to preſerve contingent remainders, remainder to all and every the *child* and *children* of his daughter as tenants in common, with remainders over. And one queſtion on this part of the caſe was, whether the gift to *M.* for life, with remainder to her children, was a good execution of the power? And it was acknowledged that it was not a good execution *as to the children*, but was ſo far void; and then the queſtion was, whether if the appointment was bad on account of the exceſs, the whole ſhould be conſidered as unappointed. *His Honor* ſtopped the argument of the

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point, by aſking, whether it ſhould not go by *cy pres?* and cited the caſe of *Chapman v. Brown*, ſtated *ſupra* as an authority. The doctrine of *cy pres*, it ſeems, is not applicable, where the ſubject of a power is *perſonal eſtate*. Routledge v. Dorrell, 2 Ves. jun. 357.

And that the limitation of a perſonal eſtate to one in tail veſts the whole in him is proved by many caſes. Stratton v. Payne, 3 Br. P. C. 257 Pelham v. Gregory, 5 Br. P. C. 435. Duke of Montague v. Lord Beaulieu, 6 Br. P. C. 255.

Where one deviſed that all his money in the government funds ſhould be laid out in the purchaſe of lands, and ſettled on his eldeſt ſon *A.* and *the heirs male* of his body, remainder to the ſecond ſon *C.* and the heirs male of his body; and bequeathed the reſt of his perſonal eſtate to *A.* and *the heirs male of his body*, remainder over in the ſame manner; Lord Chancellor held, that the perſonal eſtate, (*viz.* the reſidue after what was to be laid out in purchaſe of lands,) could not be entailed, but the whole veſted in the eldeſt ſon. 1 P. Wms. 290. Seale v. Seale, Pre. Chan. 421.

So, where long Exchequer annuities for 99 years were given by will to truſtees for the reſidue of the term, *in truſt* for *E.* for ſo many years of the ſaid term as ſhe ſhould live, afterwards to the plaintiffs for ſo many years of the ſaid term as they or the ſurvivor of them ſhould live, and after the deceaſe of the ſurvivor *in truſt* for the *heirs of their bodies* lawfully begotten, for all the reſidue of the ſaid term, and for default of ſuch iſſue, in truſt for the defendant; Lord Chancellor *King* held the remainder over to be void, and that the whole veſted in the plaintiffs to whom the limitation was for life, with remainder to the heirs of their bodies; and accordingly the annuities were decreed to be ſold, and the money to be paid to the plaintiffs. In this caſe the deviſe was only *in truſt*, and yet the rule was the ſame. Dod v. Dickinſon. Vin. vol. 8. p. 451. pl. 25.

So, where a teſtator by his will deviſed that 400*l.* ſhould be put out on good ſecurity for his ſon *T.* that he might have the *intereſt* of it for *his life, and for the lawful heirs of his body*, and if it ſhould ſo happen that he ſhould die without heirs, it ſhould go to his youngeſt ſon *J. B.* Lord *Hardwicke* decreed that the whole veſted in the firſt taker, and the limitation over was too remote. 1 Vez. 133. 154. Butterfield v. Butterfield.

Again, *R. T.* by will gave the *profits and half yearly dividends* of 4000*l.* capital bank ſtock to Sir *W. P.* during his life; together with the income and payments of ſix annuities payable at the Exchequer, to *receive the payments* during his life And gave his dwelling-houſe in *London* (being leaſehold) and the uſe of all the furniture and houſehold linen therein, to *M. C.* during her life: and gave to *L. A. P.* (daughter of Sir *W. P.*) his dwelling-houſe and eſtate at *O.* and the *uſe* of all the goods, furniture, and linen there, together with all the cattle and cart horſes, and the utenſils in huſbandry, as well as ſome other eſtates and leaſehold houſes, *during the term of her natural life*. And after the death of *M. C.* he gave to *L. A. P.* his dwelling-houſe in *London*, and the uſe of all the goods therein during her life. And after the death of Sir *W. P.*, he gave to *L. A. P.* the *dividends* on the 4000*l.* bank ſtock, and all the *payments* growing due on the ſaid Exchequer annuities *during her life*; and after her deceaſe he gave, bequeathed, and deviſed all the afore-mentioned land, houſes, bank ſtock, and Exchequer annuities, to the *heirs male of her body* lawfully begotten for ever; together with all the furniture in both his houſes: Daw v. Pitt (ſince Earl of Chatham) and Weſtern, heard at the Rolls July 1766.

houſes: and for *want of ſuch iſſue*, he gave and bequeathed all the ſaid reſpective eſtate, bank ſtock, and annuities unto *W. D.* for life, remainder to the heirs male of his body, remainder over.

Upon the death of *R. T.*, *L. A. P.* entered on the eſtates deviſed to her, ſuffered a recovery, and ſold the real eſtates: afterwards ſhe deviſed and bequeathed all her real and perſonal eſtate to the ſaid Sir *W. P.* (her father), his heirs, executors, and adminiſtrators. Her father ſurviving her by his will, after giving ſeveral legacies, gave and deviſed all his real eſtates and all the reſidue of his perſonal eſtate (which reſidue included the leaſehold eſtates, furniture, bank ſtock, and annuities deviſed as above to *L. A. P.*) unto the defendant *W. P.* his heirs, executors, adminiſtrators, and aſſigns. After the death of Sir *W. P.* the plaintiff *W. D.* claimed the leaſehold eſtate, bank ſtock, and Exchequer annuities, by virtue of the remainder limited to him in the will of *R. T.* But the Maſter of the Rolls held the limitation over to *W. D.* to be void, and that the whole veſted in *L. A. P.*, and therefore diſmiſſed the plaintiff's bill.

June 1770. *Vide* Earl Chatham v. Tothill, 6 Bro. Parl. Ca. 450. 1771.

But upon a re-hearing before the Lords Commiſſioners of the Great Seal they reverſed the order of diſmiſſion, and decreed, that the plaintiff ſhould have the benefit of the ſaid leaſehold eſtates, bank ſtock, and Exchequer annuities during his life. Afterwards, however, upon an Appeal to the Houſe of Lords, the Lords reverſed that decree, and thereby eſtabliſhed the deciſion of the Rolls.

Glover v. Strothoff, 2 Br. Ch Rep. 33.

Again, *A.* poſſeſſed of a conſiderable real and perſonal eſtate, (among other bequeſts) made one in the following words, "and further I hereby appoint my ſaid truſtees to lay out at intereſt, upon real and perſonal ſecurity, as they ſhall think proper, the ſum of 4000*l.* ſterling, part of my ſaid real and perſonal eſtate, and to make payment of the intereſt of the ſaid ſum of 4000*l.* only to *R. G.* the younger ſon of the ſaid *R. G.* during all the days of his natural life, and to make payment of the principal ſum itſelf to the heirs to be lawfully procreate of his body; but declaring that the above intereſt ſhall not be affectable by the debts or deeds of the ſaid *R. G.* (the ſon), and in the event of his death, without lawful iſſue of his body, or of his ſelling, aſſigning away, or otherwiſe diſpoſing of the above intereſt, or any part of it, my will is, that the ſaid ſum of 4000*l.* together with 1500*l.* ſterling further, making in all the ſum of 5500*l* ſterling, ſhall pertain and belong to *J. H. W.*" One queſtion was, Whether the remainder over of the 4000*l.*, and the legacy of 1500*l.* after the death of *R. G.* (the ſon) without iſſue of his body, were not too remote? It was argued in ſupport of the limitation, that it was good, from the manifeſt intention of the teſtatrix, that it ſhould take place upon the event of (the ſon) *R. G.* dying without leaving lawful iſſue. But on the other ſide it was contended, that the 4000*l.* was an eſtate-tail in money executed in *R. G.* the firſt taker, and the caſes of *Butterfield* v. *Butterfield*, 1 *Vez.* 133. and *Daw* v. *Pitt*, *ſupra*, were cited, and it was ſaid, that the caſe was too ſtrong to admit of circumſtances of the intent of the teſtatrix to contradict it. And *per* Lord *Thurlow*. With reſpect to the 4000*l.* perſonalty, the caſes of *Butterfield* v. *Butterfield* and *Daw* v. *Pitt* have confirmed the doctrine upon that ſubject, that it is too late now to argue upon the diſtinction of principal and intereſt, or to inſiſt upon circumſtances of the intent; the rule muſt take place with reſpect to the 1500*l.* *that* fell under the ſame objection. And his lordſhip decreed the remainder over too remote.

Again

Again, where *S.* by his will gave as follows, "*Item*, I give and bequeath to *T. M. S.* during the term of his natural life, the intereſt of 1000*l.* 3 *per cent.* conſol. bank annuities, to commence the day after my death, to be regularly paid from time to time, in ten days, or as ſoon as poſſible after the ſame becomes due: At his deceaſe it is to *devolve* to the *heir* of his body lawfully begotten, and in default of iſſue, I give and bequeath the ſame to the heirs of *A.* that ſhall be then living, in equal ſhares to be divided:" the Maſter of the Rolls held, that the legacy veſted abſolutely in *T. M. S.* Robinſon v. Fitzherbert, 2 Br. Ch. Rep. 127.

But where perſonalty is not ſo given, as that the words would create a clear tenancy in tail in land, the law is otherwiſe.

Therefore where one, being poſſeſſed of a conſiderable perſonal eſtate, made his will in *India*, of his own hand-writing, and gave ſeveral legacies, and *inter alia*, to *the heirs* of his brother *R. W.* 300*l.*, and gave the reſidue of his eſtate to his brother *I. W.*, and to his heirs male, *equally to be divided among them, ſhare and ſhare alike*; three queſtions aroſe, firſt, Whether *I. W.* ſhould take the whole, and the words *equally to be divided*, be rejected? Secondly, Whether *I. W.* and his ſons ſhould take as tenants in common? Thirdly, Whether the father ſhould take for life, and after his death the reſidue ſhould go to all his ſons equally? The Lords Commiſſioners *Smythe* and *Bathurſt*, were clear of opinion that, according to the true conſtruction, the father ſhould take the whole for life, and then it ſhould go to his ſons equally. Wilſon v. Vanſittart, Ambl. 362.

Again, *D.* being reſident in *Calcutta*, and poſſeſſed of *only* perſonal property, made her will, and after giving ſome legacies, gave all the reſt, reſidue, and remainder of her eſtate, both real and perſonal, unto *L.* to be placed at intereſt until her age of 21 years, or day of marriage, and then the whole thereof, together with the intereſt accumulating thereon, to be paid to and for her uſe, during her natural life, and from and immediately after her deceaſe, ſhe gave, deviſed, and bequeathed the ſame unto the heirs of her body lawfully begotten, *equally to be divided between them*, ſhare and ſhare alike; and in default of ſuch iſſue, or the death of the ſaid *L.* before her ſaid age of 21 years, or day of marriage, ſhe then gave, deviſed, and bequeathed the ſaid reſidue and remainder of her eſtate, unto her, the teſtatrix's brother. The queſtion was, Whether under this will *L* took an eſtate for life or an abſolute intereſt in the perſonal property? And it was decreed at the Rolls that *L.* took only an eſtate for life, in the property in queſtion. And that decree was affirmed on appeal to the Chancellor. Jacobs v. Amyatt, 4 Br. Ch. Rep. 542.

And it hath been reſolved, that if the firſt eſtate for life be a truſt eſtate, and the remainder to the heirs of the body a legal eſtate, the latter will take effect; becauſe if ſuch limitation had been applied to land, it would not have created an eſtate-tail. Knight v. Ellis, 2 Br. Ch. Rep. 570.

A teſtator being ſeiſed in fee, and poſſeſſed by leaſe of lands in *D.*, deviſed all his lands in *D.* whereof he was ſeiſed, poſſeſſed of, or any ways intereſted in, to *A.* for life, remainder to *B.* in tail, remainder to *C.* for life, with power to make a jointure, remainder to truſtees to preſerve contingent remainders, *&c.* It was reſolved, that the leaſehold paſſed with the freehold, and that, by reaſon of the words *poſſeſſed of or intereſted in*, which properly refer to a leaſehold eſtate, and diſtinguiſh this caſe from that of *Roſe* v. *Bartlett*, *ſupra*, where theſe words are not to be found. Addis v. Clement, 2 P. Wms. 456.

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(*If a man is ſeiſed*) But ſee the caſe of Doe v. Martin, 2 Bl. Rep 1148, where in compliance with the manifeſt intent of the teſtator, land was holden to paſs with a houſe under the word appurtenances. And in the caſe of Gulliver v. Poyntz, 3 Wilſ. 141. under a deviſe of *meſſuages, with all houſes, barnes, ſtables, ſtalls*, &c. *that ſtand upon, or belong to the ſaid meſſuages*, lands which were purchaſed with the meſſuages, and which, as well as the meſſuages, were in the teſtator's poſſeſſion at the time of making the will, were allowed to paſs.

Kingſman v. Kingſman, 2 Vern. 559.

A. having deviſed a farm to *J. S.* for life, and after other legacies, de- viſed all other his perſonal eſtate, lands, tenements, and hereditaments, no before deviſed, to the defendant; it was made a queſtion, Whether the re verſion of that farm paſſed by this general deviſe? *Per Cur.*—The rever ſion well paſſed.

Freeman v. Duke of Chandos, Cowp. 363.

One deviſed all his eſtate, *&c.* in the counties of *G.* and *W.* and elſe *where in the kingdom of* England, to truſtees, ſubject to certain charge thereon, and limitations in his marriage ſettlement, in truſt to ſtand ſeiſe of the ſaid eſtates in *G.* and *W.*, or *elſewhere*, to certain uſes. His eſtate in *G.* and *W.* were his only eſtates charged or mentioned in his marriag ſettlement; but he was alſo entitled to the reverſion of certain eſtates in th counties of *O.* and *M.* It was holden, that this reverſion paſſed by th words, *elſewhere in the kingdom of* England."

Atkyns v. Atkyns, Cowp. 808.

One ſeiſed for life, with remainder in tail to his firſt and other ſons, a conſiderable eſtate in the county of *N.*, and being alſo ſeiſed in fee of th manor of *C.*, and a ſmall eſtate at *P.* in the county of *G.*, and entitled the reverſion in fee of another eſtate in that county, after ſeveral eſtates-t in different perſons, one of whom had a ſon aged eighteen years; deviſe " all that his manor of *C.* *&c.*, and alſo all that his capital meſſuage, a " all and every his lands, tenements, and hereditaments whatſoever, ſitua " and being in or near *P.* or elſewhere in the ſaid county of *G.* to his e " ecutors, in truſt to ſell, and to divide the money ariſing from the ſa " equally among his younger children," of whom he had three. It w reſolved, that this remote reverſion paſſed to the truſtees.

Strong v. Teat, 2 Burr. 912. 1 Bl. Rep. 200. S. C.

But notwithſtanding theſe caſes, general ſweeping words will not carr reverſion, where the teſtator's intent manifeſtly appears to the contrary fro the whole complexion of the will.

5 Br. P. C. 496. S C. Roe v. Avis, 4 Term Rep. 605.

Davis v. Gibbs, 3 P. Wms. 26.

Where a teſtator ſeiſed of lands in fee, and poſſeſſed of a term for ye in *B.*, deviſed all his lands, tenements, and *real eſtate* whatſoever in *A.* a *B.*, or elſewhere, of which he was *any way ſeiſed or entitled to*, to *J. S.* a his heirs, and in a ſubſequent clauſe of his will diſpoſed of the reſt of perſonal eſtate, and of all his *mortgages, bonds, ſpecialties, and credits*; was adjudged, that the term did not paſs to *J. S.*

Ridout v. Pain, 3 Atk. 486.

But where a teſtator deviſed to his wife, to whom he had before giv life-eſtates in part of his lands, all the reſt, reſidue, and remainder of goods, chattels, and perſonal eſtate, *together with his real eſtate, not ther before deviſed*, it was holden, that theſe words, *together with the real eſ* carried the land and inheritance; for though there are caſes where it been doubted, whether the word *eſtate* joined to goods, *&c.* will carry real eſtate, yet, when a teſtator ſays, *together with my real eſtate*, it puts it of all doubt. In the caſe of *Markant* v. *Twiſden*, *ſupra*, the words w *chattels real and perſonal*; and chattels real are not called ſo, as being eſtate, but becauſe they are extractions out of the real, as Lord Chief tice *Holt* called them.

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(*If A. deviſes*) Upon the ſame principle, if lands be deviſed to the *poſterity* of *A.*—the li heir, if there be any, ſhall take them under the word *poſterity*; but if *A.* die without iſſue, and t be no lineal heir of *A.*, the collateral heir of the whole blood ſhall take them. 2 Eq. Ca 290-7.——And a deviſee may be deſcribed as the next of the name of the teſtator, and the relation of his name, whether it be male or female, ſhall take as deviſee deſcribed thereby. v. Smith, Cro. El. 532.——So, a deviſee may be deſcribed as next of kin. Thus it was adju where one deviſed lands in tail, the remainder *to the next of kin of his name*, that his brother's da

ter ſhould take by that deſcription. Jobſon's caſe, Cro. El. 576—And neareſt relation of the name is likewiſe a good deſcription of a deviſee, and operates as *nomen collectivum*: and in theſe caſes where *nomina collectiva* are uſed to deſcribe the deviſee, the term uſed comprehends all the teſtator's family that are neareſt to him in the degree mentioned. Pyot v. Pyot, 1 Vez. 335.—And if the deviſor explains who he means by neareſt relation, perſons may take under that deſcription who are not ſtrictly ſo circumſtanced in point of kindred.—As, if lands were deviſed to be divided between the neareſt relations of the teſtator; namely, the Greenwoods, the Everetts, and the Downs; the Evretts it ſeems might take, though not in the ſame degree of relation as the Grenwoods and Downs, nor within the degree of neareſt relationſhip. Greenwood v. Greenwood, cited in 1 Br. Ch. Rep. 52.—If one, being married, makes his will, and thereby deſcribe his deviſee by the term, neareſt relation, according to the ſtatute of diſtributions, his wife cannot take thereby; for ſhe is no relation to her huſband in the ſenſe in which that word is here uſed, becauſe it is transferred to a perſonal ſenſe, and as if he had ſaid kindred; and kindred, in the ſtatute, means kindred by blood only, and the wife is no relation by blood or affinity. The wife *non affinis eſt ſed cauſa affinitatis; affinis ab eodem ſtipite.* Davies v. Bailey, 1 Vez. 84. Worſley v. Johnſon, 3 Atk. 759. Skin. tit. Cognatio Parentela. Calvin's Lexicon.——And there would be no difference in ſuch a caſe as that laſt mentioned, whether the terms uſed by the teſtator were, my relations generally, or my own relations. In both caſes, relations by blood only are included. And if the reference to the ſtatute of diſtributions be omitted in ſuch a deviſe, the wife cannot even then take within the deſcription of a near relation. For, in the caſe of Thomas and Hale, Lord King determined, upon the authority of Lord Macclesfield, in the caſe of Brown and Brown, that the word "relations" ſhould be confined to ſuch relations as were within the ſtatute of diſtributions, becauſe of the uncertainty of the word relations. 2 Eq. Ca. Abr. 332. q. 368. Ca. temp. Talb. 251.

So, where one, having a reverſion in fee expectant on an eſtate tail, deviſed it to *William Pitcairne, eldeſt ſon* of *Charles Pitcairne*, in tail male, remainder over, and died; it was inſiſted, on a bill exhibited by the eldeſt ſon, to have the writings, and to receive the profits, *&c.* that the deviſee had no title, becauſe his name was not *William* but *Andrew*; but the court was of opinion that the plaintiff ſhould have relief: the reaſon of which was, that there were other words, *viz. eldeſt ſon* of, *&c.* ſufficient to point him out with certainty. Pitcairne v. Braiſe, *et al.* Finch Chan. Rep. 403. *et vid.* Dalliſon, 78, 8. Owen, 35. Rivers's caſe, 1 Atk. 410.

So, where a deviſe was to *Margaret*, the daughter of *W. K.* and her name was *Margery*, it was held that ſhe ſhould take thereby, *quia conſtat de perſona*, by the deſcription. Gynes v. Kemſley, 1 Freem. 293. 10 Mod. 371.

So, if one deviſe land to the wife of *J. S.*, and *J. S.* die, and ſhe take to huſband *J. D*, and then the deviſor die, ſhe ſhall take the land; and yet ſhe is not the wife of *J. S.* when the deviſor dies, nor ſhall ſhe take it as his wife: but the intent is, that ſhe who *was* the wife of *J. S.* at the time of making the will ſhould have it, and the perſon is clear by the deſcription. 1 Vin. Abr. tit. Dev. T. B. Pl. 2. Plowd. 344.

Again, if a man had deviſed land to *Alexander Nowel*, dean of *St. Paul's*, and to the chapter there and their ſucceſſors, and *Alexander* had died, and a new dean had been made, and afterwards the deviſor had died, the land had veſted in the new dean and chapter; and yet it would not have veſted according to the words, but according to the intent; for the chief intent was to convey it to the dean and chapter and their ſucceſſors for ever, and the ſingle perſon of *Alexander Nowel* was not the principal cauſe, though it might have been one of the cauſes of the deviſe. Vin. Abr. tit. Corp. G. 6. pl. 11. tit. Dev. W. c. pl. 4. Plowd. 344.

Upon the ſame principle it was decreed by Lord *Sommers*, where one, his wife being *enſeint* with a child, (was taken ſick and made his will, and, thereby, deviſed that if his wife ſhould have a poſthumous daughter ſhe ſhould have 500*l.*, *&c.*) had a daughter born, and afterwards died; that this daughter, though born in the life of her father, was a poſthumous child within the meaning of the will. Jaggard v. Jaggard, Pre. Ch. 175.

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(*A man had iſſue*) Ford v. Lord Oſſulſton, M. 7. Ann. B. R. Hargr. Co. Lit. 27. b note. Dowes v. Ferrars, 2 P. Wms. 1. and Pr. Ch. 589. and Mr. Hargrave's notes in his Co. Lit. 24. b. 27. 1. 164. a.

Darbiſon on dem. Long v. Beaumont, 1 P. Wms. 229. 1 Brown. Parl. Ca. 489.

S., after deviſing hereditaments to truſtees for twenty-one years for the payment of debts, *&c.* ſettled the ſame on the firſt ſon of his body lawfully begotten, and the heirs male of the body of ſuch firſt ſon lawfully iſſuing, and, for default of ſuch iſſue, to his couſin *J. S.* for ninety-nine years, if he ſhould ſo long live, remainder to his firſt and other ſons in tail male, and, in default of ſuch iſſue, remainder to the *heirs* male of the body of the teſtator's aunt *E. L.* lawfully *begotten*, and, for default of ſuch iſſue, remainder to his own right heirs. The teſtator alſo gave a legacy to his ſaid aunt *E. L.*, *whereby he took notice, that ſhe was living, and that ſhe had three ſons, A. B.*, and *C.*, to whom he gave a legacy of 500*l.* He likewiſe gave to *D. B.*, who was his heir at law, *an annuity out of the ſaid* hereditaments of 150*l.* *per annum*, and to *her* children 500*l.* a-piece. Afterwards the teſtator died without iſſue, as did alſo *J. S.*; upon which the queſtion was, Who was entitled to the teſtator's real eſtate, whether his heir at law *D. B.*, or *A.* the eldeſt ſon of the teſtator's aunt *E. L.*? And one objection taken to the claim of *A.* was, that *E. L.* his mother being living at the teſtator's death, there was no *heir* of *E. L.*, nor could be whilſt ſhe was living; and that *heir*, being a legal term, could be underſtood only in a legal ſenſe, unleſs ſome other word or words accompanying it ſhould determine the ſenſe otherwiſe, as *heir apparent*, or heir *now living*; and it was ſaid, that the word *begotten* did not determine the ſenſe to be ſpecial; becauſe the word *begotten*, or to be begotten, had the ſame legal conſtruction and it did not appear that the deviſor had any intention to confine the deviſe to the iſſue male of *E. L.* then living, much leſs to *A.* only, who would take as the heir deſcribed by this deviſe. But it was adjudged in the Exchequer, which judgment was afterwards reverſed in the Exchequer-chamber, and that reverſal reverſed in the Houſe of Peers, that *A.* was entitled under this deviſe: and the principal reaſons upon which the court of Exchequer founded their judgment, and upon which the Houſe of Lords affirmed it, were, becauſe it was evident from the whole will, that he was the perſon *manifeſtly* deſigned to take by the appellation of the *heir* male of the body of the teſtator's aunt *E. L.* lawfully begotten, before the heir general of the teſtator, who was to take no more *than an annuity* ſo long as there ſhould be iſſue male of his aunt; and then, although the word heir, in the ſtricteſt ſenſe, ſignified one who had ſucceeded to a dead anceſtor, yet in a more general ſenſe, it ſignified an heir apparent, which ſuppoſed the anceſtor to be living. Then, when the teſtator alſo took notice, that *E.* the anceſtor was living at that time, and gave her a legacy, he could not intend that the firſt ſon ſhould take *ſtrictly as* heir, which was impoſſible if ſhe was living, but, as heir apparent he might intend him to take.

Goodright on dem. Brooking v. White, 2 Blackſt. Rep. 1010.

Again, *B.* deviſed to *M.* his wife, *inter alia*, an annuity of 10*l.* *per annum* charged upon the eſtates in queſtion for eighty years if ſhe ſo long lived on condition that ſhe claimed no dower; and, after the deceaſe of *M.* his wife, deviſed annuities of 40*s.* *per annum* each to his daughters *E. N.*, *T.* and *A. H.* for ninety years, if they ſhould reſpectively ſo long live; and to his daughter *M. W.*, the wife of *W.*, another annuity of 40*s.* *per annum* for ſeventy years, if ſhe and the teſtator's only ſon *R. B.* ſhould jointly ſo long live, the ſaid term of ſeventy years to commence at the expiration of the term of two years thereafter given in the eſtates to his ſaid daughter *M. W.*, and the death of *M* his wife, and ſubject to the ſaid annuities, gave the eſtates to his daughter *M. W* for two years from and after his deceaſe, with remainder to *R. B.* his ſon for ninety-nine years if ſo long lived, and ſubject to ſuch ninety-nine years term, he deviſed

ſame to his ſon *R. B.* and his heirs male, and to the heirs of his daughter *M. W.* jointly and equally, to hold to the heirs male of *R. B.* lawfully begotten, and to the heirs of *M. W.* jointly and equally, and their heirs and aſſigns for ever; and, for want of heirs male lawfully begotten of the body of the ſaid *R. B.* at the time of his deceaſe, he deviſed the ſame, charged as aforeſaid, *to the* HEIRS *and aſſigns* of the ſaid *M. W.*, lawfully begotten of her body, to hold to the HEIRS *and aſſigns* of the ſaid *M. W.* for ever. He then deviſed a leaſehold houſe to his daughter *J. S.*, and made his daughter *M. W.* ſole executrix and reſiduary deviſee of all his perſonal and real eſtate. The teſtator died, leaving *M.* his widow, ſince deceaſed, *R. B.* his only ſon and heir, and five daughters, *viz. M.*, *I.*, *E.*, *A.*, and *M. W.*; and *R. B.* the ſon had, at the time the will was made, a ſon *R.* and two daughters; and *M. W.* the teſtator's daughter then had one ſon, and after the teſtator's death, ſhe had another ſon, both living, and no other children. On the death of the teſtator, *M. W.* entered into the whole of the eſtate, and held the ſame for two years, after which *R. B.* the ſon entered, and held the whole during his life. *R. B.* died, leaving his only ſon *R.*; upon which *M. W.* entered into the whole of the eſtates; and, on an ejectment brought by *G.* on the demiſe of *R*, ſon of *R. B.*, againſt *M. W.*, the queſtion was, Whether the plaintiff was entitled to recover? And it was contended, that *R.*'s deviſe to the heir of *M. W.* in the event that had happened was void; for, at the expiration of the particular eſtate by the death of *R.* the ſon, living the daughter *M W.*, nobody could take as heir of *M. W.* for *nemo eſt hæres viventis*. But, by *De Grey*, Chief Juſtice, the queſtion is, Whether here is a *ſufficient deſcription* of the perſon to make the ſon of *M. W.* take as *her* heir *living the mother*. The intention of the teſtator is clear, that the ſame favour ſhould be extended to the heirs of *M. W.* as to the heirs male of the body of *R.* He took notice that the daughter was living, *by leaving her a term, and a ſubſequent annuity*, and meant a preſent intereſt ſhould veſt in her heir, that was, her heir apparent, during her life. He therefore did not think the leſſor of the plaintiff was entitled to more than a moiety of the eſtates. *Gould*, *Blackſtone*, and *Nares*, Juſtices, were of the ſame opinion. *Blackſtone* thought that, as the teſtator had *varied* the tenure of *M. W.*'s annuity from that of the three other ſiſters, *their*'s depending on their own ſingle lives, and *her*'s on the joint lives of herſelf and her brother *R.*, it was plain the teſtator had in his contemplation that *ſhe might ſurvive* R., as, in fact, ſhe did; and, therefore, the word *heir* muſt be conſtrued as equivalent to *iſſue*, in order to make him take in her lifetime, agreeable to the intent of the teſtator.

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(*J. S. deviſed to truſtees*) 1 Eq. Abr. tit. Deviſes, 215. pl. 14. S. C. Pr. Ch. 442. 46. S. C. by the name of Brown v. Barkham. On a bill of review brought before Lord Hardwicke, in November 1741, the decree in this caſe was affirmed, but according to a note of it in Hargr. Co. Lit. 24. b his Lordſhip conſidered the caſe as an exception to the general rule. But the opinion of Lord Cowper has been ſince confirmed by a deciſion of the court of King's Bench on a caſe ſent by the court of Chancery. The queſtion aroſe on both a will and a deed, whether *A.* took by purchaſe under the deſcription of *heir-male of the body* of *B.* not being heir-general? *B.* being in the land the *grantor*, the court certified that *A.* took an eſtate-tail by *deſcent*, but they added in the certificate, that if a *third perſon* had been the grantor, they ſhould have thought that *A.* would be taken by *purchaſe* as heir male of the body of *B.*—And they alſo certified, that he did ſo take under the will. Wills v. Palmer, 5 Burr. 2615. And the ſame point was reſolved on a marriage ſettlement in the caſe of Evans v. Weſton, in the Exchequer, M. 1774, and H. 1775.

A deviſe

A deviſe is never conſtrued abſolutely void for uncertainty, but from ne ceſſity; for, if there be a poſſibility to reduce it to a certainty, the deviſe good.

Ungly v. Peale, 2 Ld. Raym. 1312. 10 Mod. 103. 2 Eq. Ca. Abr. 358. 8 Vin. Abr. tit. Dev. D. Ca. 19. Note, This caſe was firſt adjudged in C. P. and that judgment afterwards affirmed on writ of error in K. B.

One ſeiſed in fee of a houſe at *Ludgate*, deviſed the ſame "to *S.* and h "brothers ſucceſſively for their lives," and then the teſtator, after mentio ing another matter, went on and ſaid, "And as for my houſe at *Ludg* "I do not leave it to *S.* nor his brothers afore to be entered on and e "joyed till one month after their marriages." *S.* at the time of maki the will had two brothers, *R.* and *O.*; *S.* was the eldeſt, *R* the ſecond, a *O.* the third ſon; *R.* died in the lifetime of *S.* and *O.*; and the queſti was, Whether this was a good deviſe, or void for uncertainty? And it w argued againſt the deviſe, firſt, that it was void for uncertainty by rea of the word *ſucceſſively* not ſhewing which ſhould take firſt and which ſeco in ſucceſſion: ſecondly, that the condition in relation to marriage mad more uncertain; for, till marriage none could take; and ſuppoſe the ſec brother had married, and neither of the other two, who muſt have tak Certainly none of them; for, if he that was married ſhould take firſt, t that would overthrow the other conſtruction of *ſucceſſive*, that the ol ought to take firſt, and then the ſecond, and then the third. *Sed per t curiam*, the will was good and certain enough; for, being in the caſe of thers, the common *law* was a guide to the expoſition of the word *ſucceſ viz.* that the eldeſt ſhould, after his marriage, enjoy it firſt for his life, the ſecond, and then the third; and the court agreed, that the clauſe a marriage made no alteration in the expoſition of the will, but only add reſtriction to the deviſe, which before was general; and, therefore, th the ſecond ſon had married before the eldeſt, yet he could not have t by this deviſe.

(*If a man deviſes*) Goodright v. Wright, 1 Str. 25. and 1 P. Wms. 397. S. P. Warn White, Dougl. 344. and 1 Bl. Ch. Rep. 219. note, S. P. Hodgſon v. Ambroſe, Dougl. 33 P. Doe v. Kett, 4 Term Rep. 601. And the law is the ſame in the deviſe of a copyhold, v. Greenſlate, 1 Str. 445. Duke of Marlborough v. Lord Godolphin, 2 Vez. 77. And new publication of the will after the death of *A.* would not make ſuch a deviſe good, ſee 4 Rep. 601. 2 Lev. 243. Sir T. Jon. 135. Sir T. Raym. 408. 1 Mod. 267. 2 Mod. Pollex. 546. 1 Venti. 341.

Proctor v. Biſhop of Bath and Wells, 2 H. Bl. 358.

An advowſon was deviſed to *the firſt or other ſon of* A. *that ſhou bred a clergyman, and be in holy orders*, in fee, but in caſe *A.* ſhould no *ſuch ſon*, then to *B.* in fee. Both deviſes are void, as depending too remote a contingency: the firſt deviſe to the ſon of *A.* was void the uncertainty as to the time when ſuch ſon, if he had any, might orders; and the deviſe over to *C.* was alſo void, as it depended ſame event, for the words of the will would not admit of the contin being divided, as in *Longhead* v. *Phelps*, 2 *Bl. Rep.* 704. The h law therefore was entitled; for there was no inſtance, in which a tation after a prior deviſe, which was void from the contingency too remote, had been let in to take effect; but the contrary w Vol. iv. 320 preſsly decided in the Earl of *Chatham* v. *Tothill*, 6 *Br. P. C.* 4 which the judges founded their opinion on *Butterfield* v. *Butterfi Vez.* 134.

DISCONTINUANCE.

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IT began in the caſe of huſbands' alienations of their wives' land. By the civil law, the father gave the *dos*, which was the eſtate of the wife given on the marriage; and if it conſiſted of matter moveable, the huſband had the poſſeſſion, but was bound to reſtitution at his death; and even an action was allowed to the wife, in caſe the huſband fell to decay, to recover during his life. If it conſiſted of things immoveable, the huſband could not alien without the conſent of his wife, by the Julian law. And by Juſtinian's reformation, he could not alien, though with her conſent. *Conſtante matrimonio rei dotalis dominium civile penes maritum eſt, naturale penes uxorem.* Dig. li. 23. tit. 2. *De jure dotium.* Ibid. tit. 5. *De fundo dotali.*

(D) Of Diſcontinuances by Women of Lands of the Gift of their Huſband, or his Anceſtor.

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(By 11 *H.* 7. *c.* 20.) But it does to a uſe or an equity of redemption, for uſes are here expreſsly mentioned, and a truſt is now, what a uſe was then. 2 Vern. 489. 1 Ab. Eq. 220. Hughes v. Clubb, Com. Rep. 369. S. P.

By ſtat. 32 *H.* 8. *c.* 36. § 2. it is enacted, that no fine levied by any woman of any ſuch eſtate as is mentioned in the above ſtatute, 11 *H.* 7. ſhall be of any effect.

(F) By what Act or Conveyance a Diſcontinuance may be made, and the Effect thereof.

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(*As of a tenant*) But in this caſe it was agreed, that if the fine had been levied before the bargain and ſale was enrolled, it would have been a diſcontinuance. So, where a fine is levied in purſuance of a covenant in a prior conveyance, as, where a tenant in tail conveys his eſtate by leaſe and releaſe, and covenants in the releaſe to levy a fine, which is done accordingly; in this caſe, the leaſe, releaſe and fine will be conſidered as only one aſſurance, and the fine will, therefore, operate as a diſcontinuance of the eſtate tail. Doe v. Odiarne, 2 Burr. 704.

DISSEISIN.

(A) What Acts amount to a Diſſeiſin.

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(*By a guardian*) But on the argument of the caſe of Blunden and Baugh, commonly called Lord Nottingham's caſe, Juſtice Barclay ſaid, that he, whom Lord Coke calls in this place an abator, muſt be taken for a diſſeiſor, as he had actual poſſeſſion by the poſſeſſion of the guardian. 1 Nott. MSS. Co. Lit. 271. a. n. (2), 13th edit.

(*Tenant

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(*Tenant at will*) *Vide* Cro. Jac. 615. 1 Atk. 442.

Taylor v. Horde, 1 Burr. 60. 5 Br. P. C. 247. Cowp. 689. See Co.Lit.330. b. n. 1. 13th edit. where the law of the caſe is queſtioned with great ability.

A. tenant for life, remainder to *B.* in tail; *B.* recovers in ejectment againſt *A.* and has an *habere facias poſſeſſionem*, and whilſt in poſſeſſion makes a feoffment of the eſtate to *D.* with livery of ſeiſin, that he might become tenant of the freehold, in order for the ſuffering of a common recovery. A recovery is accordingly ſuffered, and afterwards *A.* brings an ejectment, and obtains a verdict. It was adjudged, that *B.* by his entry in this caſe under the judgment was not an actual diſſeiſor, and therefore had not in him any eſtate of freehold; and that the feoffment gave *D.* an eſtate of freehold only at the election of *A.* but did not give him an actual eſtate of freehold.

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(*A man diſſeiſes*) Why diſſeiſin of tenant for life makes a fee in the diſſeiſor is thus accounted for by Lord Hobart: "A grant to *J. S.* and his heirs during the life of *J. D.* is no fee, but "ſpecial occupancy, as is reſolved in Chudleigh's caſe. But a diſſeiſin of an eſtate for life "neceſſity in law makes a *quaſi* fee; becauſe wrong is unlimited, and ravens all that can "gotten, and is not governed by terms of the eſtates, becauſe it is not contained within rules Hob: 323

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(*Leaſe for life*) For upon the death of the diſſeiſee, that wrongful fee is turned into a right eſtate for life by operation of law. 8 Mod. 53. *arguendo*.

Goodtitle v. Riſden, Vin. Abr. tit. Diſſeiſin (N), pl. 6.

Rights and the purging of wrongful acts are always favoured in law and therefore, where a diſſeiſin or abatement is made, and the diſſeiſee brings his ejectment, and has a verdict and judgment for him. (but no execution,) yet an entry by the plaintiff being found as being in the declaration in ejectment, that entry will purge the diſſeiſin, and the continuer in poſſeſſion afterwards is only as a treſpaſſer.

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DISTRESS.

(A) Who, in reſpect of his Eſtate or Intereſt may diſtrain for Rent.

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(*If a man ſeiſed in fee*) A receiver under the court of Chancery has power, it ſeems, to diſtrain without applying to the court for particular directions for that purpoſe, unleſs there be a doubt who has the legal right to the rent; for the diſtreſs muſt be in the name of the perſons entitled to the legal eſtate. Pitt v. Snowden, 3 Atk. 750. Hughes v. Hughes, 3 Br. Ch. Rep. 87.

(*If a termor*) 2 Wilſ. 375.——v. Cooper. Where a leaſe came back to the original leſſor by an agreement entered into between him and the aſſignee of the leſſee, that the leſſor ſhould have the premiſes on the terms mentioned in the leaſe, and further ſhould pay a certain ſum annually over and above the rent towards the good will already paid by the aſſignee, it was judged that ſuch agreement operated as a ſurrender of the whole term, and that the aſſignee could not diſtrain either for the original rent, or the ſum to be paid in groſs annually. Smith v. Mapleback, 1 Term Rep. 441.

Fairfax v. Gray, 2 Bl. Rep. 1326.

Although a term be veſted in an annuitant himſelf for ſecuring an annuity, yet he may diſtrain for the arrears: as where lands were conv

to truſtees and their heirs to the uſe of *A.* for 99 years, if he ſhould ſo long live, upon truſt that he ſhould receive and take thereout an annuity or yearly rent of 250l. with power of diſtreſs, and ſubject thereto, to the uſe of the grantor for life, remainder over—it was holden that *A.* might diſtrain, for that the grantor during the term was merely an under-tenant to him at the above rent, to which rent diſtreſs was incident by law, excluſive of the clauſe in the deed.

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(*For an heriot ſervice*) Co. Lit. 83. if he claims the relief not by tenure, but by cuſtom, it ſeems there muſt be a preſcription to warrant the diſtreſs. Lat. 37. 95. 130. 3 Bulſtr. 323. 1 Jon. 132. Co. Lit. 83. b. 47. b. 1 Show. 36.

If the mortgagee give notice of the mortgage to a tenant in poſſeſſion under a leaſe prior to the mortgage, he may diſtrain for all arrears of rent in his hands at the time of the notice, as well as for what accrues ſubſequent to it. Moſs v. Gallimore, Dougl. 266. 1 Term Rep. 384.

See Powell's Mortgage, 84.

Where there is a cuſtom that a tenant may leave his away-going crop in the barns, *&c.* of the farm for a certain time after the leaſe is expired, and he has quitted the premiſes; the landlord may diſtrain the crop ſo left after the expiration of the ſix months, and within the time limited by the cuſtom. Beavan v. Delahay, 1 H. Bl. 5.

If a leſſee dies before the expiration of the term, and his perſonal repreſentative continues in poſſeſſion during the remainder and after the expiration of it, the landlord may diſtrain under this act for rent due for the whole term. Braithwaite v. Cookſey, 1 H. Bl. 465.

(B) What Things may be diſtrained.

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(*There muſt be*) *Qu.* as to dogs, now that the legiſlature hath paſſed an act to prevent the ſtealing of them. See ſt. 10 Geo. 3. c. 18. But deer kept in a private incloſure for the purpoſe of ſale or profit may be diſtrained for rent. Davis v. Powell, C. B. Hila. 11 G. 2. 3 Bl. Com. 8.

(*Things fixed*) So, an anvil in a ſmith's ſhop, and a millſtone in a mill, are privileged from this diſtreſs: and a temporary removal of the anvil out of the ſtock, or of the millſtone out of the mill, for the purpoſe of its being picked, does not deſtroy the privilege. 14 H. 8. 25. b.

(*No man can*) And implements of trade may be diſtrained if not in actual uſe at the time, and no other ſufficient diſtreſs can be found. Gorton v. Falkner, 4 Term Rep. 565. Simpſon v. Harcourt, C. P. Mich. 18 Geo. 2. cited by Buller, J. *Id.* 569. The like law with reſpect to *averia carucæ*. But *averia carucæ*, or implements of trade, may be diſtrained for a poor's rate, although there be other ſufficient diſtreſs: for the diſtreſs in this caſe is in nature of an execution. Hutchins v. Chambers and others, 1 Burr. 579. Com. Dig. tit. Diſtreſs (C). Saund. on Conventicles, p. 39.

(*Alſo for the*) Noy, 68. But a chariot ſtanding at a livery-ſtable is not privileged from diſtreſs. Francis v. Wyatt, 3 Burr. 1498. 1 Bl. Rep. 483. Nor is a race-horſe in a ſtable belonging to an inn-keeper, a mile diſtant from the inn. Croſier v. Tomlinſon, Hertford Aſſizes, *coram* Ryder, C. J. cited in 3 Burr. 1500.

(*So if an horſe*) *Infra*, note on the laſt caſe.

(*If a man rides*) But this is not law. Things in actual uſe cannot be diſtrained, becauſe the taking of them would occaſion a breach of the peace. See what is ſaid by Willes, C. J. on the caſe of Webb v. Bell, 1 Sid. 440. in 4 Term Rep. 569. and Storey v. Robinſon, 6 Term Rep. 138.

(*Things*

(*Things diſtrained*) So, it ſeems that goods under an attachment cannot be diſtrained. Monk's caſe, 1 Ventr. 221. *arguendo.*

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(*Things for which*) But money in a bag ſealed may be diſtrained; for the bag ſealed may be known again. 22 E. 4. 50. b.

But notwithſtanding this act, ſheaves of corn, it ſeems, cannot be diſtrained for the arrears of an annuity. Horton v. Arnold, Fort. 361.

Kimp v. Crewes, 2 Lutw. 1573.

The various caſes upon this point were very fully conſidered in a later caſe, where the following diſtinctions were made. If a ſtranger's beaſts eſcape into the land, by the default of the owner, they may be diſtrained for rent, without being levant or couchant. But if their eſcape be in conſequence of the default of the tenant of the land in not repairing his fences, the leſſor cannot diſtrain them, though they have been levant and couchant, unleſs he have given notice to the owner, and he ſuffer them to remain there afterwards. But the lord of the fee, or the grantee of a rent-charge, may in this laſt caſe diſtrain them, without giving notice, after they have been levant and couchant.

(C) Of the Manner of diſtraining, as to Time and Place.

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(*If the tenant*) But now by 11 Geo. 2. c. 19., goods, &c. may be diſtrained in 30 days, after removal.

Buckley v. Taylor, 2 Term Rep. 600. 6 Mod. 214.

If by the cuſtom of the country, or by expreſs ſtipulation between the parties, the rent be payable on the day on which the tenant enters, the landlord may diſtrain for it on that day. So, it ſeems, by the uſage of a pariſh, a quarter's rent may be diſtrained for before the end of the quarter.

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(*A diſtreſs*) See the ſtat. 11 G. 2. c. 19. § 7., which empowers the landlord in the caſe of goods being fraudulently removed to prevent a diſtreſs, to break open a dwelling-houſe, taking a conſtable with him, and having firſt made oath before a juſtice of a reaſonable cauſe to ſuſpect that they are therein. See *infra*, tit. Rent, (K).

Rogers v. Berkmire, Ca. temp. Hardw. 245. 2 Str. 1040.

If the demiſes are ſeveral, there muſt be ſeparate diſtreſſes upon the ſeveral premiſes ſubject to each diſtinct rent; for one diſtreſs cannot be taken diſtributively, and the law gives no right to enter into any premiſes but thoſe whence the rent iſſues.

(D) Of the Diſtreſs when ſeiſed: And herein of the Diſtrainer's Intereſt therein, and what he is to do therewith.

(*Alſo by the ſtatute*) Treſpaſs will not lie for impounding a diſtreſs in another county, but the action muſt be upon this ſtatute.. Gimbart v. Pelah, 2 Str. 1272.

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(*If a man takes*) It is ſaid by Popham, C. J. that the diſtrainor may meddle with a diſtreſs where it is for the owner's benefit, as by ſcouring armour, or fulling raw-cloth. Cro. Eliz. 783.

It is provided by the 11 G. 2. c. 19. § 19, 20. that for any unlawful act done, the diſtrainor ſhall not be a treſpaſſer *ab initio*; but that the party grieved ſhall only have an action for the real damage ſuſtained; and not even that, if tender of amends is made before any action is brought.

(That

(*That where*) The five days are inclusive of the day of sale. 1. H. Bl. 14.

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(*And that upon*) Lawson v. Story. The plaintiff under this clause is entitled to treble *costs* as well as damages. Carth. 321. Ld. Raym. 19.

(E) Where a Distress shall be said to be wrongful and excessive: And herein of the Remedy which the party injured hath.

Page 115
(*If for* 10*l.*) Whether or not there shall be more distresses than one depends upon the entirety and identity of the thing distrained for, not upon the value of the goods taken. One entire duty, or sum, shall not be split, and distrained for, part at one time, and part of it at another time; for instance, if, as was the case in Lutwyche, the whole sum due by 77*l.* 10*s.*, a man shall not distrain for 62*l.* 10*s.* at one time, and afterwards distrain again for 15*l.* the residue of the 77*l.* 10*s.*, but he shall distrain for the whole 77*l.* 10*s.* at once. But if, from mistake or ignorance of their value, the goods at first distrained for the whole 77*l.* 10*s.* be not sufficient to satisfy it, he may distrain again in order to supply the deficiency, and to make up that same sum. Wallis v. Savill, 2 Lutw. 1532. Hutchins v. Chambers, 1 Burr. 589.

A distress may be taken for rent under a lease, though the tenant entered before the commencement of it. Macdonnel v. Welder, 1 Str. 550.

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(*So if a man*) *Secùs*, where the number is uncertain. Hall v. Harding, 4 Burr. 2426.

(*If turfs*) The commoner's power of distraining is not mentioned in the case cited.

Goods brought to a market to be sold, cannot be distrained by the owner of it for toll as damage-feasant. Wigley v. Peachy and others, 2 Ld. Raym. 1589. Sawyer v. Wilkinson, Cro. El. 628.

If a man hath a freehold in a market, and corn is brought thither on the market-day, and set down, he cannot justify the taking it there damage-feasant. Mayor of Launceston's case, Cro. El. 75

A. demised to *B.* the milk of twenty-two cows, to be provided by *A.*, and to be fed at *A*'s expence, on certain closes belonging to *A.*; and *A.* covenanted that *B.* might turn out a mare, and that no other cattle should be fed there. *B.* may distrain other cattle of *A.* there, for the separate herbage and feeding of the closes passed to *B.* Burt v. Moore, 5 Term Rep. 329.

(G) Of Distresses for Amercements.

(*Such fines*) Roll. cites for the contrary opinion the case in 41 E. 3. 26. b. which seems an authority (if any) *the other way*.

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(*No Bailiff*) In replevin the officer must state that "the defendant was guilty;" in trespass the conviction is a sufficient justification. It must appear too, that the amercement was by the jury, and not by the court. Stephens v. Haughton, 2 Str. 847.

By prescription there may be a distress for toll in a fair or market. But toll is not incident of common right to a fair; and, therefore, if the fair is a new one, and toll is not expressly granted, a custom cannot support it. Hob. 187. Roll. Abr. 66. Holloway v. Smith, 2 Str. 1171.

If goods are fraudulently sold out of a market, in order to evade the toll, the owner of the market cannot distrain them for it. Blakey v. Dinsdale, Cowp. 661.

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DOWER.

Ilderton v. Ilderton, 2 H. Bl. 145.

A MARRIAGE celebrated in *Scotland* (but not between perſons who go there merely to evade the laws of *England*) will entitle the woman to dower in *England*. As the lawfulneſs of ſuch a marriage muſt be tried here by a jury; therefore a replication of "*ne unques accouple*" in a writ of dower alledging a marriage in *Scotland*, may conclude to the country.

Vol. ii. 370
Vol. iv. 555.

It is laid down in the preceding part of this work under this title, and alſo under the title "Marriage and Divorce," that a divorce *propter adulterium* does *not* bar the wife of dower. But this doctrine ſeems ſcarce maintainable. *Rolle's* report of the caſe of *Powell* v. *Weeks*, the principal caſe referred to in ſupport of it, differs from that of the other reporters, for he expreſsly ſays, it was adjudged, that a divorce for adultery *is* a bar of dower. If the going away with an adulterer deprives a woman of her dower, of which there can be no doubt (*a*), it ſhould appear rather extraordinary to aſſert, that a divorce for that cauſe ſhould not have the ſame effect, that is, that a woman convicted of a crime ſhould not incur the puniſhment which ſhe would otherwiſe be expoſed to. But the truth ſeems to be, that a divorce *propter adulterium* does not diſſolve the marriage; and therefore does not of itſelf occaſion a forfeiture of dower: but the loſs of dower is not the conſequence of the divorce, but of the crime: though there were no divorce, yet if the adultery of the woman were manifeſt ſhe would loſe her dower. In order therefore to ſhew that a woman has no title to dower by reaſon of adultery, it is not neceſſary to produce a ſentence of divorce for that cauſe. This ſeems to be a ſolution of the difficulty.

Ro. Abr. 680,

(*a*) Co. Lit. 32 a. 6 Term Rep. 604

Mundy v. Mundy, 2 Vez. jun. 122. 4 Br. Ch. Rep. 194. S. C.

If the right to dower is controverted, it muſt be made out at law: but if not controverted, the court of Chancery has a concurrent juriſdiction; therefore, where to a bill for dower and arrears ſince the death of the huſband, the defendant demurred, and by anſwer admitted the right, and ſtated an offer to aſſign the dower, and an offer of the arrears ſince the claim, the court overruled the demurrer. For, whether a widow is entitled to the arrears of dower from the death of her huſband, or only from her claim, cannot be determined on a writ of dower. To a writ of dower only legal bars can be oppoſed, which has had the effect of almoſt putting an end to them; and the idea that there muſt in equity be a legal bar ſeems to have prevailed till the caſe of *Lawrence* v. *Lawrence* (*b*) determined by Lord *Somers* in King *William's* time.

(*b*) 2 Vern. 365. 1 Eq. Ca. Abr. 218.

(A) Who may have Dower, and who not: As herein of the Age, and other Diſabilities of the Huſband or Wife.

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(*If an idiot*) The marriage of idiots muſt be void upon general principles of law, by reaſon of their incapacity to contract.

(B)

(B) Of what Eſtate a Woman may have Dower.

2. Of the different Kinds of Inheritances.

This muſt mean a uſe not executed.

Of a Uſe a Woman ſhall not be endowed.

So, of a truſt-eſtate of inheritance, or of an equity of redemption of mortgage in fee, a woman ſhall not be endowed. Chaplin v. Chaplin, 3 P. Wms.

Attorney General v. Scott, Ca. temp. Talb. 138. Goodwin v. Winſmore, 2 Atk. 525 Burs v. Wheate, 1 Bl. Rep. 138, 161. Dixon v. Saville, 1 Br. Ch. Rep. 326.

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(*Of tithes*) But the aſſignment is good, though tithes of the third yard-land be aſſigned. 9. Jac. C. B. Kettleby's caſe. Hale's MSS. Co. Litt. 32. a. n. 3. 13th edit.

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(*A woman entitled*) Owen, 4. S. C.

So, a woman is entitled to dower out of ſhares in the navigation of the ver *Avon* under the ſtatute of 10th of *Anne*. Buckeridge v. Ingram, 2 Vez. jun. 652.

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(*In dower upon*) The true reaſon is, that the remainder to *B.* was an intervening *veſted* eſtate d not a poſſibility. Freme's C. R. 509-10. 4th ed.

Lands were conveyed to the uſe of *A.* and his wife for life, remainder the uſe of *B.* the ſon of *A.* and his wife for life, remainder to the firſt d other ſons of *B.* in tail, remainder to *A.* in fee; *A.* and his wife died the lifetime of *B.*, who afterwards died without iſſue, leaving a wife: e queſtion was, whether the wife of *B.* was entitled to dower in the ds? And it was decreed ſhe was; for that the eſtate for life in *B.* was erged by the deſcent of the inheritance upon him, and the contingent reainder deſtroyed. Hooker v. Hooker, Ca. temp. Hardw. 13.

(C) Of the Things requiſite to the Conſummation of Dower, *viz.* Marriage, Seiſin, and the Death of the Huſband.

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(*In ſome caſes*) The propoſition, that in the caſe of an inſtantaneous ſeiſin, the wife ſhall not be owed, though here laid down broadly, is by no means general. When, indeed, the ſame act ich gives the huſband the eſtate, conveys it out of him again, when he is the mere inſtrument paſſing the eſtate, the tranſitory ſeiſin gained by ſuch an inſtrumentality does not in general ſufficient to entitle the wife to dower. But when the land in the language of Sir Wm. kſtone, 2 Comm. 132. *abides* in the huſband for a ſingle moment, that is, as a later writer ains it, Preſton on Eſtates, tit *Dower*, when he has a ſeiſin for an inſtant *beneficially for his* n, the title to dower ſhall ariſe in favour of the wife. Thus, in the caſe put above, where deſcend on a man who is married, and a ſtranger enters by abatement immediately, after death of the anceſtor—there the wife of the heir ſhall have her dower, and yet the huſband merely a ſeiſin in law, and that for an inſtant only, for the abatement deveſted it from him. in the caſe above of the father and ſon jointenants, who were hanged out of one cart, where queſtion depended on the priority of their death. And, where a huſband *tortiouſly* gains an antaneous ſeiſin, as againſt the perſon benefited by, and deriving an eſtate in virtue of, ſuch ous act, the wife is entitled to her dower. Thus, in Matthew Taylor's caſe in C. B. 34 El. d in Sir W. Jon. 317. where tenant at will, or for years, makes a feoffment in fee, and dies, and

and his wife brings dower, the feoffee cannot plead that the husband was never seised; for as the court there say, in an instant he gained a seisin, or as it is better explained *supra* tit. *Disseisin* (A), since the feoffee received his estate from him, he is estopped to say that the husband was never seised: besides, in respect of the feoffee the feoffor had an estate, though in regard to the disseisee he is to be considered as a wrong-doer. It may be questioned whether either of these instances will support the doctrine here advanced, *viz.* that there cannot be dower in the case of an instantaneous seisin. In the first, the husband is never *solely* seized during the coverture: for when he makes the feoffment he is seised *jointly* with his companion: the tenancy is not severed *until* the husband has made the conveyance, and departed with all his right and estate; and consequently, during all the time he hath seisin of the estate, he hath it *jointly* with some other and not *solely* by himself. In the other instance, *viz.* of the *cestui que use*, the husband hath no seisin of the land *at any period*: he had merely the *use* with the *power* in virtue of the statute of 1 R. 3. of transferring that quantity of estate in the *land* which he had in the *use*. Preston on Estates, *ubi supra*.

(*If lessee for life*) *Secùs*, of such a feoffment or lease by a tenant at will, or for years, for thereby he gains a freehold. Sir W. Jon. 317. Br. tit. Disseisor, &c. pl. 67. 12 E. 4. 12.

Sneyd v. Sneyd, 1 Atk. 442. So, if a husband become entitled to estates by virtue of surrenders from tenants by copy of court roll, and grant them out again by copy of court roll, this instantaneous seisin of the freehold will not entitle the wife to dower.

(D) Of the Assignment of Dower.

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(*If there be two*) This case of assignment of dower by one of two or more jointenants must be understood to be where the husband has been solely seised during the coverture, and afterwards conveys or devises the lands to two or more jointly and dies; for the wife of a jointenant is not dowable. *Vide supra.*

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(*If lands whereof*) But see 2 H. 5. 12. The heir assigns dower of lands of which the husband was seised, but the wife not dowable, she is tenant in dower. 30 E. 1. Briefe, 884. If she be endowed, and afterwards exchange with the heir for other lands which were the inheritance of the husband, she shall be said to be tenant in dower of the lands so taken in exchange, and her entry shall be said to be by the husband. *Per omnes justiciarios.* Hal. MSS. Co. Lit. 34 n. 9. 13th edit.

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(*The assignment*) The dowress holds of the heir; but by the institution of law she is in of the estate of her husband; so that after the heir's assignment, she holds by an infeudation from the immediate death of her husband. Hence it is, that dower defeats descent, because the land cannot be said to descend as demesne which are in tenure; and the assignment of dower being the nature of infeudation, and taking place immediately from the death of the husband, there are only two-thirds which descended as demesne. Gilb. on Dower, 395.

(*It is a rule*) Sty. 276. According to the latter reporter, a special verdict found, that the heir said to the widow thus. viz. *I do endow you of a third part of all the lands my cousin* J. S. *your husband died seised of*, Roll, C. J. to which Nicholas and Ask, justices, agreed, held, that it may be assigned generally of the third part in some cases, and the parties may agree against common right, and that here both parties agreed to take dower in this manner; but Jermain contra. But *per* Roll, C. J. if the sheriff assigns dower, and does it not *per metas et bundas*, it is error, for it might have been so assigned; and where a feme cannot be endowed *per metas et bundas*, she may enter without assignment.

(E) Wh

(E) Where the Wife shall have her Election to be endowed of one Thing or another, and where of both: And herein of Endowment *de novo*, and the *Dos de Dote*.

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Lands, subject to a title of dower, were devised to a person in fee who died leaving a widow; this widow sued for her dower, and recovered a third part of the whole without any regard to the title of dower in the widow of the testator, who did not put her claim in suit: it was holden by the court, that the testator's widow not having recovered her dower, it was to be laid out of the case, and the dower of the devisee's widow was not *therefore* to be looked upon as *dos de dote*. Hilchins v. Hilchins, 2 Vern. 403.

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(*One devises*) A better reason than this is, that the whole of a will concerning lands must be in writing, and no averment ought to be taken out of the words of the will. 4 Co 4. a. Moore, in the case referred to, expressly states that this second reason was disallowed, and such devise holden a bar of dower by two judges, Weston and Bowles against Dyer, J.

(*A man marries*) See *acc.* Lawrence v. Lawrence, 2 Vern. 365. 1 Eq. Ca. Abr. 218. 2 Freem. Rep. 234. 1 Br. P. C. 591. Lemon v. Lemon, Vin. Abr. tit. Devise, (T. c.) pl. 45. Hitchin v. Hitchin, Pr. Ch. 133. Galton v. Hancock. 2 Atk. 427. Tinney v. Tinney, 3 Atk. 8. Incledon v. Northcote, *id.* 436. Ayres v. Willis, 1 Vez. 230. Charles v. Andrews, 1 Mod. 152. Broughton v. Errington, 7 Br. P. C. 12. Pitt v. Snowden, 1 Br. Ch. Rep. 292. Pearson v. Pearson, *id. ibid.* However, notwithstanding these cases, devises have been frequently deemed a satisfaction of dower, where the will has been silent, on account of strong and special circumstances; as, where allowing the wife to take a double provision would be inconsistent with the dispositions of the will. Arnold v. Kempstead, Ambl. 466. and 1 Br. Ch. Rep. 292. Villa Real v. Lord Galway, Ambl. 682. and 1 Br. Ch. Rep. *ubi supr.* Jones v. Collier, Ambl. 730. Wake v. Wake, 3 Br. Ch. Rep. 255. Boynton v. Boynton, 1 Br. Ch. Rep. 445. In such case the widow must make her election.. But she shall not be put to this election, unless there be a declaration plain, or a clear incontrovertible result from the will that the testator meant that she should not take both. Foster v. Cook, 3 Br. Ch. Rep. 347. French v. Davies, 2 Vez. jun. 572. Nor shall she in any case be obliged to make her election till the account be taken, and it appear out of what estates she is dowable, Boynton v. Boynton, *ubi supr.* nor will she be precluded from claiming it by accepting of an annuity for three years under the will, she during that time claiming both her dower and the annuity. Wake v. Wake, *ubi supr.*

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(*Or to elopement*) Nor is a jointure now forfeitable by elopement or adultery. Sidney v Sidney, 1 P. Wms. 268. Neither will the circumstance of a wife's living separate from her husband in adultery prevent a court of equity from decreeing a specifick execution of articles in her favour. Hunt v. Winter, in Canc. July 19, 1781.

(F) Of the Proceedings and Damages in Dower. *unde nihil habet.*

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(*Damages must*) But the statute is express that the widow shall have her damages, viz. *valorem dotis si contingentis a tempore mortis viri sui*, and in a modern case, which underwent a great deal of discussion, damages were awarded her from the death of her husband, though she had stopped bringing her writ of dower for above two years. Dobson v. Dobson, Ca. temp. Hardw. 1 Barnard, K. B. 180. 207. 443. S C. In that case, however, it is to be observed, the tenant might plead *tout temps prist.* And though he plead such plea, yet the widow shall recover damages from the teste of the original to the execution of the writ of entry. *Vide* cases *supr.* and Bull. N. Pr. 117.

Upon the execution of a writ of inquiry in an action of dower *unde nihil* had, the jury assessed damages to the amount of the third part of the Penrice v. Penrice, Barnes, 234.

value

value of the land, from the death of the husband to the day of the inq
sition, without making any deduction for land-tax, repairs, or chief rent
The inquisition was set aside, the court being of opinion, that as there a
in a writ of dower *unde nihil habet* the words *ultra repriſas*, a deducti
ought to have been made for land-tax, repairs, and chief rents; and th
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If the heir sell to *J. S.* and the widow recover her dower against h he must pay the whole mesne profits from the death of the husb though he have not himself been half the time in possession: she is enti by the statute, and can recover only against the tenant.

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...eſne profits and damages, and alſo for coſts of ſuit.

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(K) Of the Admeaſurement of Dower.

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to the plaintiff. At the trial, only one instance of a lease by licence w given in evidence; whereupon it was insisted for the defendant, t widow, that there being no special custom to let by lease, the only way transferring the copyhold was by surrender. And therefore in this c if the estate of *H.* the husband was not determined according to t custom of the manor, he must be deemed to have died seised of the co hold, and the widow still entitled to her free-bench. But the court s that here, the right of the husband was confined to such estate as he sh *die seised of*; consequently, as between lord and tenant, they might de the wife's estate when they pleased.

DURESS.

(A) For what Nuress or Degree of Restra or Terror, a Man shall avoid his Deed or C tract.

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(*Also by a rule*) The same rule obtains in B. R. See tit. Attorney, vol. 1. 298.

But even in that case, if the party had been prevailed upon to confess a judgment for than was really due, the court would relieve. Cowp. 281.

(B) On whom and by whom the Duress must committed.

(*The duress*) Wayne v. Sands, Freem. 351. *acc.*

(*But* (g) *a son*) But *per* Twisden, J. a man shall in no case avoid his deed by a duress to ther, let him be related how he will. Freem. 351.

EJECTMENT.

(K) Where a Court of Equity will interpose Injunction.

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(A) Of the Nature of the Action, and Ano Manner of Proceeding in Ejectment.

10 Mod. 177. 1 Burr. 119. 21 Ja. 1. c. 16.

IT is also a *possessory* action, grounded on a *right* to the possess the premises in question between the parties. It is always nec therefore for the plaintiff to shew that his lessor had a right to ent proving a possession within twenty years, or accounting for the want under some of the exceptions allowed by the statute.

(*But the concluding*) This method appears to have been settled as early as the reign of Edw. In 7 E. 4. 6. *per* Fairfax, *si home port ejectione firmæ, le plaintiff recovera ſon terme qui eſt arrere lion come en quare ejecit infra terminum; et, ſi nul ſoit arrere, donques tout in damages.* Bro. Abr. 1. *quare ejecit infra terminum*, p. 6.

(*At this reſolution*) The practice of ſetting up a caſual ejector is ſaid by Keeling to have been introduced about the time of the troubles, 1 Keb. 705. but in truth it is of much earlier date. Burr. 1297.

(B) Of the Modern Manner of Commencing and Proceeding in Ejectment: And herein.

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(*According to the*) Which is the firſt proceſs. Roe v. Doe, Barnes, 173. It muſt be ſigned by the caſual ejector. Barnard. K. B. 43. or by the nominal plaintiff. 3 Term Rep. 351.

(*It hath been*) But by the modern practice, ſervice on the child or ſervant of the tenant is deemed good ſervice, provided it be made on the premiſes, and be afterwards acknowledged by the tenant or his wife. Barnes, 175, 176. 180. 188. 190. 192. 2 Wilſ. 263. and that, though it ſhould not clearly appear that the declaration came to the hands of the tenant before the eſſoign day of the term. 1 H. Bl. 644. Barnes, 183. The ſervice, if made perſonally on the tenant himſelf, need not be on the premiſes. 2 Str 1064. But if the tenant abſcond, or keep out of the way, to avoid being ſerved, it is uſual to ſerve a declaration on ſome perſon reſiding at his houſe, or if that cannot be done, to affix the ſame upon the door; and then, on an affidavit of the circumſtances, to move the court for a rule upon the tenant, to ſhew cauſe why ſuch ſervice ſhould not be deemed ſufficient: the court will preſcribe the mode of ſerving the rule, which is generally made abſolute on an affidavit of its ſervice. Sprightly v. Dunch, 2 Burr. 1265. Goodright v. Noright, 1 Bl. Rep 290. Fenn v. Denn, 2 Burr. 1181. Gulliver v. Wagſtaff, 1 Bl. Rep. 317.

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(*The affidavit*) Affidavit of ſervice on *A. B.* tenant, or *C.* his wife; or the wives of *A.* and *B.* who or one of them are tenants: neither ſufficient. Barnes, 173, 174.——The affidavit required, where the declaration is ſerved in purſuance of 4 Geo. 2. c. 28. is, in ſubſtance, as follows. "That the declaration was fixed on ſuch a place, being the moſt notorious part of the premiſes in queſtion (there being no perſon in poſſeſſion, on whom the declaration could be legally ſerved): that half a year's rent was then due from the tenant: that no ſufficient diſtreſs was to be found on the premiſes to anſwer the arrears then due: that the late tenant held ſuch premiſes by virtue of a leaſe from the leſſor of the plaintiff; and that therein is contained a clauſe of re-entry for non-payment of that rent." Caſ. Pr. C. P. 68.

In the King's Bench, if the premiſes are ſituate in *London* or *Middle-*ſex, and the notice requires the tenant to appear on the firſt day, or within the firſt four days of the next term, the plaintiff ſhould regularly move for judgment againſt the caſual ejector, in the beginning of the term; and then the tenant muſt appear within four days incluſive after the motion, or the plaintiff will be entitled to judgment. If, however, the motion be deferred till the latter end of the term, the court will order the tenant to appear in two or three days, and ſometimes immediately, that the plaintiff may proceed to trial at the ſittings after term; though if the motion be not made before the laſt four days of the term, the tenant need not appear until two days before the eſſoign day of the ſubſequent term. And ſhould the notice in ſuch caſe require the tenant to appear to the next term generally, the tenant has the whole of that term to appear in. Running-ton's Eject. 165.

In the Common Pleas, if the premiſes are ſituate in *London* or *Middle-*ſex, and the tenant has notice to appear in the beginning of the term, the plaintiff Reg. Tr. 32. Car. 2. C. B.

plaintiff cannot take any thing by his motion for judgment againſt the caſual ejector, for default of appearance, unleſs ſuch motion be made within *one week* next after the firſt day of every *Michaelmas* and *Eaſter* terms, and within four days next after the firſt of every *Hilary* and *Trinity*
Barnes, 178. terms. But it has been holden, that this rule does not extend to the caſe of a vacant poſſeſſion under 4 *Geo.* 2. *c.* 28.

In country cauſes, though the declaration be delivered before the eſſoign day of *Eaſter* or *Michaelmas* term, yet the tenant, in both courts, is allowed till four days after the next iſſuable (that is, *Hilary* or *Trinity*) term to appear, and if the cauſe ariſe in *Cumberland*, or in any other county where the aſſiſes are holden only once a year, the tenant is not compellable to appear till four days after the term preceding the aſſiſes.
1 Salk. 257. But in the King's Bench, the plaintiff muſt move for judgment the ſame term in which the tenant has notice to appear; though the practice is different in the Common Pleas, for there he may move for judgment at any
M. 31 Geo. 3. 4 Term Rep. 1. time during the next iſſuable term. By a late rule of the court of King's Bench, the clerk of the rules is, for the future, to keep a book, in which are to be entered all the rules which ſhall be delivered out in ejectments inſtead of that formerly kept, which contained a liſt of the ejectments moved. The entry is to ſpecify the number of the entry; the county in which the premiſes lie; the name of the nominal plaintiff; the *firſt* leſſee of the plaintiff, with the words "*and others*," if more than one; and also the name of the caſual ejector. And unleſs the rule for judgment be drawn up, and taken away from the office of the clerk of the rules within two days after the end of the term in which the ejectment ſhall be moved, no rule is to be drawn up, or entered, nor any proceeding had in ſuch ejectment.

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(*If on the trial*) And ſuch is the practice of the court of King's Bench. Doc. on the dem. of Lord Palmerſton v. Copeland, 2 Term Rep. 779. But in the court of Common Pleas, the plaintiff may, in this caſe, enter up judgment againſt the caſual ejector, and take out execution, *immediately* after trial. Throgmorton on the dem. of Fairfax v. Bentley, C. P. Hil. 6 Geo. 3. *Ibid.*

(*The court hath*) However, in a ſubſequent caſe, the term was enlarged without conſent from five to ten years. Oates v. Shepherd, 2 Str. 1272. And as the demiſe is now conſidered to be mere matter of form, the courts feel no difficulty in altering it, where the juſtice of the caſe requires it. Doe v. Pilkington, 4 Burr. 2447. Small v. Cole, 2 Burr. 1159. Goodright v. Strother, 2 Bl. Rep. 706. Roe v. Ellis, *Id.* 940. Vicars v. Haydon, Cowp. 841.

Doe v. Bayliſs, 6 Term Rep. 765. A declaration in ejectment may be ſerved on the wife, either on the premiſes, or at the huſband's houſe off the premiſes.

(*No* (*d*) *perſon*) Such, it ſeems, was the right of the landlord at common law: yet, by ſtat. 2 Geo. 2. c. 19. § 13. it is enacted, "that the landlord may, by leave of the court, make himſelf defendant with the tenant in poſſeſſion, in caſe he appear; and in caſe ſuch tenant ſhall refuſe or neglect to appear, judgment ſhall be ſigned againſt the caſual ejector. But if the landlord ſhall deſire to appear by himſelf, and conſent to enter into the like rule as the tenant, in caſe he had appeared, ought to have done, the court ſhall permit him" (as the court often did permit before the paſſing of this ſtatute, ſee the authorities collected in 3 Burr. 1290.) "ſo to do, and order a ſtay of execution upon ſuch judgment until further orders." And by the ſame ſtatute, § 12. "the tenant being ſerved with a declaration in ejectment muſt give notice thereof to the landlord, under the penalty of three years improved rent." This penalty, however, does not attach on the tenant of a mortgagor who omits to give notice of an ejectment brought by the mortgagee in order to enforce an attornment. Buckley v. Buckley, 1 Term Rep. 6

A lord, claiming by eſcheat, or it ſeems, a mortgagee, who is out of poſſeſſion, (though as to the latter it hath been holden otherwiſe formerly, Jones v. Williams, Barnes, 194.) may be admitted to defend. Fairclaim v. Shamtitle, 3 Burr. 1299. So, the immediate heir of the perſon laſt ſeiſed, or remainder-man claiming under the ſame title with the original landlord. Hebblethwaite v. Roe, 3 Term Rep. 783. n.; or, a deviſee in truſt, Lovelock v. Doncaſter, 4 Term Rep. 122; though they have never been in poſſeſſion. But if the perſon who wiſhes to defend, be neither tenant, nor *actual* landlord, but have ſome intereſt to ſuſtain, he muſt move the court, on an affidavit of the fact, to be made defendant inſtead of, or with the caſual ejector, which may now be done without the conſent of the tenant. Sty. 368. 3 Burr. 1290. And ſuch *new* defendant may give a rule to reply, and *non pros.* the plaintiff, but cannot have coſts. Ward v. Shuttle, 2 Rep. 760. And in no event will it be permitted to a leſſee to defend *alone* againſt his landlord, or thoſe who claim under him on a ſuppoſed defect of title. Driver v. Lawrence, 2 Bl. Rep. 1259.

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(*In ejectment*) The practice in this caſe is now to proceed againſt the one who does appear, and to enter a verdict againſt the other, indorſing on the *poſtea* the cauſe of ſuch verdict, which as to the defendant entitles the plaintiff to judgment againſt the caſual ejector. Claxmore v. Searl, 1 Ld. Raym. 729. Thruſtout v. Foot, Barnes, 149. Ellis v. Knowles, *Id.* 174.

But where ſeveral ejectments are brought for the *ſame premiſes*, upon the *ſame demiſe*, the court on motion, or a judge at his chambers, will order them to be conſolidated. Grimſtone v. Burgers, Barnes, 176.

No perſon can be admitted to defend in ejectment without confeſſing leaſe, entry, and *ouſter*. In the caſe of tenants in common, where no actual ouſter is admitted, they may confeſs it under a ſpecial order of the court, that it ſhall be without prejudice. Doe v. Roe, Anſtr. 86.

(*The parties*) If a verdict be given for the defendant, or the plaintiff be nonſuited for any other cauſe than the want of confeſſion of leaſe, &c. the defendant muſt tax his coſts on the *poſtea*, in other actions; and ſue out a *capias ad ſatisfaciendum* for the ſame againſt the plaintiff, which muſt ſhew, under ſeal, to the plaintiff's leſſor, and at the ſame time ſerve him with a copy of the conſent-rule; and if the leſſor, being required, refuſe to pay the coſts, the court, on motion, will grant an attachment againſt him. Tilly v. Baily, M. 6 G. 2.—If the leſſor of the plaintiff die before the commiſſion-day of the aſſiſes, and the plaintiff be afterwards nonſuited, becauſe the defendant did not confeſs leaſe, &c. the executor of the leſſor of the plaintiff is not entitled to coſts. Thruſtout v. Badwell, 2 Wilſ. 7. But if he die after the trial of the cauſe, the executor ſhall have the coſts, which had been taxed on the conſent-rule. Goodright v. Holman, Barnes, 119.—If the tenant appear, confeſs leaſe, &c. and a verdict be given againſt him at the trial, the judgment thereupon is entered againſt the tenant, on which the plaintiff may take out execution, as in ordinary caſes; for this is not a caſe provided for by the rule. Manningt. 415.

(*If an infant*) Ca. temp. Hardw. 56. 1 Wilſ. 130. Previouſly however, to any motion in court, enquiry ſhould be made, whether there be a real and ſubſtantial plaintiff or not? for on enquiry, the guardian may undertake to pay the coſts, in which caſe the court would probably refuſe to interpoſe. Cowp. 128.—It hath likewiſe been holden, that upon the death of the plaintiff's leſſor, proceedings may be ſtayed, till the plaintiff ſhall have given the defendant ſecurity for his coſts.—Eaſt v. Nonelly, Barnes, 147. Thruſtont v. Grey, 2 Str. 1046. So, where an ejectment was brought on the demiſe of a perſon reſiding at Antigua, Cuſack v. Jones, 35 G. 3. B. R.; and in another caſe, where the leſſor of the plaintiff reſided in Ireland, the plaintiff was compelled to give the defendant a ſimilar ſecurity. Denn v. Fulford, 2 Burr. 1177. In he latter caſe, the ejectment was brought under the direction of the court of Chancery, where the bill was retained till after trial of the ejectment, and ſecurity had been there given to the amount of 40*l.* But excepting ſuch inſtances, and that of a former ejectment, the court will not compel the leſſor of the plaintiff to give ſecurity for the coſts. Doe v. Alſton, 1 Term Rep. 491.

(C) In what Caſe the Ancient Form is ſtill to be adhered to.

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(*Where the*) But a very little matter is ſufficient to retain the poſſeſſion; and therefore where the tenant had left ſome beer in the cellar, and the landlord proceeded as on a vacant poſſeſſion, the judgment was ſet aſide. Savage v. Dent, 2 Str. 1064.

(*It*

(*It has been*) And the law is the same before verdict; for in Farley on the demise of the Mayor, &c. of Canterbury v. Wood, Kent Summ. Ass. 1794, where the declaration stated the lease to have been made to the plaintiff under the common seal of the corporation; it was objected that the lease ought to be proved; but Lord Kenyon said, that by the common rule and appearance the lease was admitted as stated. Runningt. 150. If a corporation be aggregate of many, they may set forth the demise in the declaration without mentioning the christian names of those who constitute the corporation; but if the corporation be sole, the name of baptism must be inserted; because in the former case, the name wholly consists in its character; in the latter, in the individual person; therefore, there cannot be a sufficient specification of that person without mentioning his name. Dy. 86.

(*Another instance*) But there seems to be no necessity for so doing, even in this case; inasmuch as by the common rule, according to the modern practice, the lease would, of course, be admitted: and though there be several defendants, yet each appears and defends only for such part of the premises as is in his possession. Runningt. 151.

(D) Of the Declaration in Ejectment: And herein

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(*An ejectment*) But for common appendant or appurtenant ejectment will lie, because the sheriff may give possession of such common, by giving possession of the land to which it belongs. Newman v. Holdmyfast, Str. 54. Andr. 107. So, it will lie for so many acres of lands with common of pasture, *cum pertinentiis*. Baker v. Roe, Ca. temp. Hardw. 127.

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(*So an ejectment does*) And in the case of the King v. Old Alresford, 1 Term Rep. 364. Ashhurst, J. is reported to have said, "there is no doubt but that a fishery is a tenement. Trespass "will lie for an injury to it, and it may be recovered in ejectment."

(*So an ejectment lies* (*a*) But see Rex v. Piddlerenthide, 3 Term Rep. 772. Rex v. Tolpuddle, 4 Term Rep. 671. Bunt v. Moore, 5 Term Rep. 329.

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(*It was formerly*) In an ejectment for a chapel and lands in Hampstead, the court refused to make the chaplain a defendant, *quoad* his right of entry into the chapel to perform divine service. Martin v. Davis, 2 Str. 914. 2 Barnard. K. B. 27 —In the case of *the King* v. *Bishop of London*, it was said (*in argument*), that an ejectment would lie for a prebendal stall, after collation or admittance; for then it becomes a freehold. 1 Wils. 14.

(*In this action*) At this day, however, the practice is otherwise. The sheriff, *now*, delivers possession according to the direction of the plaintiff, who therein acts at his peril. The plaintiff himself must *now shew* the sheriff that which under the writ he is to deliver possession of; and to take possession, at his peril, *only* of what he has title to; for if he takes more than he has recovered, and proved title to, the court will, in a summary way, set it right. 1 Burr. 6[illegible] 5 Burr. 2673.

So, it will lie for *alder car*; a well-known term in Norfolk for land covered with alders. Barnes v. Peterson, 2 Str. 1063. So, for a *beast-gate*, a provincial term in Suffolk, importing [illegible] and common for one beast. Bennington v. Goodtitle, *id.* 1083. Andr. 106. S. C. So, for a *cattle-gate*, a Yorkshire term, said to be synonymous with beast-gate. Metcalf v. Roe, Ca. temp. Hardw. 106. 1 Term Rep. 137.

(*But the judges*) But in Sty. 194. Roll, C. J. said, that an ejectment would lie in this case, and according to positive law (4 & 5 Ann. c. 16. § 3. 3 Geo. 2. c. 25. § 14.) and modern practice a view may (on motion in the usual manner) be had of the *locus in quo* in ejectment, as well as in the ancient assise, or any other action.

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(*So an ejectment*) So, an ejectment for part of an house in *A.* hath been adjudged to be well enough. Sullivaine v. Seagrave, 2 Str. 795. Rawson v. Maynard, Cro. Eliz. 286.

(*But an ejectment for a close*) Coup. 349.

(*An ejectment*) So, in modern times, it hath been holden, that it will lie for fifty acres of furze and heath, and fifty acres of moor and marsh. Connor v. West, 5 Burr. 2672.

(*An ejectment de uno*) Barnes, 173. 2 Str. 834. 3 Wilſ. 23.
After verdict an ejectment for a meſſuage *and* tenement hath been holden good. Doe v. Denton, Term Rep. 11.

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(*An ejectment for one hundred*) So, it will lie for mountain in Ireland, becauſe there, the word "mountain" is rather deſcriptive of the quality, than of the ſituation of the land. Lord Kildare v. Fiſher, 1 Str. 71. So, for a "quarter" of land in Ireland; for it may be a term as well known there as mountain is; and that the courts will intend. 1 Burr. 623. 627. 629. 630. Cowp. 348. So, "20 *villis et terris*" in Ireland. 2 Keb. 745. 1 Burr. 627. In the caſe of Cuningham v. King, 1 Burr. 623. the following deſcription was holden to be ſufficient on *writ of error*, after judgment in the Common Pleas, affirmed by the King's Bench in Ireland; viz. 1000 meſſuages, 5000 cottages, 10,000 acres of land, &c. in all thoſe the lordſhips, manors, and late diſſolved abbey or monaſtery of Boyle and Inſemacranaw, and quarter of land of Tallagh, with the town and tenement of Boyle, and fairs and markets thereunto belonging, in the county of Roſcommon: and all thoſe the lands and hereditaments called Grangemore, and part of Sumternat, &c. a large deer-park, &c. and the parſonage of Longford, &c. in the county of Roſcommon; and a ſmall park or field in the poſſeſſion of, &c." This caſe was after verdict; and after verdict, an ejectment may be preſumed to have been brought for ſuch things *only* of which it will lie, 1 Str. 54.

(*An ejectment was*) In this caſe of Savile v. Borlace, Dom. Proc. 1735, it was decided, that *ſcilicet* was no objection in ejectment. 1 Burr. 626. 630. See too Harebotle v. Placock, Cro. Jac. 21.

An ejectment will lie for part of a highway; for though the publick have a right to paſs over it, yet the freehold and all the profits belong to the owner of the ſoil, ſubject to the publick ſervitude or eaſement attached to it. But it muſt be deſcribed as *land*; and though it be built on, ſuch a deſcription will be ſufficient. Goodtitle v. Alker, 1 Burr. 133.

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(*Alſo by the ſtatute*) Twenty years adverſe poſſeſſion is not only a negative bar to the action or remedy of the plaintiff, but takes away his right of poſſeſſion, and gives a poſitive title to the defendant: for the plaintiff muſt ſhew a right of *poſſeſſion* as well as of property; and therefore, the defendant need not plead the ſtatute of limitations, as in other caſes. 1 Burr. 119. And by Holt, C. J. "a poſſeſſion for twenty years is like a deſcent which *tolls* entry," and gives a right "of poſſeſſion which is ſufficient to maintain an ejectment:" as where *A.* had the poſſeſſion of lands for twenty years without interruption; *B.* then acquired the poſſeſſion, on which *A.* was put to his ejectment: here, though *A.* was plaintiff yet his poſſeſſion for twenty years was deemed a good title, and he recovered accordingly. Stokes v. Berry, 2 Salk. 421. For, if no other title appears, a clear undiſturbed poſſeſſion for twenty years, is evidence of a fee. Cowp. 357.

(*If a rent*) Under a proviſo of this kind, the grantee muſt make his entry during the term, for the proviſo operates no longer than the term continues. Johns v. Whitley, 3 Wilſ. 127. To avoid a fine, levied *with proclamations*, (though it is otherwiſe in the caſe of a fine at *common* law, Jenkins v. Prichard, 2 Wilſ. 45.) there muſt be an actual entry, and the action muſt be commenced within a year *afterwards*, and the demiſe muſt be laid ſubſequent to the entry. Oates v. Brydon, 3 Burr. 1897. Berrington v. Parkhurſt, 2 Str. 1086. 4 Br. P. C. 353. In all other caſes, Lord Mansfield ſaid, the confeſſion of leaſe, entry, and ouſter is ſufficient, 3 Burr. 1897. And in the caſe of Goodright v. Cator, Dougl 483. it was ruled not to be neceſſary to take advantage, by ejectment, of the uſual clauſe in a leaſe, to re enter for non-payment of rent. However, the reporter of this laſt caſe, hints a doubt, whether *actual* entry be not alſo neceſſary to prevent the operation of the ſtatute of limitations, 21 J. 1. c. 16.; and after citing Bull. N. P. 102 ſays, "ſo held on a trial at bar in Ford v. Grey, unleſs there be ſome ſpecial reaſon to the "contrary." H. 2 Ann. B. R. 1 Salk. 285. *Actual* entry is alſo neceſſary (as the ſame reporter ſtates) to enable a perſon who has recovered in ejectment, to maintain treſpaſs for the meſne profits, againſt one who was occupier when the title accrued, but not at the time of the ejectment. Bull. Ni. Pri. 87.

But if a man enter on the premiſes, on behalf of the leſſor of the plaintiff, though without any previous authority for that purpoſe, and the leſſor afterwards aſſent to the entry, before the day of the demiſe laid in the declaration, ſuch *aſſent* will be equal to an actual entry, and need not be either by deed or in writing. Fitchet v. Adams, 2 Str. 1128.

(*But if the*) As the leaſe is now conſidered as a fiction, theſe caſes cannot have much (if any) weight at preſent.

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(If the plaintiff) Heatherley v. Weſton, 2 Wilſ. 232. acc.

Yet in the old caſe of Milner v. Robinſon, Moor, 682. it was allowed a good exception to the declaration, that the plaintiff declared that two coparceners *demiſerunt*. Heretofore, to avoid difficulty in ſuch caſes, the way was for coparceners, joint-tenants, and tenants in common to join in a leaſe to a third perſon, and for that leſſee to make a leaſe, after the ancient courſe, to try the title.

Right v. Proctor, 4 Burr. 2208.

A plaintiff cannot recover *againſt* his own covenant; and a licence to inhabit amounts to a leaſe.

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(A leaſe made) But a leaſe made by the *teſtamentary* guardian of an infant is void. Parry v. Hodgſon, 2 Wilſ. 129. 135. And if the leſſor of the plaintiff claim title as guardian in *ſocage*, he may be called upon to prove that the infant is not *fourteen* years of age. 1 Bl. Com. 461. 5 Term Rep. 471.—It has been long ſettled, that an infant himſelf may make a leaſe without rent to try his title. 3 Burr. 1806. 2 Term Rep. 161. 5 Br. P. C. 570.

Cro. Jac. 322.

(A man may) But it was not neceſſary, that the huſband and wife ſhould join in a leaſe to try the title to her eſtate; he alone might make a leaſe for that purpoſe.

Cro. Eliz. 469. 535. Owen, 18. Latch. 199. Hard. 330. 1 Lutw. 803.

A copyholder may declare on a leaſe for any number of years without forfeiture: and the leſſee of a copyholder for a year, may ſuſtain an ejectment; for his eſtate is warranted by law, and it is the moſt eaſy way for him to recover the poſſeſſion. Co. Lit. 398. a. 4. Co. 26. a.

Doe v. Staple, 2 Term Rep. 684. (*a*) Goodtitle v. Way 1 Term Rep. 735.

In ejectment, the plaintiff muſt recover on a *legal* title. Therefore (*a*), the truſtee of a term for the benefit of creditors, not having notice of an agreement for a leaſe made previous to the grant of a term, has been permitted to maintain an ejectment againſt the tenant in poſſeſſion under the agreement: for the title of the tenant, being only a doubtful equity, cannot be ſet up againſt the legal title of the truſtee.

Roe v. Lowe, 1 H. Bl. 446.

So, it *ſeems* to have been determined, that if an *equitable* tenant in tail grant a leaſe for a long term, under ſuſpicious circumſtances of fraud or impoſition, it will not prevent truſtees, in whom the legal eſtate is veſted, from recovering in ejectment againſt the leſſee. And in conformity with

England v. Slade, 4 Term Rep. 682.

the principle laid down, the tenant, againſt whom his landlord had brought an ejectment, was deemed competent to ſhew that the title of the latter had expired; conſequently, that he had no legal right to turn him out of poſſeſſion.

Denn v. Sybourn, 7 Term Rep. 2. Goodtitle v. Jones, *Id.* 47.

In all caſes where truſtees ought to convey to the beneficial owner of the eſtate, a jury may preſume a term ſurrendered to him. But, if ſuch a ſurrender be not preſumed by the jury, and it appear to the court on the face of a ſpecial verdict that the term, though ſatisfied, is ſtill outſtanding in a truſtee, ſuch an eſtate in the truſtee muſt prevail at law.

(E) Of the Plea and General Iſſue in Ejectment.

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(THE general rule) And that he claimed within twenty years after he came of age, *&c.*, for every plaintiff in ejectment muſt ſhew a right 1 Burr. 119. of *poſſeſſion*, as well as of property; and therefore the defendant need not plead the ſtatute of limitations, as in other actions.

(Aſſured is a) But this cannot be pleaded without leave of the court and affidavit. 3 Wilſ. 51. 1 Burr. 1046.

(F) Of

(F) Of the Verdict and Judgment in Ejectment.

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(If one of the) This latter part of the judgment hath been holden to be unneceſſary; becauſe ſuggeſting the death, it is awarded by the court, "that further proceedings ſhall ſtay againſt the perſon deceaſed." 1 Burr. 363.

(G) Of the Writ of Execution: And herein,

1. Of the Time when the Writ is to be ſued.

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But if execution be taken out within, and continued beyond, the year, there is not neceſſity for a *ſcire facias*. No preſumption can then ariſe, that the plaintiff hath releaſed the execution; becauſe, having been duly taken out, it may be owing to the neglect of the ſheriff that it was not executed. 2 Inſt. 471. 2 Leon. 77. Runningt. Eject. 429.

If the plaintiff die within the year and a day, his executors cannot take out execution without a *ſcire facias*; for they are not parties to the judgment: though if execution has been regularly ſued out in the lifetime of the plaintiff, the ſheriff may execute it after his death; becauſe the authority is from the court, and not from the party. The writ of poſſeſſion has relation to its *teſte*; therefore, though it be not actually ſued out till after the death of the leſſor of the plaintiff, yet if it be *teſted* before his death, it is good. Runningt. *ibid.* 14 H. 7. 16. Doe v. Roe, 4 Burr. 1970.

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(If the) Which, it ſeems, cannot be done in the caſe of a writ of error, becauſe that removes the record out of the court where judgment is given; and therefore there can be no proceedings below, till it be affirmed and returned to the inferior court.

Tenant for years had judgment in ejectment: the term incurred: then brought a *ſcire facias quare executionem habere non debet of the land*, and damages and coſts. The defendant demurred. It was holden by the court, that though the defendant might have a *ſcire facias* for the damages and coſts, yet this being for the term likewiſe, which was incurred, it was held a new *ſcire facias* ought to iſſue. It was afterwards argued by *Holt*, that the *ſcire facias* was good for the damages; but the court thought otherwiſe, and a new *ſcire facias* was granted. Sedgwick v. Goſton. Skin. 161.

2. How the Writ is to be executed.

Execution ſhould be iſſued according to the right and juſtice of what is really recovered, the plaintiff muſt be careful not to take out execution for more than he had right to recover. And that the ſheriff may not labour under any difficulty in executing the writ of poſſeſſion, the law now is, (different indeed from what it was formerly,) for the ſheriff himſelf not only to point out to the ſheriff that which, in execution of the writ, he is to deliver him poſſeſſion of; but to take poſſeſſion, at his peril, of only that which he has title to: for ſhould he take poſſeſſion of more than he has recovered and proved title to, the court will, in a ſummary way, interpoſe and ſet it right. 1 Burr. 366. Runningt. Eject. 432. 1 Burr. 629. 5 Burr. 2673. 3 Wilſ. 49.

(If

(*If the plaintiff*) 1. Roll. Abr. 886.

(*If the Sheriff*) *Qu.* Whether the courts would not now hold it to be a full execution of th writ.

(*Where the recovery*) 1 Burr. 629. 5 Burr. 2673.

3. How the Plaintiff is to be quieted, and what Relief he has when h Poſſeſſion is diſturbed.

2 Bl. Rep. 892. But in the caſe of a tenant, (who cannot be conſidered as a me ſtranger,) it is otherwiſe. As in *Davis* v. *Doe*, an attachment was grante and that abſolute, in the firſt inſtance, againſt the tenant in poſſeſſion, o an affidavit that he had been ſerved with a rule of court, (which had be made abſolute,) for delivering up the poſſeſſion, and had refuſed ſo to do

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(*The plaintiff*) This deciſion is not entitled to much, if to any attention. For in the c ſtated, nothing can be more evident than that the execution was iſſued contrary to *good faith*; a whenever that appears, the court, in the conſcientious exerciſe of its ſummary juriſdiction, w interpoſe and correct it. Runningt. Eject 437. Yet according to the modern practice, if t truth be manifeſted to the court by affidavit, the party may obtain relief from its ſummary ju diction.

(H) Of the Meſne Profits, and how to be recovered.

3 Wilſ. 128. 2 Burr. 688. 3 Term Rep. 17. 547. It ſeems certain, that the plaintiff may recover the whole meſne profits in the ejectment; and that is apparent from 16 & 17 Car. 2. which enacts, that in caſe the judgment be affirmed on the writ of error, the court may award a writ of inquiry as well of the meſne profits, as of the dam by any waſte committed after the firſt judgment. Perhaps it may be anſwered, that the will take notice that the proceedings in ejectment are merely fictitious, and only to enabl plaintiff to get poſſeſſion, and that it is never uſual to recover more than ſmall damages fo ouſter, without any conſideration had of the meſne profits. And it is certain the courts d quently take that into conſideration; otherwiſe the leſſor would not be entitled to recover for the time laid in the declaration, ſince, by his own ſhewing, his leſſee, and not himſelf entitled to the action. But if the plaintiff were, upon the judgment in the ejectment affirmed in error, to have a writ of inquiry, it would probably, if rightly pleaded, preven from recovering any thing in a ſubſequent action of treſpaſs; and therefore, if the demiſe laid any time back, it would be adviſeable for the plaintiff in ejectment to take (as he may)

(*ALTHOUGH*) Indeed, the action of ejectment, as now conducted altogether a mere fiction, brought by a *nominal* plaintiff againſt a *nominal* fendant, for a *ſuppoſed* ouſter, and of courſe for mere *nominal* damages. T object at this day propoſed to be recovered by it is quite changed from w it was in its original ſtate; for, as formerly, damages only were recover by it, and not the term; ſo now the term only is ſought for by it, and not mages. For a ſatisfaction in damages, therefore, a ſubſequent action i be brought, which ſubſequent action is in *form*, an action of treſpaſs, *armis*, but in *effect* to recover the rents and profits of the eſtate. It *form* an action of treſpaſs, becauſe it is conſequent and as it were, ſup mental to the action of ejectment, and therefore muſt neceſſarily be of ſame ſpecies with it. It may be brought by the leſſor of the plaintif his own name, or in the name of the nominal leſſee; but in either ſha is equally his action; for it is not in any manner affected by the fictio the ejectment. And it may be brought in the name of the nominal leſſe well where the judgment is by default, as where it is upon a verdict; there is no diſtinction betweeen judgment by a default, and upon verd in the one, the right of the plaintiff is tried and determined againſt defendant; in the other, it is confeſſed.

ment for his coſts on the writ of error, without having any writ of inquiry. Bull. Ni. Pri. 88. In Traherne v. Greſſingham, Barnes, 87. it is ſaid by the court, that the actions for meſne profits (which are grown very faſhionable) tend to create double expence: that the plaintiff ſhould be ready at the trial of the ejectment to prove his damages, which may be recovered in that action, without bringing a ſecond for meſne profits. But it was formerly thought, that *antecedent* profits were not recoverable at law; and therefore it was uſual for the plaintiff to go into equity for an account of the meſne profits. 1 Vern. 105. 3. Wilſ. 118. 2 Burr. 688. 3 Term Rep. 17. 547.

If the action be in the name of the nominal plaintiff, the court, upon application, will ſtay the ſuit, till ſecurity be given for anſwering the coſts: and if ſuch a plaintiff releaſe the action, his releaſe will be ſet aſide, as a contempt of court. Runningt. Eject. 439. Skin. 247. Salk. 260.

It was formerly holden, that if the action for meſne profits were brought in the name of the leſſor of the plaintiff, or after a judgment by default, the defendant in ſuch action was at liberty to controvert the plaintiff's title, the leſſor of the plaintiff in the one caſe, and the tenant, who had never appeared, in the other caſe, being no parties to the record, and therefore no eſtoppel ariſing either againſt, or in favour of either of them. But it is now ſettled, that after a recovery in ejectment, the tenant is eſtopped from controverting the title in a ſubſequent action for meſne profits; provided the plaintiff proceed only for thoſe profits from the time of the ouſter complained of in the ejectment: but if he proceed for *antecedent* profits, he muſt prove his title to the premiſes whence they aroſe, to ſhew his right to receive them. Lill. Pr. Reg. 499. 2 Str. 960. Dacoſta v. Atkins, Hil. 4 G. 2. Bull. Ni. Pri. 87. 2 Burr. 688. Barnes, 472.

Hence it ſhould ſeem, that in order to prove the plaintiff's title in an action for the meſne profits, it is only neceſſary to produce the judgment in ejectment; and ſo is the practice, where the judgment is after verdict: but after judgment by default, the practice is different: then, it is uſual not only to produce the judgment, but alſo to prove a writ of poſſeſſion executed. This latter proof, however, does not ſeem to be neceſſary; for if the tenant be concluded by the judgment in ejectment from controverting the plaintiff's title, he is, conſequently, concluded from controverting his poſſeſſion, becauſe poſſeſſion is part of his title. Bull. Ni. Pri. 87. Runningt. Eject. 442.

But if this action be brought againſt a precedent occupier, the judgment in ejectment is no evidence againſt him; and therefore in ſuch caſe, it is neceſſary for the plaintiff to prove his title, and alſo an actual entry; for treſpaſs being a poſſeſſory action cannot be maintained without it. But it may admit of doubt what proof of an actual entry will be ſufficient. It has been ſaid, that the plaintiff will be entitled to recover the meſne profits only from the time he can prove himſelf to have been in actual poſſeſſion; and therefore, if a man make his will and die, the deviſee will not be entitled to the profits till he has made an actual entry. Others have holden, that when once he has made an actual entry, that will have relation to the time his title accrued, ſo as to entitle him to recover the meſne profits from that time, and they rely on the caſe in 1 *Sid.* 239. which was treſpaſs brought for the meſne profits *devant le leaſe*, and nothing ſaid in the caſe about proving an actual entry antecedent to it. They ſay too, that if the law were not ſo, the courts would never have ſuffered plaintiffs in ejectments to lay their demiſes back in the manner they now do, and by that means entitle themſelves to profits they would not otherwiſe be entitled to. However, ſuppoſing a ſubſequent entry has relation to the time the plaintiff's title accrued, yet certainly the defendant may plead the ſtatute of limitations, and by that means protect himſelf from all but the laſt ſix years. Bull. Pri. 87. Stanynough v. Couſins, Barnes, 456 1 Roll Abr. tit. Treſpaſs *per* Relation

In

3 Wilſ. 121. 2 Term Rep. 547. In this action the plaintiff muſt prove the value of the meſne profits for the judgment in ejectment does not prove any thing as to that. In eſtimating it, however, the jury are not confined to the mere rent of the premiſes; they may give *extra* damages, and after judgment by default, the coſts in ejectment are recoverable, and are therefore uſually declared for as damages, in the action for meſne profits.

Goodtitle v. North, Dougl. 584. Bankruptcy is no plea in bar to this action.

Birch v. Wright, 1 Term Rep. 386. A plaintiff may, if he pleaſes, wave the treſpaſs, and recover the meſne profits in an action for uſe and occupation. But in the action for uſe and occupation he cannot recover the profits any farther than to the time of the demiſe in the ejectment; for this action does not ſpring out of the ejectment as the action of treſpaſs does, but, when applied to the ſame thing, is totally inconſiſtent with it, this being founded on a contract, that on a tort; the one, the plaintiff ſays the defendant is his tenant, and therefore muſt pay him rent; in the other, he ſays he is no longer his tenant, and therefore muſt deliver him up the poſſeſſion.

(I) Of bringing a new or ſecond Ejectment.

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(IF a man has) But this diſtinction now no longer prevails; and the courts of *Weſtminſter Hall* conſider a former ejectment in *another* court in the ſame light, as a former *ejectment* in the *ſame* court, and will in either caſe

1 Salk. 255. Barnes 153. equally ſtay the proceedings in a new ejectment, till the coſts of a former be paid.

Doe v. Law 2 Bl. Rep. 1158. A former ejectment had been brought in the King's Bench, where the defendant, in *Hilary* term 13 *Geo.* 3., obtained a rule for coſts for not proceeding to trial, which were taxed at 85*l.* 8*d.* after which the cauſe was tried in the ſame term by a ſpecial jury, and a verdict for the defendant, and his coſts were taxed on the *poſtea* on the 11th *June* 1777, at 273*l.* 1[illegible] total 358*l.* 10*s.* 8*d.*; no part of which was paid. It was moved in C. B. to ſtay the proceedings in this cauſe till the coſts of the former were paid. For the plaintiff it was urged, that the application came too late. The declaration was delivered before the eſſoign-day of *Eaſter* term 177[illegible] Notice of trial was given for the ſittings after *Trinity* term, *viz.* the 19th of *June* 1777. The plaintiff had been at the expence of preparing for trial, and bringing his witneſſes to town; and the motion was not made till *Friday* the 13th of *June*. In ſupport of the motion it was alleged, that the cauſe was ſo clear at the laſt trial, and the parties had reſted ſo long that the defendant did not think them in earneſt till notice of trial was given. He then proceeded to tax his coſts in order to ground this application, which otherwiſe he would not have done, the leſſor of the plaintiff being inſolvent. The court, on conſidering all the circumſtances, made the rule abſolute.

Doe v Law, 2 B. Rep. 1180. An ejectment brought by the *fraudulent* aſſignee of an inſolvent was ſtayed, till the coſts of former ejectments, which had been brought by the debtor himſelf, were paid.

Smith v. Barnardiſton, 2 Bl. Rep. 904. Where there is manifeſt vexation and oppreſſion, the court will ſtay the proceedings in a ſecond ejectment, even though the leſſor of the plaintiff did not enter into a conſent-rule in the former cauſe.

But where the leſſor of the plaintiff was in cuſtody, under an attachment for non-payment of coſts in a former ejectment, and brought a new ejectment upon the ſame demiſe, the court refuſed to ſtay the proceedings therein, till the coſts of the former ſhould be paid. Benn v. Denn, Barnes, 180

Though the principle of this rule be founded in a ſuppoſed vexation of the party, yet, where a *defendant* againſt whom there had been a verdict in a former ejectment, afterwards brought an ejectment againſt the former plaintiff, the court would not ſtay the proceedings in the latter till after the coſts of the former ejectment were paid. Roberts v Cook, 4 Mod 379. But qu. whether the courts would not interpoſe, and conſiſtently with the principle ſtay the proceedings; for though both actions are not commenced by the ſame perſon, yet, in truth, it is equally vexatious to proceed in the latter, till the coſts of the former action be diſcharged? Runningt. Eject. 420.

Where a defendant in ejectment, pending a writ of error, brings a new action, the court will ſtay the proceedings on the ſecond ejectment, till the error is determined. So they will, pending a ſpecial verdict. 1 Salk. 259. Andr. 298.

If the defendant in a former ejectment, who was then evicted, bring another ejectment for the ſame premiſes, the court will ſtay the proceedings until he pay the coſts of the former cauſe. Thruſtout v. Holdfaſt, 6 Term Rep. 223.

So, the court will ſtay the proceedings in a ſecond ejectment until the coſts of a nonſuit in a former ejectment be paid, if it be brought on the ſame title, though it be for different lands in a different county, and all the defendants be not the ſame. Keene v. Angel, 6 Term Rep. 740.

The plaintiff muſt prove the defendant or defendants in poſſeſſion. Goodright v. Rich, Tr. 37G.3. B. R.

(K) Where a Court of Equity will interpoſe by Injunction.

WHERE in an ejectment the principal ſubject in diſpute is the locality of the lands of both the parties, which have been long holden together in the occupation of one perſon, a court of equity will not allow the leſſor of the plaintiff to take out his execution, ſo as to chooſe his own part of the lands. Hardcaſtle v. Shafts, Anſtr. 184.

Where lands are confuſed, and the plaintiff at law recovers on an indictment which ſtates the whole to be twenty-five acres, of which eighteen belonged to him, and in fact it appears that the whole are only twenty-one acres, he ſhall not be allowed to take out execution for eighteen, but muſt take proportionably. *Id. ibid.*

ELECTION.

(E) Where a party ſhall be put to his Election or not.

(A) In what Caſes an Election is given.

Where money is agreed by articles to be laid out in land, the party, who would have the ſole intereſt in the land, when bought, may elect to have the money paid to him, and that it ſhall not be laid out in land. Page 183 Benſon v. Benſon, 1 P. Wms. 129.

So,

Short v. Wood, 1 P. Wms. 471. Edwards v. Countess of Warwick, 2 P. Wms. 173. Oldham v. Hughes, 2 Atk. 453. Trafford v. Boehm, 3 Atk. 44 Cunningham v. Moody, 1 Ves. 176. Countess of Holderness v. Marquis of Caermarthen, Br. Ch. Rep. 377. *Contrà*, Eyre's case, 3 P. Wms. 13, and Mr. Onslow's case mentioned in th note to Eyre's case.

So, if the party being adult, could by fine levied acquire the entire inte rest in the lands when settled (as tenant in tail with the immediate remain der to himself in fee): but otherwise, if a recovery would be necessary as in case of a tenant in tail with remainder over.

Earlom v. Saunders, Ambl. 242. Carr v. Ellison, 2 Br. Ch. Rep. 56.

But this rule will not apply where an infant becomes so entitled; for a infant is incapable of making an election to vary the nature of his estate.

(B) To what Person: And herein of him that t to do the first Act.

(*It is laid*) Doug. 14, 15.

(C) Where the Election shall be said to continu or be determined.

Croft v. Pyke, 3 P. Wms. 183.

A. died indebted by one bond to *B.*, and by another bond to *C.*, a left *B.* and *J. S.* executors. *B.* intermeddled with the goods, a died before probate, and before any election made to retain. It was i fisted, but the point was afterwards waved, that as *B.* might have reta ed the goods in his hands, his executors had now the same power. How ver, in a preceding case, where *A.* lent money on bond to *B.* who dy

Weeks v. Gore, Mich. 1720, cited *ibid.*

intestate, *C.* took out administration to him, after which *C.* dying, *A.* to out administration *de bonis non &c.*, to *B.* it was determined (*inter al.*) t *A.* might, out of the assets of *B.*, retain for such bond-debt contracted fore he took out administration; and though *A.* happened to die bef he had made any election in what particular effects he would have property altered; yet the court said, it must be presumed he would el to have his own debt paid first, and this being presumed, there wo be no difficulty as to altering the property; for as the executors of were to account for the assets of *B.*, they must, on that account, ded the amount of the money lent by *B* to *A*.

Tyssen v. Benyon, 2 Br. Ch. Rep. 5.

By settlement, previous to the marriage of the plaintiffs *Samuel Ty* and *Sarah* his wife, bearing date 24th *September* 1799, *Francis T Tyssen* deceased, the plaintiff's father, agreed to convey certain lands other estates, and it being, among other parcels, recited, that cer farms, *&c.* at *Foulden* in *Norfolk*, were the rent of 550*l.* he coven before the end of twenty-four calendar months, to purchase lands in county of *Norfolk*, sufficient to make up with the farms at *Foulden*, sum of 500*l.* a year, and to convey the same to uses, or to convey o farms, *&c.* at *Hackney* in *Middlesex*, of sufficient value to make good much as the farms, *&c.* in *Norfolk*, should be deficient of 500*l.* a y By an indorsement on the deed (before the execution thereof) it agreed by the parties, that it should be at the option of *Francis T Tyssen*, within twenty-four calendar months after the marriage, either con

convey the lands according to the covenant, or to pay the truſtees 12,000*l.* to be laid out in the purchaſe of other lands to be ſettled to the like uſes; and in the mean time to be placed out at intereſt, and the intereſt to be received by the perſons entitled, according to their reſpective intereſts. The marriage took place, and there was no iſſue, except a daughter, who was one of the plaintiffs. *Francis John Tyſſen*, died 9th *September* 1781, having made his will, bearing date the day of his death, whereby he gave annuities charged upon his eſtates in *Middleſex*, *Eſſex*, *Norfolk*, and elſewhere, and gave and deviſed all his manors, &c., to truſtees for payment of debts and legacies, and for other purpoſes, and to allow the plaintiff *Samuel*, ſuch ſum of money yearly during his life, as they ſhould think proper, the remainder to accumulate during his life, and after his death to be laid out to certain uſes therein declared. The conveyance, covenanted to be made by the ſettlement, having never been made, or the money paid; the plaintiffs filed their bill, praying that *Francis John* might be declared to have made his election to pay the 12,000*l.* or that an election might now be made: and if the perſons intereſted ſhould elect to pay the 12,000*l.* it ſhould now be raiſed; and, if the election ſhould not be conſidered as having been made, and ſhould not be now made, that a proper part of the teſtator's eſtate in *Norfolk* ſhould be conveyed upon the truſts in the marriage articles. The plaintiffs, by the bill inſiſted, that *Francis John Tyſſen*, by the deviſe of the premiſes covenanted to be conveyed (included in the general deviſe,) had made his election to pay the 12,000*l.* and if not ſo, that the defendants by letters and acts ſtated in the bill, had made ſuch election. The heir at law and executors ſubmitted the queſtion of election, and ſaid that the teſtator's debts having exceeded his perſonal eſtate, they had no fund out of which to pay the 12,000*l.* but the real eſtate. Lord Chancellor ſaid, that although the teſtator had covenanted to convey in twenty-four months, and therefore, after that time he had loſt his election; yet, after that time, as it lay in recompences, the court would have permitted it to be made good; and, after his deceaſe, he having given both his real and his perſonal eſtate to the ſame perſon, that perſon might perform either part of the covenant, and the court would not hold the deviſee bound by the teſtator not having made his election within twenty-four months: but in the events which had happened, his lordſhip decreed the eſtate at *Fulden*, to be conveyed to the uſes of the ſettlement, and to be made equal to 500*l.* *per annum*, by the conveyance of other parts of the eſtates.

If a teſtator is bound to ſettle within four months after his marriage, lands of 100*l.* *per annum* upon his wife, or to leave her 2000*l.*, and die within the four months, and the four months elapſe without any election being made by the executors; yet, under ſuch circumſtances, a court of equity will enlarge the time, and relieve againſt the lapſe. Eaſtwood v. Vinke, 2 P. Wms. 617.

(E) Where a Party ſhall be put to his Election, or not.

THE doctrine of election, as far as it may be conſidered under this head, is grounded upon this broad principle, that no man ſhall claim in repugnant rights; a principle of more frequent application perhaps in courts of equity, but yet equally recognized in courts of law. A court of law will not allow a tenant to ſet up a title againſt his landlord: it 2 Vez. jun. 370. 696-7. 2 Vez. 13, 14. Ambl. 390. 3 Br. Ch. Rep. 287.

it will not allow a man to affirm an act as to one part, and disaffirm it to other part; to treat the same act as lawful, and as injurious. If man, either in a court of law or equity, claims under a deed, he m claim under the *whole* deed; it shall not be permitted to him to take o clause and reject the rest; he must confirm the whole, or abandon whole The principle indeed is universal; it prevails in the laws of countries; is applicable to all interests, to the interests of marr women, of infants; to interests immediate, remote, contingent, of va and of no value. He who would take the benefit, shall not dispute title. If a testator devises an estate the property of *Titius*, and by a ther clause of his will gives *Titius* a legacy, *Titius* shall not hold the est and claim the legacy. He shall not take the benefit under the will, un he suffers the whole instrument to take effect. It is immaterial whet the testator thought he had a right to dispose of the estate of *Titius*, whether he meant by an arbitrary exertion of power to exceed the ext of his authority,—if *Titius* will avail himself of the testator's bounty, shall not disappoint his will. If indeed an infant affect to devise r estate by a will not duly executed, here, admitting the infant to be of age to make a will of personalty, a legatee under that will may take legacy, and at the same time succeed to the real estate: for a will may considered as two distinct instruments, as it purports to dispose of real of personal property; and in this case, the will *quoad* the real est cannot be read; the court cannot look into it; it is a mere nullity; th is a want of capacity both in the instrument and in the testator. But p haps even in this case, most undoubtedly, if the incapacity were only the instrument, as, if a person competent to devise real estate were to vise it by an instrument not duly attested, if in such case the testator w to annex to a personal legacy a condition that the legatee should per *Titius* to enjoy the real estate devised to him, here, the personal leg should not have his legacy, unless he renounced his claim to the real est in favour of *Titius*. For the court can read the will as to the perso estate, the instrument as to that being valid: but, if they can read will, they must read the *whole* clause relating to the personal legacy, that clause be connected with what it may: and upon reading the w clause, it appears that the legacy is given only conditionally: if there the legatee would take his legacy, he must take it on the terms u which it is given: if he would abide by the will, he must abide by *toto*; if, therefore, he would have his legacy, he must give up the estate. Wherever then it is *apparent*, that the claim of a legatee in their right, if pursued, will frustrate or obstruct any of the disposit of the will, he must either forbear to insist on that claim, and the disturb those dispositions, or he must wholly renounce benefit under will.

Questions of election often arise in cases of dower, where a dow claims also a benefit under her husband's will. The rights, howe under which the dowress claims in this case are not of themselves obvio inconsistent: *a particular* intent in the testator, therefore, that his should not have both must be made out, either from the words used by testator in his will, or the striking inconsistency of her claims with dispositions of it, before she can be put to her election: such inten seems, cannot be inferred from a testator's making a general dispositio *all* his property, because the estate is not his to give exempt from the c

4 Br. Ch. Rep. 21. 2 Vez. jun. 372.

of dower, the tenancy in dower being an eſtate in the land different from that of the huſband, and equally firm.

The putting a deviſee under a will to his election is ſaid to be a ſtrong operation of a court of equity: the calling upon him to elect is an argument addreſſed to his conſcience in favour of a deviſee whom he would otherwiſe diſappoint: it is evident therefore that the obligation to elect can only be enforced at the inſtance of a perſon claiming a ſpecifick intereſt under the ſame will. Neither can it be enforced without a clear knowledge of the extent and amount of each of the funds, between which the party is to elect; for the will cannot be fairly determined where the objects it is to embrace or reject are not diſtinctly propoſed to it. 4 Br. Ch. Rep. 24. 2 Vez. jun. 562. Ambl. 727. 3 Wooddeſ. Append. 1. 2 Vez. jun. 371.

If an anceſtor by articles made previous to his marriage agrees to ſettle lands to the uſe of himſelf and wife, with remainder to the iſſue of the marriage in the uſual manner; and afterwards makes a deed not purſuant to the articles; and on the marriage of a ſon of that marriage ſettles other lands in the uſual manner, and levies a fine of the firſt mentioned lands to the uſe of himſelf in fee, and deviſes them for the benefit of his grandſon; the grandſon, being entitled under the articles, ſhall be put to his election, whether he will take under the will or the articles. Streatfield v. Streatfield. Ca. temp. Talb. 176.

So, where a teſtator having ſeveral copyholds, part of which he had ſurrendered to the uſe of his will, and part were not ſurrendered, deviſed to his heir, and the heirs of his body, and ſtated in his will, that as to ſome part of his copyholds, he was not enabled to deviſe them, becauſe they were not ſurrendered, and that therefore ſuch part would deſcend to his heir, and in conſequence thereof he directed his heir to ſurrender to the truſts he had created, and on his refuſal ſo to do, ordered, that the eſtate limited to him and the heirs of his body ſhould ceaſe, and the remainders take effect in poſſeſſion; the heir was decreed to ſurrender the premiſes Wardell v. Wardell, 3 Br. Ch. Rep. 116.

So, where a teſtatrix, being ſeiſed of freehold eſtates, and alſo having ſome copyhold lands, which lay diſperſed, and having ſurrendered her copyhold lands to the uſe of her will, deviſed all her real eſtates as well freehold as copyhold, and gave *J. S.* who was one of her co-heirs at law, 1000*l.*; and after the making of her will exchanged thoſe copyhold lands for others, which were ſurrendered to her, but not afterwards ſurrendered by her to the uſe of her will; *J. S.* was put to her election; and on her having elected to take the 1000*l.* the court decreed, that ſhe and the other co-heirs ſhould ſurrender the copyholds to the uſes of the will. Frank v. Standiſh, 1 Br. Ch. Rep 588.

So, where a teſtator deviſed all the reſidue of his eſtates, as well copyhold as freehold, (the copyhold being ſtated in the will to have been ſurrendered to the uſe of the will, but in truth never being ſo ſurrendered,) upon ſeveral truſts in favour of his wife and children; and the only truſt for his eldeſt ſon and heir was an annuity for life; it was holden to be a miſtaken deſcription, the copyhold being clearly intended to paſs, and the heir was decreed to elect. Indeed the heir would be equally bound, if it were not apparent that the teſtator intended the copyholds to paſs, ſince no one can claim under a will and contravene it. Rumbold v. Rumbold, 3 Vez. jun. 65. Wilſon v. Mount, *Id.* 191.

Where a teſtator appointed to grandchildren under a power to appoint children a fund that was to go in default of appointment equally among Whiſtler v. Webſter, 2 Vez. jun. 367.

the children; the appointment being bad; the children having legacies under the will, were put to their election.

Macnamara v. Jones, 1 Br. Ch. Rep. 480. Where a teſtator deviſed to truſtees to the uſe of his daughter for life, with remainders over; and directed that the annuitants under his will ſhould take in ſatisfaction of all claims upon him; and the daughter was entitled under a marriage-ſettlement to 1000*l.*; it was decreed, that the daughter could not take the benefits given to her under the will, but upon the terms of extinguiſhing her claim under the ſettlement. She muſt elect to take under the will, or againſt the will.

Newman v. Newman. 1 Br. Ch. Rep. 186. A wife was entitled to an eſtate under a marriage-ſettlement: the husband by will gave her an intereſt in another eſtate, and all his perſonalty in lieu of her claim; but the will was not executed ſo as to paſs real eſtate. She muſt elect between the perſonal eſtate and her claims under the ſettlement.

Lewis v. King, 2 Br. Ch. Rep. 600. Where one deviſes what is not his own, giving the owner an equivalent; if the owner would defeat the deviſe, he muſt give up the equivalent.

2 Vez. jun. 372. S. P. 4 Br. Ch. Rep. 24. S. P. *Id* 38. S. P. 2 Vez. 618. S. P.

Wake v. Wake, 3 Br. Ch. Rep. 255. Where a teſtator gives his widow an annuity (charged upon an eſtate of which ſhe would be dowable), ſhe muſt elect between the annuity and her dower.

Pugh v. Smith, 2 Atk. 43. Car v. Car, *Id.* 278. Morris v. Burrows, 1 Atk. 404. 2 Atk. 627. Frederick v. Frederick, 2 P. Wms. 722. Where a freeman of *London* makes a will diſpoſing of more than the teſtamentary part of his eſtate, a wife or child of ſuch freeman muſt elect to take by the cuſtom, or by the will, and cannot claim part by one, and part from under the other. It is otherwiſe, indeed, where the will affects the teſtamentary part only. And where in ſuch caſe a child elects to take by the will, her ſhare does not accrue to the orphanage part, but to the teſtator's eſtate, and muſt go according to the will: for the electing to take by the will is only a ſubmiſſion that that part ſhall go according to the diſpoſition of the father.

Cowper v. Scott, 3 P. Wms. 123.

Newman v. Newman. 1 Br. Ch. Rep. 186. A woman being entitled to a real eſtate under her marriage-ſettlement, her huſband by his will deviſed another real eſtate to her, and gave alſo the reſidue of all his perſonal property, both expreſsly *in bar of her other claims*. The will was not duly atteſted to paſs the real eſtate. The widow muſt elect between the perſonal eſtate alone, and her claim under the ſettlement. The words extend to all her claims: general words cannot be confined to particular deviſes.

Read v. Crop, 1 Br. Ch. Rep. 492. A teſtator deviſed all his real and copyhold eſtates ſituate in *R.*, *E.*, and *W.*, (which copyholds he had ſurrendered to the uſe of his will) and all other his freehold and copyhold eſtates to his wife for life, with remainders over. In *T.* he had no eſtate but a moiety of a copyhold eſtate in right of his wife, which he had not ſurrendered to the uſe of his will. It was not the teſtator's intention to deviſe this moiety, for he deſcribed what he meant to deviſe by the words *which he had ſurrendered*. The widow therefore ſhall not be put to her election.

Noys v. Mordaunt, 2 Vern. 582. *Q.* Whether the If a teſtator, diſpoſing of his eſtate among his children, deviſes to fee-ſimple lands, to another lands entailed, it is upon an implied condition that each party acquit and releaſe the other; and ſuch deviſees cannot to acquieſce in the will, or renounce all benefit thereby.

rule eſtabliſhed by this caſe will apply where the deviſe is not ſpecifick, but in general words, and whether ſuch a condition can be coupled with a partial intereſt, where there are ſubſequent limitations. See Forreſter v. Cotton, Ambl. 390. and Pulteney v. Lord Darlington, 2 Vez. jun. 552.

A feme covert and an infant, who had by her father's will a power to diſpoſe of real and perſonal eſtate, being above 17, bequeathed the perſonal eſtate to her daughter, and deviſed the real eſtate to two collateral relations, and died under age. The will is good as to the perſonal eſtate, but void as to the real by reaſon of the teſtatrix's infancy, and the daughter is not bound to elect; for here is no inſtrument executed ſufficient to paſs land; and no caſes have determined that there ſhall be ſuch election but where there is a will concerning the land. There is no ground for the court to imply a condition to abide by a will of land, where there is none. It would be dangerous to break in upon the ſtatute of frauds to make an eſtate paſs by an inſtrument not ſufficient to paſs it, and not by the words of the teſtator, but by a condition implied by conſtruction of the court. Hearl v. Greenbank, 3 Atk. 695. 1 Vez. 298.

But, if there is no deviſe of a real eſtate, but a perſonal legacy is given upon expreſs condition, that the legatee ſhall not enjoy it, unleſs within a certain time he conveys a real eſtate, whether coming from the teſtator or not, he ſhall not enjoy it, but on thoſe terms; the lands not paſſing by virtue of the will, but from the operation of the clauſe. The legatee has it in his power, whether he will part with the lands or not; if not, he forfeits the condition; for any lawful condition may be annexed. Vez. 251.

So, if in the ſame inſtrument there is a deviſe both of real and perſonal eſtate, and the will is only executed ſo as to paſs the latter, not the real eſtate; but a condition is annexed, that the perſonal legatee ſhall permit the perſons to whom the land is given to hold to them and their heirs; the condition annexed will take place, though the deviſe be void as to the lands; for the legatee cannot take it in contradiction to the teſtator's words. *Ibid.*

A teſtatrix in purſuance. as ſhe recited, of a power for that purpoſe, but in fact ſhe had no ſuch power, deviſed a copyhold eſtate to a perſon for life, who was entitled after her death to the ſame in fee, and appointed him executor, whereby he became entitled to the reſidue of the perſonal eſtate. The deviſee was admitted to the copyhold after the teſtatrix's death under her will and that of her huſband, under whoſe will ſhe claimed the power whereby ſhe made the above diſpoſition. The deviſee died without iſſue about ſix years after the teſtatrix, having deviſed over this copyhold. Thirty years after the teſtatrix's death one of the perſons to whom the eſtate was limited in remainder after the deviſee for life, filed a bill for an account of rents and profits, and a ſurrender of the copyhold, inſiſting that this was a caſe of election, and that the deviſee had made his election by proving the will, and being admitted to the copyhold under it. But Lord *Apſley* held this not to be a caſe of election, well becauſe the teſtatrix had no deviſab'e intereſt whatever (*a*), and therefore the parties did not take under the will, as becauſe from the length of time it was impoſſible to aſcertain the amount of the perſonal eſtate; and no perſon can be put to elect without a clear knowledge of the funds (*b*). Call v. Showell, Ambl 727. 3 Wooddeſ. Append.

(*a*) This firſt ground is impeached by the Maſter of the Rolls in 2 Vez. jun. 371. The parties, he ſays, did not in any one of the caſes of election take under the will.

(*b*) So, Wake v. Wake, 1 Vez. jun. 335.

Where a father recited by his will that he, as executor of *J. S.* was obliged to pay his ſon ſeveral ſums particularly, and ſeveral payments having Jenkins v. Jenkins, cited in 2 Vez. 617.

ing been made (ſome of which were allowable, others not) he liquidated the debt to a ſum certain, and gave the ſon ſeveral legacies; on a bill by the ſon it was decreed at the Rolls, that he was entitled both to the legacy for which his father was debtor to him, and alſo to the legacies under the will. But Lord *Talbot* varied that decree, ſaying, the plaintiff muſt make his election, muſt ſubmit to the adjuſtment of his debt, otherwiſe the perſons prejudiced by his reſorting to his debt muſt have the benefit given to him under the will.

Clark v. Guiſe, 2 Vez. 617

But, where a teſtator gave an annuity to *J. S.* of 50*l.* *per annum* charged on his real and perſonal eſtate, and then went on, "Whereas I am "indebted to her in the ſum of 500*l.* ſhe having my obligation for 68o "2*s.* 4*d.* Memorandum, paid her 100*l.* to let *A. B.* have, and at divers "times having paid her 80*l.* I make the balance I am indebted to her in the "full ſum of 500*l.* I ordain this to be paid out of my real and perſonal "eſtate;" on a bill by the annuitant to be paid her whole debt, the teſtator having miſcalculated it, and alſo to have her annuity under the will it was decreed, that ſhe was entitled to both, the bounty being unconnected with the debt, and the teſtator not affecting to ſtate the debt accurately or to make a compoſition with her, but manifeſtly intending to pay the whole.

Lady Cavan v. Pulteney, 2 Vez. jun. 544.

A. tenant in tail with power to leaſe, remainder to *B.* wife of *C.* in tail, conceiving himſelf to have obtained the fee under a void execution of a power, made leaſes exceeding his power, reciting, that he was ſeiſed of the freehold and inheritance, and covenanting for quiet enjoyment againſt any act or default of himſelf or thoſe claiming under him. *A.* deviſed the eſtates and others to *B.* for life, remainder to truſtees to preſerve contingent remainders, remainder to her firſt and other ſons in tail male, remainder to her daughter and her firſt and other ſons, remainder to *D.* and his firſt and other ſons ſucceſſively in the ſame manner; and gave to *A.* and *C.* other benefits by his will, and the reſidue to D. who filed a bill to have the will eſtabliſhed. *B.* elected to take her eſtate-tail in oppoſition to the will, which the Maſter reported to be for her benefit. After *B.*'s death *C*, who had taken under the will, claimed as tenant by the courteſy and brought ejectments againſt the leſſees, ſome of whom had expended conſiderable ſums on their tenements. It was decreed, that neither the leſſees nor *D.* were entitled to ſtop the ejectments, or to put *C.* to his election.

Briſtow v. Warde, 2 Vez. jun. 350.

The doctrine of election cannot apply, where there is no other ſubject but that to be appointed. It never can be applied, but where, if an election is made contrary to the will, the intereſt that would paſs by the will can be laid hold of to compenſate for what is taken away; therefore in all caſes there muſt be ſome free diſpoſable property given to the perſon, which can be made a compenſation for what the teſtator takes away. It cannot apply where no part of the teſtator's property is compriſed in the will, but that which he has power to diſpoſe of.

Forſyth v. Grant, 3 Br. Ch. Rep. 242.

J. S. entered into a bond previous to his marriage, by which he bound himſelf to leave 2000*l.* to his wife and children, but if no children, then the whole to his wife. There was no iſſue of the marriage, and *J. S.* by his will gave his wife life-eſtate in his whole property. Lord *Thurlow* held, ſhe was entitled both to the ſum ſecured by the bond, and the life eſtate under the will.

Freke v. Lord Barrington,

By ſettlement in 1712, a houſe called B., part of the manor of [illegible] was ſettled upon the ſettlor's nephew for life, remainder to the firſt [illegible] other

other ſons in tail, with divers remainders over. By indenture in 1722 the brother of the ſettlor ſettled the remainder of the manor upon his ſon (nephew of the firſt ſettlor) for life, remainder to *W.* his firſt ſon for life, remainder to *W.*'s firſt and other ſons in tail male: and a term was created, by this deed, to raiſe 4000*l.* for the daughters of *W.*, and there was a proviſo in the deed, that in caſe *W.*, or ſuch perſon as ſhould come into poſſeſſion of the manor, ſhould, within ſeven years, convey *B.* to the ſame uſes to which the manor was limited, he ſhould have a power of making a jointure; but, if he ſhould refuſe or neglect ſo to do, all the uſes limited of the manor, ſubſequent to his eſtate for life, ſhould ceaſe. There was alſo a proviſion, by which *W.* was empowered to make leaſes for the benefit of his daughters or younger ſons.—*W. F.* the grandſon took poſſeſſion of *B.*, and afterwards of the manor, and lived ſeveral years, but did not ſettle *B.* to the uſes of the deed of 1722, but ſuffered a recovery of it, and diſpoſed of it by will; neither did he execute the power of jointuring, but charged the term with 4000*l.* for his daughters, and executed the power of leaſing for their benefit. A bill was filed to have *B.* conveyed to the uſes of the deed of 1722, or to have the leaſes declared void, and the execution of the power bad; or for a compenſation to the amount of the charges on the manor of *H.* But the Maſter of the Rolls held, that this was not a caſe of election; and that, as upon neglecting to ſettle *B.* to the ſame uſes, only the eſtates ſubſequent to *W*'s eſtates for life were made void, and the powers (though ſubſequent in the order of the deed) were annexed to the eſtate for life, the execution thereof ought not to be ſet aſide. 3 Br. Ch. Rep. 274.

By marriage ſettlement 1000*l.* was covenanted to be laid out to the uſe of the huſband during the joint lives of the huſband and wife, remainder to the wife, in caſe ſhe ſhould ſurvive; and if the huſband ſhould ſurvive, then to ſuch uſes as the wife ſhould appoint; in default of appointment, to ſuch perſon as the ſame would have gone to by the ſtatute of diſtributions, in caſe the wife had died unmarried. The wife died without any appointment, leaving a daughter. The father deviſed a real eſtate to the daughter in fee in performance of the covenant. This was holden to be a caſe of election, but the daughter electing to take under the will, takes the perſonal eſtate alſo as next of kin. Hoare v. Barnes, 3 Br. Ch. Rep. 316.

ERROR.

WRITS of error or falſe judgment are of a higher nature than other kinds of civil ſuits. They are *quaſi caſus reſervati* to the king's ſpecial cognizance. And therefore by the ſtatute of *Marlbridge*, *c.* 20. *ſalvo excepto domino rege teneat placitum in curiâ tenentium ſuorum, quia hujuſmodi placita ſpecialiter pertinent ad coronam et dignitatem domini regis.* Hale's Lords' Juriſdiction, c. 23. 25.

And hence it is, that even in the greateſt courts of ordinary juriſdiction, the King's Bench or Common Pleas, thoſe courts cannot, barely by virtue of their ordinary juriſdiction, without the king's writ under the great ſeal, hold plea to reverſe a judgment given in an inferior court of record; no not ſo much as a judgment in a court-baron, or hundred court, though no courts of record. And the reaſons are theſe two principally, 1ſt, In reſpect of the

the king, all juriſdiction is mediately or immediately derived from him; a
the courts of all kinds are his courts, and have that ſtyle (unleſs in count
palatine where the lord hath *jura regalia*, and yet even that is derived fr
the crown), and conſequently judgments there given are virtually given
the king; and therefore it is not reaſonable to have them examined, but
the king's writ or commiſſion derived from him ſpecially. 2d, In reſp
of the ſubject, who having run his courſe to obtain or defend his right
the ordinary courts of juſtice, it is not reaſonable after his long expectat
and expence to turn all about again, without the ſolemnity of the kin
ſpecial writ or commiſſion.

(A) In what Caſes a Writ of Error will li
And herein.

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(*If a man recovers*) But by ſtat. 17 Car. 2. c. 8. the death of either party between ver
and judgment ſhall not be alleged for error, ſo as the judgment be entered within two terms a
the verdict.

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(*If the plaintiff*) Newell v. Pidgeon, 1 Str. 235. Box v. Bennett, 1 H. Bl. 2432. Ke
land v. Macauley, 4 Term Rep. 436.

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(*So if the*) If the defendant do not, at the trial, confeſs leaſe, entry, and ouſter, accor
to the rule, he cannot have a writ of error: becauſe, in ſuch caſe, the judgment is againſt
caſual ejector; and error cannot be ſued in the name of the caſual ejector, Roe v. Doe, Bu
181. George v. Wiſdom, 2 Bur. 757. neither can it be ſued, in ſuch caſe, in the name of
defendant, for he has not made himſelf party to the record.

(B) Who may bring a Writ of Error, a
againſt whom: And herein of the Perſons
ceſſary to be made Parties thereto.

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(*If there be*) Tenant in remainder may bring error of a common recovery where the te
in tail, *vouchee*, dies before the judgment; and he need not ſet out a complete title, but
ſhew the connection and privity between him and the perſon againſt whom the recovery wa
Sheepſhanks v. Lucas, 1 Burr. 410. In ſuch caſe *ſcire facias*, or any warning to the *hei*,
neceſſary, *Id.*

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(*So if there be*) Walter v. Stokoe, 1 Ld. Raym. 71. Burr. v. Atwood, *id.* 328. R
Etherington, 2 Lord Raym. 870. Ginger v. Cowper, *id.* 1403. 1 Str. 606. Elkins v. F
2 Ld. Raym. 1532. Ratcliffe v. Burton, Ca. temp. Hardw. 135. Vavaſor v. Faux, 1
88. Knox v. Coſtello, 3 Burr. 1792, Laroche v. Waſsborough, 2 Term Rep. 738. all S. P

(C) Of the Time of bringing a Writ of Erro

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(*But it ſeems*) 1 Term Rep. 280.

If the plaintiff defers ſigning judgment till the writ of error is ſpent, then ſigns it, and
debt thereon, the court will order a new writ of error, at the expence of plaintiff's atto
Arden v. Lamley, Barnes, 250. Jaques v. Nixon, 1 Term Rep. 280.

(D) Of the Manner of bringing it: And here

(*Neither need the plaintiff*) 1 Burr. 410.

Alth

Although the return to a writ of error from the Common Pleas be not ſigned by the chief juſtice *propria manu*, yet this is no objection to proceeding on the writ of error. Hardw. 344. 2 Str. 1063. S. C. — Blackwood v. S. S. Company, Ca. temp.

If a writ of error be directed to *W. W.* chief juſtice, and the return be only by *W. W.*, without adding "the chief juſtice within named," yet if there are the words, "*as to me within is commanded*," the return is good, for theſe words are enough to ſhew him to be the ſame perſon to whom the writ is directed. — Sullivane v. Seagrave, 2 Str. 695.

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(*And now by the* 5 *G.* 1. *c.* 13.) Collins v, Muxworthy, Ca. temp. Hard. 194.

A writ of error was not amendable at common law, nor by any of the ſtatutes of amendments and jeofails, till the above ſtatute of 5 *G.* 1. for all amendments are granted for the ſupport of judgments; but the principal deſign of writs of error is to reverſe them. A writ of error was not amendable at common law, becauſe it has in its nature two things, *viz.* a *certiorari* to remove the record, and a commiſſion to examine it; and no court was ever allowed to amend its own commiſſion. — 1 Ld. Raym. 71. *Per* Forteſcue, J. 1 Str. 607.

An ejectment was brought againſt the Company and Mr. *Edwards*. After a verdict for the plaintiff, Mr. *Edwards* died, and a writ of error was brought laying the judgment to be *ad grave damnum* of the Company, and of *Mary Edwards* the daughter and heir, and ſhe and the Company jointly aſſign errors. It was moved to amend the writ and aſſignment by ſtriking out her name. And upon conſideration, the court were of opinion, that it was amendable by the above ſtatute, not only as a variance from the original record, which is really no way to the damage of Mrs. *Edwards*, but alſo by virtue of the general words, *other defects*. — Swordblade Company v. Dempſey, 2 Str. 892. 8 Fitzg. 201. S. C. 1 Barnard. 405. 421. S. C. So, where two were charged with a joint treſpaſs, and judgment was given againſt one only, the other being found not guilty &c., a writ of error was afterwards brought in both their names, on an affidavit that this happened by the miſtake of the officer; the court of *B. R.* upon the authority of the above caſe, ordered the writ to be amended by ſtriking out the name of the perſon who was acquitted. Verelſt v. Rafael, Cowp. 425.

There was a variance between the writ of error and the record and as it ſtood in the paper, the court obſerved it, but neither party would move to amend it, for fear of paying coſts; upon which the court ſaid, the above ſtatute would warrant their amending it, which they did without coſts. — Gardner v. Merrett, 2 Str. 902. 2 Ld. Raym. 1587. S. C. Fitzg. 268.

S. C. 1 Barnard. 462. It appears from ſome of the reports of this caſe, that no coſts are payable upon amendments purſuant to the ſtatute, though at the prayer of the party; but if the prayer be alſo to amend the aſſignment of errors, the rule is with coſts, becauſe then the party comes for a favour of the court.

A writ of error was returnable before any judgment given, and on conſideration, it was holden to be ſuch a fault as is not amendable by this ſtatute. — Wright v. Canning, 2 Str. 807 2 Ld. Raym. 1531. S. C. 1 Barnard. 62. 65. S. C. Rejindoz v. Randolph, 2 Str. 834. S. P. Vice v. Burrow, *Id.* 891. S. P. Wilſon v. Ingoldſby, 2 Ld. Raym. 1179. However, in almoſt all caſes, the writ is ſued out before judgment ſigned, becauſe otherwiſe execution would iſſue inſtantly. *Per* Buller, J. Jaques v. Nixon, 1 Term Rep. 280.

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(*So if a writ of error*) It is the very record which comes here out of Ireland, and not the tranſcript of it. And it is no objection, that it ſhould be the tranſcript for fear of the peril of the

the ſea; for one might object in the ſame manner, that upon error in the Common Pleas, the tranſcript only is removed hither, for fear it ſhould be burnt or loſt, before it comes into the King's Bench. But in fact, when the record in both caſes arrives here, then it is the true record, and not before; and that which is in Ireland, or the Common Pleas, ceaſeth to be the record. *Per* Holt, C. J. in Coot v. Linch, 1 Ld Raym. 427.

Dougl. 352. n. 3. Rutter v. Redſtone, 2 Str. 837. Tully v. Sparkes, *id.* 869. 2 Ld. Raym. 1571.

By the words of the ſtatute of 27 *Eliz. c.* 8., which firſt gave the writ of error from the court of King's Bench to the Exchequer-chamber, the chief juſtice is to cauſe the record to be brought before the judges in the Exchequer-chamber; yet the practice hath always been to ſend only a tranſcript, the original record remaining in *B. R.* In the pleadings in *Weſtby's* caſe, (3 *Co.* 67. *a.* 70. *b.*) the entry of the proceedings in error runs thus: "Afterwards, *&c.* the *tranſcript* of the record and proceed-" ings, *&c.* by a certain writ of the lady the queen of correcting errors, *&c.* " was brought to the juſtices, *&c.* in the chamber of the Exchequer afore-" ſaid, according to the form, *&c.*" Yet the ſubſequent part of the ſame entry ſays, "and thereupon the *record* aforeſaid, *&c.* was ſent back, *&c.*"

2 Term Rep. 737. Ingoldſby v. Martin, 1 Str. 316.

However as to all legal effects, the record itſelf is conſidered to be removed. If the writ is "*between* A. *late of* Weſtminſter *in the county of* Mid-" dleſex," and the record only "*late of* Weſtminſter," if *Middleſex* is in the margin, it is well enough.

Anon. 1 Wilſ. 35. (*b*) Goodright v Hugoſon, Ca. temp. Hardw. 351.

A defendant cannot have leave to tranſcribe the record (though plaintiff has not done it) in order to *non-pros* the writ, and have the benefit of the recognizance. But (*b*) if the plaintiff in error is dilatory, the defendant muſt give a rule to tranſcribe, and then if he will not, the defendant may *non-pros* the writ of error.

(E) Of alleging Diminution and granting a *Certiorari.*

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Reſolved that the *certiorari* was not well awarded; for after *in nullo eſt erratum* pleaded,

(*After in nullo*) *Michaelmas* 2 *Car.* between *Weaver* and *Felton, B. R.* adjudged, and ſuch certificate diſallowed, and a new writ of *certiorari* granted by the court, which is entered, *Hil.* 1 *Car. Rot.* 647. and the record of *Biſhop's* caſe was ſhewn to the court, where the defendant did not plead *in nullo eſt erratum*, as the book is 5 *Co.* 37. *a.* but it paſſed againſt the defendant *nil dicit*, and after diminution alleged, as it is in the book.

neither the plaintiff nor defendant can allege diminution; for by the joinder they allow the record; and a note is there added, that Biſhop's caſe in 5 Co. does not agree with the record: for there the defendant had not joined *in nullo eſt erratum*, but did not ſay any thing, *ideo remanet in indefenſus.* Noy, 83. S. C. held accordingly, but yet the court *ex officio* may award a *certiorari* *informandam conſcientiam*, and that which is certified ſhall be annexed to the record, and is called a rider-roll, and ſays, ſee 22 E. 4. 46. a. 28 H. 6. 10 *Dy.* 32. b. 9 E. 4. 32 b. Franklyn v. Reeves, Ca. temp. Hardw. 118. And note in Chapman's caſe, the difference is, if diminution be alleged in a thing collateral, as warranty of attorney, or any meſne proceſs that is not of the body of the record, it may be alleged after *in nullo eſt erratum*: but otherwiſe, if it be of the ſubſtance and parts of the record itſelf; as, if returned in the detinue only, where the firſt action was in the *debet* and *detinet*, for which ſee 1 H. 7. 21. which reconciles many differences.

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(*A writ of error was brought*) But this the court will do only in order to affirm a judgment. Berkley v. Howard, 2 Str. 907. not to reverſe it. Merryfield v. Berrey, *Id.* 765. Bowers v. Mann, *id.* 819.

Smith v. Stoneard, 2 Ld.

A writ of error was brought of a judgment in the Common Pleas after a verdict. The plaintiff in error aſſigned for error want of an ori-

…d, but did not take out a *certiorari*, as the courſe is, to get the want of …e original certified: the defendant in error pleaded *in nullo eſt erratum*. …was objected, that there ought to have been a *certiorari* taken out, and …certificate made of the error; for it might be that there was an ill origi…l, and if that were returned, the plaintiff in error might take advantage …f it, and that would not be helped by the verdict, though the want of the …iginal were. *Per Holt*, C J. If the want of an original be aſſigned …r error, and the plaintiff in error do not take out a *certiorari*, and get …turn to it, and the want of an original certified; the courſe is for …e defendant in error to go to the maſter of the office, and get a rule for …e plaintiff in error to return his *certiorari* (*a*); and if he do not get it …me, as is ordered by the rule, the aſſignment of error ſtands for nothing. …t if the defendant in error will come in *gratis*, and confeſs the error, …ere need be no *certiorari* returned. And as to the matter, that there …ight be a bad original, *&c.* that is another ſort of error; and when the …nt of an original is aſſigned for error, the court will never intend, that …ere is a bad original. And the judgment was affirmed.

Raym. 1156. 1 Salk. 267. S. C.

(*a*) Error for want of an original is not completely aſſigned, until the certificate is returned. Sterling v. Tanner, Com. Rep. 115.

If upon error, diminution be alleged for want of original, warrant of …rney, *&c.* and a *certiorari* be ſued out, upon which a record is returned …trary to what is before returned, it cannot be received.

Tyſon v. Hilyard, 1 Ld. Raym. 1122. 1 Salk. 269. S. C.

Where the want of an original is aſſigned for error, and it appears …t all the proceedings are of the ſame term wherein the original is return…e, ſuch an original warrants thoſe proceedings, let it be of any return …that term. But an original of the term wherein final judgment is given, …ll not warrant the proceedings, if by the record it appears that there …e been proceedings in the cauſe, in a term or terms before. The caſe …original writs differs from that of warrants of attorney; for it is ſuffi…nt if a warrant of attorney be filed at any time pending the ſuit, let it …in which term it will; the ſtat. of *H.* 8. only requires a warrant of at…ney to be filed in the cauſe; and the ſtat of 4 *Ann.* requires it to be filed …rding to the courſe of the court; and that is to have it filed at any …e pending the cauſe; and it is no matter when, ſo that it be in the ſame …. But as to an original writ, it is otherwiſe, for if there be proceed…s in the action in a term preceding the return thereof, the original will …t ſupport them.

Diſmo v. Shirley, Yelv. 108. Booth v. Beard, 1 Keb. 327. Dyke v. Sweeting, 1 Wilſ. 181.

The plaintiff in error aſſigned for error the want of an original, and …d a *certiorari* upon which it was certified that there was no original; …rwards the defendant applied to the court of Chancery, and upon affi…it that inſtructions were given to the curſitor for an original, but that …y were loſt, that court allowed the original to be ſupplied. Upon this …e defendant in error prayed another *certiorari*, and an original was cer…ed of the ſame term in which the default of an original was certified …e. It was inſiſted, that this was irregular, for before the ſecond …iorari was returned, the defendant ought to have given a copy of the …al to the plaintiff's attorney; and the maſter informed the court, that …courſe was ſo, when the ſecond original certified was of another …; but it being in the ſame term, the motion was not allowed.

Levin v. ——, Com. Rep. 118. 1 Ld. Raym. 695. S. C.

(F) Of

(F) Of the *Scire Facias*.

Page 207 Wright v. Treweeke, Barnes, 432.

IF the original plaintiff dies, pending error, his executor may hav *ſcire facias quare executio non* out of *C. B.* before the record is tr ſcribed; but afterwards out of *B. R.* And the plaintiff in error m have a *ſcire facias ad audiend.* out of *B. R.* againſt the executor of de dant in error.

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(*b*) (*If a writ*) Sir *B. Shower* in his report of this caſe, 2 *Show.* 4 ſays, that the court were of opinion, that the awarding of a *ſcire fa* to the terre-tenants was not *ex neceſſitate*, but diſcretionary. And the ſa is ſaid in argument in *Comberbach*'s Report.

Hall v. Woodcock, 1 Burr. 359. Sheepſhanks v. Lucas, *id.* 410.

And upon the authority of thoſe two laſt caſes Lord *Manſfield* that by the eſtabliſhed mode of proceeding there muſt be a *ſcire fa* againſt the terre-tenants, otherwiſe it is an irregularity, but no m But a *ſcire facias* to the heir is clearly not neceſſary.

The Queen v. Ford, Tr. 8 Ann. B. R. Vin. Abr. Error, (H. a.) p. 9.

In an information *qui tam*, *&c.* upon 5 *El.* for uſing a trade co *formam ſtatuti*, there was a judgment for the plaintiff, on which a wr error was brought. *Per cur.* In the caſe of indictments, there need *ſcire facias* for the party to aſſign his errors, but a rule is ſufficient, cauſe the queen is always in court by her attorney-general. But a rul this caſe being moved for, the court ſaid, they had ordered preceden be ſearched for, but could find none; and therefore the defendant in muſt proceed as he could by law.

Johnſon v. Jebb, 3 Burr. 1772.

If a plaintiff below brings error to reverſe his own judgment, and not proceed, the court will make a rule to aſſign errors in a limited or his writ to be non-proſſed, for a *ſcire facias* would here be improper

Forteſcue Alland v. Maſon, 2 Str. 1258.

Where in error from *Ireland*, the King's Bench affirmed the judg on a collateral point, it was holden, that the plaintiff could not, o defendant in error's coming of age, take out a *ſcire facias ad aud errores* in *B. R.* in *England*; for upon the affirmance of the judgment record muſt be remitted to *Ireland*.

Marſhal v. Cope, 2 Str. 917. Sambidge v. Houſley, 2 Term Rep. 17.

A rule to aſſign errors was ſet aſide, becauſe given before any ru the *ſcire facias quare executio non*. However, theſe rules may be together.

Thatcher v. Stephenſon, 1 Str. 144.

On *ſcire feci* returned, if the defendant do not appear and join in the plaintiff may put it in the paper without taking out a rule to error.

Millar v. Yeiraway, 3 Burr. 1723.

A *ſcire facias* in error need not lie four days in the office befo return.

Groſs v. Naſh, 4 Burr. 2439.

Id. c. 26.

The ordinary return of the *ſcire facias* in a writ of error in parl was *ad proximum parliamentum*: for the ſeſſions were ſhort and unc and if it had been returnable at a day certain (as it muſt) in th ſeſſion, the ſeſſion might end before the return of the writ. But i where no *ſcire facias* was to iſſue, as, where the king was party, rors were oftentimes examined the ſame parliament wherein the peti

error was exhibited. But in *Charles* the First's parliaments the ancient courſe was altered, for they made writs of error returnable *in præſens parliamentum*, and gave notice by orders from day to day to the defendant. And this courſe holds now in uſe, the old way of *ſcire facias* returnable the next parliament being laid aſide, yet without any law at all to warrant it; for the record cannot be reverſed or affirmed without making the defendant a party by writ, unleſs he appear *gratis* without a *ſcire facias*, and plead to the errors. This is now the common courſe, and the defendant commonly appears upon orders of the Houſe without any *ſcire facias*, and pleads to the errors *gratis*; which therefore being done *gratis* ſupplies the defect of a regular proceſs, which yet the defendant may inſiſt upon, if he will.

(G) Of the Proceedings after the Record removed: And herein of the Abatement of the Writ of Error.

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(*If the plaintiff*) 1 Burr. 410.

(*If error be*) Upon error in the record, as, want of *capias*, or the like, there, he may ſay *in nullo eſt erratum*; and there, though the defendant confeſs the error, the court ought not to reverſe the judgment, till they be aſſured of the error. Br. Error, pl. 165. cites 7 E. 4. 16.

(*If a writ*) For if they do not all join, the writ will be quaſhed. 1 Ld. Raym. But though the Writ, in ſuch caſe be quaſhed, yet the record is removed by it. 2 Ld. Raym. 1403. 1 Str. 656. Where two join in a writ of error, and one will not aſſign errors, the court will give the other time to ſummon and ſever. 2 Str. 783. But if one of two perſons againſt whom judgment hath been given, dies after judgment, error may be brought by the ſurvivor without the executor of the other. 1 Str. 234.

(H) How far the Writ of Error is a *Superſedeas*.

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(*After a writ*) A writ of error is ſaid to be a *ſuperſedeas* from the allowance. Barn. 376. 1 Term. Rep. 279. but as it is the practice to ſue out the writ of error before judgment is ſigned: the courts have ſaid, it ſhall not operate as an allowance till the judgment is actually ſigned, and the party ſhall be allowed four days after the ſigning of the judgment to put in bail; for before the judgment no bail can poſſibly juſtify. As to the ſervice of the allowance, *that* is only material to bring the party into contempt, if he proceeds to ſue out execution afterwards. Jaques v. Caſon, 1 Term Rep. 279. Doe v. Bracebridge, *ibid.*

(*If a writ of error*) See *acc.* Laroche v. Waſsbrough, 2 Term Rep. 737.

Where a plaintiff, in order to proceed againſt bail, took out a *capias ad ſatisfaciendum*, and on the following day a writ of error was allowed, notwithſtanding which he called for a return of *non eſt inventus*, and then waiting till the writ of error was at an end, proceeded by *ſcire facias* againſt the bail; the court, on motion, ſet aſide the proceedings; for the ground of them, *viz.* the return of *non eſt inventus*, was obtained after notice of the writ of error, which in its nature ſtopped all ſort of proceedings, and the ſheriff could not ſo much as look after the defendant, in order to found ſuch a return. Beſides, it is an invariable rule, that the *capias ad ſatisfaciendum* ſhall in no caſe operate as againſt the bail until it has lain four days in the office; and though it have lain that time in the office, a writ of error afterwards allowed and ſerved before the day on which Smith v. Nicholſon, 2 Str. 1186. Perry v. Campbell, 3 Term Rep. 390.

which the *capias* is returnable, ſhall have the effect of a *ſuperſedeas* to an proceedings againſt the bail.

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(*If a writ of error is brought*) See Burr. Rep. 340.

Benwell v. Black, 3 Term Rep. 643.

(*It ſeems clearly*) But execution cannot be ſued out upon the ſecond judg ment until the writ of error be determined.

Such a motion, however, cannot be made until the defendant has put in bail to the ſecond a tion. Smith v. Shepherd, 5 Term. Rep. 9. Nor is it merely of courſe; and therefore the cou will not interpoſe, where the writ of error is obviouſly for the purpoſe of delay. Intwiſtle Shepherd, 2 Term Rep. 78 In that caſe indeed the allowance of the writ of error will not op rate as a *ſuperſedeas* to any proceedings. Box v. Bennett, 1 H. Bl. 432. Kempland v. Mac ley, 4 Term Rep. 436. Maſterman v. Grant, 5 Term Rep. 714.

(I) To what Court a Writ of Error lies: An herein,

BY § 12 of the ſtatute of 6 *Ann. c.* 26., which eſtabliſhed a court Exchequer in *Scotland*, a writ of error is given from that court parliament.

Hale's Lords' Juriſdiction, c. 23. 25.

The writ of error in the ordinary courts of juſtice is *breve de curſu*, a grantable in Chancery of courſe; and ſo is the writ of error in parl ment as to ſome purpoſes, and therefore made by the curſitor; but, co ſidering that the court of parliament is an extraordinary court, wh principal end is to adviſe the king *circa arduа regni*; that ſuch writs m be brought there for delay, and without any juſt cauſe; that the proce ings in parliament muſt neceſſarily be dilatory and expenſive in reſpect the intervention of publick buſineſs, and their frequent adjournment, p rogations, and diſſolution; and that ſuits for error in parliament are the moſt part upon judgments given in the higheſt court of ordinary j tice, the court of King's Bench, where the proceeding is *coram ipſo r* and where the cauſes are diſcuſſed by judges of great learning and ex rience; all theſe reaſons conſidered, the writ of error in parliament ou not to paſs the ſeal without a petition or bill to the king, and that bill ſi ed by him. And the writ itſelf was anciently, and ſtill ought to be *regem*, or *per warrantum domini regis*; and this appears expreſsly by books of 22 *E.* 3. 1 *H.* 7. 19. *Flourdew*'s caſe; and *Dy.* 375. and the conſtant indorſement of theſe writs, *viz. per regem.* And this cou anciently obtained till the long parliament; where, by reaſon of king's abſence, he who then exerciſed the office of Attorney-General, grant his warrant to the curſitor for the making of writs of error retur ble in parliament, and the writ was indorſed *per warrantum attornati d regis generalis.* And upon that account it hath been alſo practiſed ſince reſtoration, which is an error, and ought to be reformed.

Id. c. 26.

According to the courſe of parliament as ſettled in the time of *Hen.* in error from the King's Bench, when the Chief Juſtice was comman either by petition of error or writ of error to bring the record into liament either *indilatè* or in a day certain, he brought up the roll an tranſcript of the record, and left the tranſcript and roll with the clerk the parliament to be examined, and then the ſame day, or ſome ſ time after, the rolls themſelves were carried back into the treaſury.

his hath obtained to this day. In the parliament of 18 *Jac.* when the Chief Juſtice of the King's Bench was made Speaker of the Houſe of Lords by commiſſion on the ſuſpenſion of the Lord Keeper, yet it was reſolved 14 *Maii* 1621, in that parliament, that upon a writ of error he ſhould bring in the record as Chief Juſtice.

If a writ of error be brought in parliament upon a judgment in the King's Bench, if the writ abate by death, a record is made of it in the Lords' Houſe, and by judgment the writ is there abated, and the judgment of abatement is entered upon the tranſcript left in the Lord's Houſe, and the ſame is remanded into the King's Bench to proceed according to law, *H.* 22 *Car.* 1. *B. R. rot.* 696. *Trowl* and *Methurſt*. *Id.* c. 28.

So, if the judgment be affirmed by the Lords, the judgment of affirmation is entered upon the tranſcript, and *remittitur* entered thereupon, and the record delivered back to the King's Bench to proceed with execution. *T.* 26 *Car.* 2 *rot.* 807. *Id. ibid.*

And ſo, if the judgment be reverſed by the Lords, the judgment of reverſal is entered upon the tranſcript with a *remittitur* in this form: *Superinde recordum et proceſſus per curiam parliamenti curiæ domini regis eram dicti domino rege ubicunque*, &c. *remittuntur, et in eâdem curiâ coram ipſo domino rege jam reſident.* M. 24 Car. 2. B. R. rot. 237. Streter's caſe. *Id. ibid.*

And it ſeems, that although as to ſome purpoſes the record was removed from the King's Bench into parliament; yet really the record remains to many purpoſes in the King's Bench; and after ſuch a *remittitur* the court of King's Bench proceed upon the original record before them, and after the reverſal and *remittitur* upon that record. Therefore, if the parliament be diſſolved before any judgment of affirmance or reverſal, upon a queſtion thereof upon the roll in the King's Bench, the court of King's Bench ſhall proceed upon the record before them, though there be no *remittitur* of the tranſcript out of the parliament into the King's Bench. *Id. Ibid.*

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(By the 27 *Eliz. c.* 8) A judgment on a *ſcire facias* grounded upon one of thoſe actions mentioned in the ſtatute, is in effect a part of the firſt ſuit, and the Exchequer-chamber, having cognizance of the original action, hath alſo cognizance of all its dependencies; *per* Hale, 1 Mod. See Cro. Jac. 384. Cro. Car. 143. Hob. 72. 1 Mod. 297. 5 Mod. 200. 3 Atk. 297. But will clearly not lie in the Exchequer-chamber upon an award of execution in a *ſcire facias* without including the judgment in the former action. Bertie v. Clutterbuck, 2 Str. 1102. 287. Marquis of Powis' caſe, 3 Atk. 297.

Vide Dougl. 352. note.

It is now ſettled that it does. Lloyd v. Skutt, Dougl. 350.

A writ of error from a judgment in the court of Exchequer iſſued returnable in the Exchequer-chamber, pending which the plaintiff in error died; whereby the writ abated. Lord Chancellor *Hardwicke*, and the Chief Juſtices *Lee* and *Willes*, were of opinion, that the new writ did not be properly to the Exchequer-chamber, becauſe the record did reſide with them, and the words of the writ are *record. quod coram eis reſidet*; for only a tranſcript of the record is ſent into the Exchequer-chamber, and the record itſelf remains in the court of Exchequer. But the court made a rule for *remittitur* to be entered on the record, together with a ſuggeſtion of the death. Rex v. Cotton, 2 Ves. 298. Parker, 142.

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(The court) But now by ſtat. 23 Geo. 3. c. 28. § 2. no writ of error or appeal from the courts of Ireland ſhall be received or adjudged in any court in this kingdom.

So

(*So a writ*) No traces of any writ of error being actually brought from the common law fide of the court of Chancery into B. R. are to be met with later than the fourteenth year of Queen Elizabeth, A. D. 1572. Dy 315. And Lord Keeper North in 1682 declared, that no such writ of error lay, that the books were founded only on the ſingle opinion of Lord Dyer in the above caſe and that he would grant injunction againſt them. 1 Vern. 131. 1 Eq. Caſ. Abr. 129. This opinion of the Lord Keeper, Sir W. Blackſtone ſays, ſeems not to have been well conſidered. However, there are reſpectable authorities in confirmation of it. Lamb. Archion. 69. The opinion of Mr. Juſtice Choke, Yearl. 37 H. 6. 13 b. and 11 E. 4. 9. a. Bro. tit. Error, pl. 95. At the ſame time it muſt be acknowledged, that the learned commentator cites authorities equally reſpectable in oppoſition to it. 18 E. 3. 25. 27 Aſſ. 24. 29 Aſſ. 47.

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(*Upon a judgment*) In the caſe of Harriſon v. Evans, 6 Br. P. C. 181. on a judgment in the ſheriff's court in London, a writ of error was returnable in the court of Huſtings there, and on the judgment of that court, a ſpecial commiſſion of errors was directed to five of the twelve judges, or any two of them, upon whoſe judgment a writ of error was brought returnable in parliament.

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(*If a record*) In all caſes where the record is actually removed and the writ of error is quaſhed, error *coram vobis* lies: *ſecùs*, where the record is never removed, as is the caſe where the writ is quaſhed for variance between the writ and the record. Ginger v. Cooper, 1 Str. 607. 2 Ld. Raym. 1403.

Lambell v. Pretty John, 2 Str. 690. Error *coram vobis* does not lie in the King's Bench after error brought in the Exchequer-chamber, and the judgment affirmed; for before the ſtatute of *Eliz.* the King's Bench could not examine its own errors in fact after an affirmance in parliament; and the Exchequer-chamber is not in the ſame degree with regard to the King's Bench in thoſe caſes with the ſtatute, as the parliament was before.

2 Cr. Pr. 337. Error *coram vobis* lies not in the Exchequer-chamber.

(K) Of aſſigning Errors: And herein,

(*Upon a writ*) But a *ſcire facias*, it ſeems, cannot iſſue till the tranſcript of the record below is removed; and therefore the defendant in error, if the plaintiff is dilatory, muſt give a rule to tranſcribe; and if the plaintiff will not do it, he may then *non pros* the writ of error. Ca. temp. Hardw. 351.

Rex v. Stapleton, 1 Str. 443. A defendant convicted for a miſdemeſnour, and in execution for the fine, may, with leave of the court, aſſign errors by attorney.

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(*If a writ of error upon*) In ſuch caſe, he muſt move the court for time to aſſign his errors till the others can be ſummoned and ſevered. Freſcobaldi v. Kinaſton, Str. 783.

Leith v. M'Farlan, 3 Burr. 1772. A writ of error cannot be nonproſſed without a rule to aſſign errors. But where neither plaintiff in error nor his attorney could be found ſo as to be ſerved with the rule, the court of *K. B.* ordered, that fixing the rule up in the King's Bench office ſhall be good notice.

Thomſon v. Baker, Ca. temp. Hardw. 130.

2. Of aſſigning Errors in Fact and in Law.

Burleigh v. Harris, 2 Str. 975. And as error in fact and error in law cannot be aſſigned on one writ: after affirmance on error in law aſſigned, error *coram vobis*, and error in fact aſſigned, ſhall not be allowed

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(*So if the*) This caſe is not law; where error in fact is aſſigned, the plaintiff muſt conclude with an *averment*, in order to give an opportunity of trying the fact by the country, if the defendant in error chooſes it. Sheepſhanks v. Lucas, 1 Burr. 412. Carth. 367.

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(*If the defendant*) Nor can it be alleged that the defendant died before the day of *nisi prius*, if the record mentions that he appeared on that day. Plummer v. Webb, 2 Ld. Raym. 1415.

Where in the deſcription of the juſtices of aſſiſe, *A. & B. juſt.*, *&c.* *ad capiend. juxta formam*, *&c.* the word *aſſiſes* was omitted; yet, as it appeared from other parts of the record, that they were juſtices of aſſiſe, the court held, that this could not be aſſigned for error, inaſmuch as it would be contradictory to the record. Baker v. Thompſon, Ca. temp. Hardw. 166.

If *A. B.* is ſworn upon the principal pannel, and another of the ſame name is ſworn upon the *tales*; it ſhall not be aſſigned for error that the *A. B.* firſt ſworn, and *A. B.* the tales-man were one and the ſame perſon, ſo as to make it a trial by eleven jurors only; for this is contrary to the record, which ſays, that they who were ſworn on the *tales* were *alii de circumſtantibus*; he could not be *idem* conſiſtently with the record, which ſays, that he was *alius*; and therefore ſuch an averment, contrary to the record, ſhall not be admitted. 1 Roll. Abr. 758. pl. 8.

So, it ſhall not be aſſigned for error, that *A. B.*, who was ſworn as a juror, returned upon the principal pannel, was never returned by the ſheriff: for after the joinder in iſſue, the record goes on to the award of a *venire facias* returnable at ſuch a day, *ad quem diem*, it ſays *jurata inter partes prad. ponitur in reſpectu* till the next term, *niſi prius* the juſtices come *&c.*; at which time they come, *et juratores unde infra fit mentio exiſtit unus eorum*, (that is, one of thoſe returned by the ſheriff,) *viz. A. B.* *qui ad inde in juratam illam juratus exiſtit*; ſo that the record expreſsly ſays, that the *A. B.* who was ſworn, was one of them who was returned by the ſheriff, and therefore the error aſſigned is contrary to the record. Helbut v. Held, 2 Str. 684. 2 Ld. Raym. 1414.

So, as being contrary to the record, it ſhall not be aſſigned for error, that the defendant filed his warrant to defend by *A. B.* his attorney, and that it appears on the judgment that he appeared and defended by *C. D.* his attorney. Bradburn v. Taylor, 1 Wilſ. 85.

A defendant in ejectment cannot aſſign for error, that being an infant, he appeared by attorney. Goodright v. Wright, 1 Str. 25.

4. Of aſſigning that for Error which is for the Party's Advantage.

So, if one defendant only be charged with the whole of the damages and coſts, this may be alleged for error by the other defendant not charged; for this is an error in the final judgment, it is the fault of the court. Kent v. Kent, Ca. temp. Hardw. 50. 2 Str. 971. 2 Barnard. 357. 386. 441.

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(*If upon a trial*) This challenge is taken away by 24 Geo. 2. c. 18. § 4.

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(*If where*) And where for this cauſe, a writ of error was brought, the court permitted the plaintiff to enter a *remittitur* of the exceſs above the ſum laid in the declaration, on payment of the coſts of the writ of error. Pickwood v. Wright, 1 H. Bl. 643.

A party who has agreed under a conſolidation-rule not to bring a writ of error, is precluded from bringing one, though there be manifeſt error in the record. Camden v. Edie, 1 H. Bl. 21.

Executors againſt whom a *ſcire facias* is ſued out to recover damages aſſeſſed on an interlocutory judgment againſt their teſtator in his lifetime, cannot bring error, if the teſtator's attorney agreed for him, that no writ of error ſhould be brought *in that action*. Executors of Wright, Bart. v. Nutt, 1 Term Rep. 388.

The

James v. Staples, 6 Term Rep. 367.

The defendant in error cannot rule the plaintiff to assign errors before the expiration of the rule to appear to the *scire facias*.

6 Term Rep. 255.

It is not a cause of error to enter a judgment of *misericordia* in a *qui t* action for a penalty.

Pullin v. Stokes, 2 H. Bl. 512.

Neither is it assignable for error that the plaintiff is adjudged to be *misericordia* instead of the defendant.

Parrott v. Spraggon, 2 H. Bl. 268.

Although it appear on the return to a *certiorari* that no bill was fi in the King's Bench against the defendant, in a suit there by bill, *in* term of which the declaration is entitled, but that *a* bill was filed aga him by the plaintiff *in the following vacation*, it is not error, if it also pear that the bill was filed *of* the preceding term.

(L) What Defence the Defendant in Error m make: And herein of pleading a Releaſe.

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(*The defendant*) And a releaſe of errors in the ſame inſtrument with the warrant of attor and dated the term in which judgment was entered, is good. London v. Pickering, 2, Str. 1

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(*But the Tertenants*) 1 Burr. 362.

By ſtat. 10 & 11 *W.* 3. *c.* 14. a writ of error for the reverſing of fine, recovery, or judgment, muſt be commenced, or brought and pr cuted within twenty years after ſuch fine levied, recovery ſuffered, judgment ſigned or entered of record.

Street v. Hopkinſon, Ca temp. Hardw. 345. 2 Str 1055. S. C.

Although it ſhould appear on the record that the judgment is ab twenty years ſtanding, yet cannot the defendant have the benefit of ſtatute without pleading it, becauſe there is a ſaving of rights of the ſons mentioned in the act, as infancy, *&c.* which may be replied to off the effect of the plea; and therefore the court cannot take notice o merely as it appears upon the record itſelf. And this plea, as wel

Ibid. 1 Str. 127. 2 Str. 683. 1 Sho. Rep 50.

the plea of a releaſe of errors, muſt conclude with praying that the p tiff may be barred of his writ of error, not that the judgment be affir for they admit the judgment to be erroneous.

(M) Of the Judgment to be given on the W of Error: And herein,

1. Where, on the Writ of Error, Part only, or the whole Judgm ſhall be reverſed.

Per Holt. C. J. 1 Salk. 24. Ca. temp. Hardw. 50.

WHERE a judgment is partly by the common law, and p by ſtatute, it may be reverſed in part; for that which was a j ment at common law will remain a judgment, and be comp'ete wit the other.

Moor, 565.

A judgment in an information *qui tam*, *&c.* may be reverſed as to informer, and ſtand for the king.

Frederick v. Lookup, 4 Burr. 2021. Bellew v. Aylmer, 1 Str. 189.

And wherever the judgments are diſtinct, part may be affirmed, the other part reverſed. Hence, if a judgment for a common info gives damages for detention, and coſts *de incremento*, the judgment fo penalty may be affirmed, and for the damages and coſts reverſed. (*a*) where coſts are merely acceſſary to the principal judgment, the

S. P. Kent v. Kent, 2 Str. 673. Ca. temp. Hardw 50. S. P. Green v. Waller, 2 Ld. Raym. 8

P. (*a*) Lampen v. Hatch, 2 Str. 934. Rous v. Etherington, 2 Ld. Raym. 870. 1 Salk.

they are erroneouſly given, the judgment cannot be reverſed as to them only, but muſt be reverſed *in toto*.

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(*If judgment*) Pugh v. Goodtitle on the demiſe of Bailey, Houſe of Lords, 15th May 1787. If defendant demur for duplicity, and have judgment, the entry ſhall be *quod judicium affirmetur*. Jeffry v. Wood, 1 Str. 439. If a releaſe of errors, or the ſtatute of limitations be pleaded, and found for the defendant, the judgment muſt be, *quod querens nil capiat per breve*, not, *quod judicium affirmetur*. Kitle v. Clifton, 1 Show. 50. Cunningham v. Houſton, 1 Str. 127. Dent v. Lingwood, 2 Str. 683. Street v. Hopkinſon, *id.* 1055. Ca. temp. Hardw. 345. In the Houſe of Lords, if judgment below be given for the plaintiff, and deemed right, it is ſimply affirmed. Counteſs Dowager of Cavan v. Doe on the demiſe of Pulteney, 7 May 1795. So, if judgment be given in the Exchequer or King's Bench for the plaintiff, reverſed in the King's Bench, or Exchequer-chamber, and that reverſal approved by the Lords, their judgment is, that ſuch ſecond judgment be affirmed Sutton v. Johnſtone, 22 May 1787. Home v. Earl of Camden, 22 June 1795. So, if two former judgments concur, and are deemed right, they need only be affirmed. Foley v. Burnell, Houſe of Lords, 27 April 1789

If the Exchequer-chamber reverſe a judgment in *B. R.* for defendant upon demurrer, they cannot award a writ of inquiry of damages, their power being confined by the ſtat. 27 *Eliz. c.* 8. merely to the affirming or reverſal of the judgment, but they muſt remit the record to *B. R.* with an order to that court to award a writ of inquiry and execution on the return of it. Faldowe v. Ridge, Cro. Jac. 206. Witherley v. Sarsfield, 1 Show. 127. Kent v. Kent, Ca. temp. Hardw. 51.

It is now ſettled, though it was in one caſe (*a*) denied, that a court of error may award a *venire facias de novo*. And this it may do, after a bill of exceptions allowed, upon a demurrer, to evidence, and after a general verdict, when ſome of the counts are defective. Hardwood v. Goodright, Cowp. 89. Grant v. Aſtle, Dowl. 731. Bent v. Baker, 3 Term Rep. 27.—In Kinaſton v. Mayor, &c. of Shrewſbury, 2 Str. 1051. 4 Br. C. P. 271. Haſwell *qui tam* v. Chalie, 2 Str. 1124. Andr. 392. Parker v. Wells, 1 Ham Rep. 783. Lickbarrow v. Maſon, 5 Term Rep. 367. the Houſe of Lords directed a *venire de novo* to be awarded by B. R. (*a*) Street v. Hopkinſon, 2 Str. 1055. Ca. temp. Hardw. 345.—In Trevor v. Wall, 1 Term Rep. 151 the court of B. R. refuſed to award ſuch a writ, on the ground that the proceedings upon which error was brought originated in an inferior court. But in Davis v. Pierce, 2 Term Rep. 125., where a bill of exceptions had been tendered in the court of Great Seſſions in Wales; and the proceedings were removed by writ of error into B. R., that court being of opinion that the bill was properly tendered awarded a *venire de novo* into the next Engliſh county.

A court of error ought to give the ſame judgment upon reverſal which the court below ought to have given. Rex v. Amery, Anſtr. 178.

If judgment be given for the plaintiff on one count of a declaration, and a diſtinct judgment for the defendant upon another, and the defendant bring a writ of error to reverſe the judgment on the firſt count, the court of error cannot examine the legality of the judgment on the ſecond count, no error being aſſigned on that part of the record. Campbell v. French, 6 Term Rep. 200.

Eſcape in Civil Caſes.

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DEBT will lie againſt a gaoler for the eſcape of a priſoner in execution, though the eſcape were without the knowledge or fault of Alſept v. Eyles,

2 H. Bl. 108. the gaoler; for nothing will excuſe him but the act of God, or the king's enemies.

Gabel v. Perchard, Anſtr. 522. If a ſheriff ſuffers a perſon taken on meſne proceſs to eſcape, he is anſwerable for the debt which ſhall be proved, not merely for that ſworn to.

Jones v. Famer, *Id.* 675. If a ſheriff let a defendant, arreſted on meſne proceſs, go at large without bail below, and on being ruled to return the writ, returns *cepi*, but no bail is then put in above, the ſheriff is liable to an action for an eſcape from which he cannot protect himſelf by putting in bail, when ruled to bring in the body.

(A) Where the Party ſhall be ſaid to be legally committed, ſo that the ſuffering him to go at large ſhall be adjudged an Eſcape: And herein

1. Where the Authority by which he is committed ſhall be ſaid to be ſufficient for that Purpoſe.

Bull v. Steward, 1 Wilſ. 255. IN an action on the caſe againſt the defendant, bailiff of the borough court of *Southwark*, for an eſcape upon meſne proceſs, it was moved in arreſt of judgment, that the declaration was ill, becauſe it appeared that the plaint in the court below was levied againſt *two* perſons, but only one was proceeded againſt, ſo that the plaintiff, by proceſs againſt *one* only could not have had the effect of his ſuit below. To this it was anſwered and reſolved *per curiam*, that even ſuppoſing the plaint to be erroneous, yet the officer ſhall not take advantage thereof in a collateral action as this is; he may juſtify the arreſt under the proceſs, and ſhall not be ſuffered to ſay in this action, that the plaintiff could not have the effect of his ſuit below. It was then objected, that the declaration did not allege in what manner the defendant below was indebted to the plaintiff; but only in general that he was indebted: it might be on a judgment, or ſuch a debt as that court had no juriſdiction of: nor did it appear, that the cauſe of action aroſe within the juriſdiction. To this it was anſwered, and reſolved (*a*) But ſee Trevor v. Wall, 1 Term Rep. 151. *per curiam* (*a*), that this being after a verdict, they would ſuppoſe every thing proved at the trial which was neceſſary to be proved; and that the cauſe of action aroſe within the juriſdiction, unleſs the contrary could be made to appear upon the face of the record.

See tit. "*Treſpaſs*" (D).

2. Where the Form of the Commitment, or being in Cuſtody, ſhall be ſaid to be regular.

Wightman v. Mullens, 2 Str. 1226. In an action againſt the marſhal for an eſcape, it was laid, that a priſoner being brought before Sir *William Chapple*, one of the juſtices of our lord the king, at his chambers in *Serjeants Inn*, was there committed to the cuſtody of the marſhal at the ſuit of the plaintiff, as by the commitment may more at large appear. To this the defendant demurred and ſhewed for cauſe, that it did not appear the commitment was of record. And on argument the court held it ill; for he is not in point of law in the marſhal's cuſtody, till the commitment is entered on record; nor can the court take notice that Sir *William Chapple* had any power to commit him, he being only ſtyled one of the juſtices of the king, which every common juſtice of the peace is.

(B) Wh

(B) What Degree of Liberty, or going at large, ſhall be deemed an Eſcape: And herein,

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(*But the law*) This ſtatute having made the rules to all intents the ſame as the walls of the priſon, it follows, that an eſcape from them, without the marſhal's knowledge, cannot be conſidered as a voluntary eſcape. Bonafous v. Walker, 2 Term Rep. 126.

(*So if the*) 2 Bl. Rep. 1050.

If a ſheriff, having arreſted a defendant on *meſne* proceſs, keep him in his cuſtody after the return of the writ, and then carry him to priſon, he is not liable to an action as for an eſcape, if the jury find, that the plaintiff has not been delayed or prejudiced in his ſuit. Planck v. Anderſon, 5 Term Rep. 37.

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(*If an act*) The contrary was adjudged in Sir Thomas Otby's caſe, 1 Ld. Raym. 323; but Lord Raymond queſtions the law of the deciſion, becauſe, if the ſum for inſtance, exceeds that which the ſtatute allows a diſcharge for, the juſtices have no juriſdiction, and the ſheriff is bound to take notice at his peril for what ſum his priſoner is charged in execution. 3. 4 Mod.

Debt was brought by the plaintiff, executor of *A.*, againſt the defendant as executor of *B.* formerly ſheriff of the county of *D.* Upon *nil debet* pleaded, the jury found a ſpecial verdict, *viz.* that *A.* recovered a judgment againſt *F.* and ſued a *capias ad ſatisfaciendum* directed to *B.* then ſheriff, *&c.* which writ was executed by the under-ſheriff, and *F.* being in cuſtody, aſſigned a term for years to the under-ſheriff in ſatisfaction of the money recovered by the judgment, and to be diſcharged out of execution, which aſſignment was to be void upon payment of the money recovered by the judgment at a day, after *B.*'s office would determine. Upon this *B.* was diſcharged out of execution, and at the day, *&c.* he paid the money to the under-ſheriff; but the under-ſheriff did not pay the full money to *A.* *B.* died; and *A.* died; and the plaintiff as executor of *A.* brought this action.—It was adjudged, that it did not lie; becauſe the releaſe of *F.* out of cuſtody was an eſcape in the ſheriff, and the receipt of the money afterwards could not purge it. Langton v. Wallis, 1 Ld. Raym. 399. 1 Lutw. 582. S. C.

(C) Of the Difference between voluntary and negligent Eſcapes.

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(*But yet there*) 2 Wilſ. 295. 5 Term Rep. 25. & *vide* the authorities *ſupra*.

And where the eſcape is voluntary, nothing afterwards can purge it; for whenever a gaoler commits a voluntary eſcape, from that moment he commits a tort. Ravenſcroft v. Eyles, 2 Wilſ. 295.

(D) Of the Difference between an Eſcape in Meſne Proceſs and Execution.

(*If the ſheriff*) 2 Bl. Rep. 1049.

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(*But after the*) Upon the ſame principle the gaoler will be liable for an eſcape upon the rescue of one brought out of gaol by *habeas corpus* between judgment and execution. Crompton v. Ward, 1 Str. 429.

(E) What Perſons are anſwerable for, and to be charged with an Eſcape: And herein,

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(*But if the ſheriff*) By ſtat. 3 Geo. 1. c. 15. § 8. the duties of the office of ſheriff are, in this caſe, to be executed by the under-ſheriff, until a ſucceſſor is appointed. And it is not uſual to appoint a new ſheriff till the end of the year.

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(*But if the ſheriff directs*) It hath been repeatedly holden, that where a ſpecial bailiff is appointed on the nomination of the plaintiff in the action, the ſheriff is not anſwerable for the acts of ſuch bailiff. De Moranda v. Dunkin, 4 Term Rep. 120.

(*So if a wo it*) And if the bailiff in ſuch caſe remove the party to the county and gaol ſituate out of the liberty, and there deliver him into the cuſtody of the ſheriff, he will ſubject himſelf to an action for an eſcape. Boothman v. Earl of Surry, 2 Term Rep. 5.

3. Where the Party injured may have his Remedy againſt the Perſon eſcaping, and therein of Eſcape Warrants.

Holland v. Eyles, C.P. M. 28 G. 3. MSS.

In an action againſt the warden of the *Fleet*, for an eſcape on meſne proceſs, a verdict was given for the plaintiff with 300*l.* damages. The facts of the caſe were as follows:—The plaintiff had recovered againſt one *Fakeney* a debt of 11,000*l.*, but at the time of the eſcape, a writ of error was pending, and final judgment not entered up. On *Friday* the 24th of *November* laſt, the deputy warden of the *Fleet* (the warden himſelf being not in town) received a notice in writing (which notice it was in proof was duly ſerved) from the plaintiff, to diſcharge *Fakeney*. The deputy warden having ſome doubts whether the notice were really the handwriting of the plaintiff in the ſuit, and thoſe doubts being increaſed by its having been brought by one *Knight*, a man of very bad character; he did not immediately obey it, but employed himſelf in inquiring into the matter, and endeavouring to diſcover whether this were actually the handwriting of the plaintiff, or not. On the *Saturday*, the next day, he met the plaintiff's attorney, who told him, he was not enough acquainted with plaintiff's handwriting to be able to give any opinion on it. On the following day *Sunday*, in the afternoon, he met the plaintiff and his attorney; the plaintiff then acknowledged that the notice which defendant had received was written by him, but after ſome converſation, ſwore that he had been made a dupe of in giving it, and immediately ſerved the defendant with a countermand of it. The defendant diſregarded this countermand, and that evening diſcharged *Fakeney*. Lord *Loughborough*'s idea, at the trial was, that this firſt notice could amount to nothing more than merely to entitle *Fakeney* to a *ſuperſedeas*, that it by no means warranted an immediate diſcharge, and therefore as the defendant had taken upon him to judge of the legal effect of it, he thought he ought to take the conſequences, and told the jury that they ſhould find for the plaintiff.

Bond, Serjeant, moved, that a nonſuit ſhould be entered upon the above evidence as it appeared on the judge's notes. He inſiſted, that by the letter of diſcharge all claims by the plaintiff on the defendant for the detention of *Fakeney* were put an end to, and that that letter of diſcharge could not be countermanded. For in the firſt place, this notice from the plaintiff was a legal diſcharge: a parol direction to the gaoler by the plaintiff in the ſuit, to let the priſoner go out of priſon, is a good diſcharge *Brown Anal.* 29.; and ſuch direction is a good defence by the gaoler in an action for an eſcape. 2 *Inſt.* 382. Lord *Coke*, commenting on the word *ſine aſſenſu domini*, ſays, this aſſent may be by parol, and ſhall be a ſufficient bar in an action of debt for the eſcape. *Dy.* 275. *a. Cro. Car.* 3[illegible]

Vezey v. *Harris* and wife, *Gouldſ.* 81. Theſe caſes prove, that where there is the conſent of the plaintiff, a diſcharge without writ is a ſufficient defence in an action againſt the gaoler for an eſcape. But this order of diſcharge having been thus properly given, could not in law be countermanded. To ſee whether it were countermandable or not, it will be neceſſary to ſee what was to be its operation on the priſoner. As with reſpect to him, it was a grant of liberty, a grant of an intereſt of the higheſt nature, and therefore not countermandable. For wherever a valuable intereſt is given by grant or manumiſſion, it cannot be countermanded. A villein enfranchiſed for an hour, is ſo for ever; an expreſs manumiſſion of a villein cannot be upon condition, for once free in that caſe, and ever free. *Co. Litt.* 274. *b. Finch.* 29. The law invariably makes the diſtinction between matters of profit or intereſt, and matters of pleaſure, eaſe, truſt, authority, and limitation; with reſpect to the former it allows of no countermand; with reſpect to the latter, they may be countermanded, though a power of revocation be taken away in the moſt poſitive terms, for a man cannot by his own act make that not countermandable, which by law and in its nature is countermandable. This was ſettled in *Viner's* caſe, 8 *Co.* 82., where it was determined that a ſubmiſſion to an award is revocable, though the party have declared it to be irrevocable; but the grant of a valuable intereſt is in its nature irrevocable. *Sheph. Abr.* tit. *Countermand*, 464. If I preſent *J. S.* to a church, I cannot after vary and preſent anew, for a kind of intereſt paſſeth out of me. *Finch.* 32. *Dyer*, 348. *a.* In *Plowd.* 36. *a.* it is ſtated *arguendo*, that if a perſonal thing be once in ſuſpenſe, or the perſon of a man be once diſcharged for a perſonal thing, that is a diſcharge for ever. From all theſe authorities then it is clear, that where a valuable intereſt is denied to a party, it is not ſubject to a countermand. And further, by this order of 24th of *November*, *Fakeney* can never be deprived of his liberty again for this debt. It is ſaid in the caſe of *Alanſon* v. *Butler*, cited in *Salk.* 177. that in an eſcape by conſent of plaintiff, neither the plaintiff nor the ſheriff can retake, though the debt be unſatisfied. And in *Freem.* 213. in the caſe of *Baſſet* v. *Salter*, *North*, C. J. ſays, Since the law is ſo ſtrict that matters of deed ſhall not be diſcharged but by deed, he wondered that the law ſhould permit an execution to be diſcharged by a miſtake of the plaintiff's; as he cited a caſe, where a creditor went over to the *King's Bench* to treat with a priſoner, and brought him over the water to a tavern to treat, it was held that he could never take him again, and ſo the law is clear when he is once diſcharged by the conſent of the plaintiff. S. C. in 2 *Mod.* 136. Theſe words ought to have the more weight, becauſe the C. J. ſeems to expreſs a diſſatisfaction in declaring the law to be ſo ſettled. But when this order was delivered to the warden, he was bound to obey it, otherwiſe he would have been guilty of a treſpaſs, and he actually was guilty of one, in detaining *Fakeney* till the *Sunday*. That the action of treſpaſs will lie in this caſe is determined in 3 *Bulſtr.* 96. *Gilbert* v. *Henly*. But if the defendant is chargeable in an action at the ſuit of *Fakeney* for detaining him, he cannot be chargeable in an action at the ſuit of *Holland* for diſcharging him.

See Fytche v. Biſhop of London, Houſe of Lords.

Qu. A caſe cited from a Roll. 39.

On the other ſide it was anſwered by *Adair*, Serjeant, that as to the firſt ſet of caſes which were cited by the council for the defendant, and which went to prove that an intereſt once granted cannot be revoked; admitting that poſition to be true, yet liberty is not the intereſt meant in theſe caſes; all thoſe caſes relate merely to property. That as to the caſe that was cited from *Freem.* 213. and 2 *Mod.* 136. in the ſecond ſet of caſes,

caſes, which ſtruck the court as preſſing rather hard upon the plaintiff, where it was held, that if a creditor had once taken his debtor out of priſon, though for the expreſs purpoſe of a compromiſe, he could not afterwards detain him; in that caſe it ſhould be conſidered that there was an actual diſcharge, not as in this, a mere aſſent to a diſcharge. There is another diſtinction, which was exceedingly material; and that is, between a party in priſon under an execution, and under meſne proceſs; execution is much more like an intereſt than a detention under meſne proceſs; for the diſcharge of the party under meſne proceſs by no means annihilates the debt; for the creditor, though he cannot arreſt the debtor again, yet he may ſue him for the debt, and then take him in execution.

An authority to a gaoler to diſcharge a priſoner on meſne proceſs is merely a licence not coupled with an intereſt, therefore may be countermanded.

Lord *Loughborough*.—The point made at the trial was this, that a diſcharge once given, no matter by what means obtained, whether by fraud or fairly, was irrevocable? I did not leave it to the jury to inquire whether there had been any fraud uſed in obtaining the diſcharge, but ſummed up the evidence without adverting to that part of the caſe. I thought the counſel extremely judicious in not preſſing upon that ground, as I was ſtrongly of opinion that the plaintiff had been groſsly impoſed upon, and ſhould moſt certainly have ſummed up to the jury with very ſtrong obſervations. The queſtion therefore now comes before the court, bearing on an admitted fact upon the face of it, that the plaintiff had been duped, and therefore it is for the defendant's counſel to contend that the original order of diſcharge was effectual, notwithſtanding the diſcharge had been obtained on the ground that the plaintiff had been duped.

The defendant's counſel, after ſome heſitation, confeſſed that if the caſe were put upon that ground, they ſhould be unable to ſupport it, and not chooſing to let the whole go again to a jury, the rule was discharged.

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(*By the* 1 *Ann. c.* 6.) The eſcape warrant not grantable for any contempt but not performing an order. Hincheliffe v. Payne, 1 Str. 99.

And by 5 Ann. c. 9. § 2. the warrant may be granted on an affidavit made in the country before a commiſſioner, ſuch affidavit being firſt duly filed.

By 5 Ann c. 9. § 3. eſcape warrants may be executed on a Sunday.

By ſtat. 5 Ann c. 9. § 1. perſons taken by virtue of 1 Ann. c. 6. inſtead of being committed to the common gaol of the county where they are taken, are to be committed to the priſon where the ſheriff keeps priſoners for debt, from which, if they eſcape, the ſheriff ſhall be anſwerable in other caſes of eſcape.

The warrant ſhall be ſuperſeded, if the party was entitled to his diſcharge at the time he eſcaped. Webb v. Thompſon, 1 Str. 401.

(F) Of the proper Remedy and Nature of the Action to be brought for an Eſcape.

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(*Alſo the*) If he adopt the latter, the jury *muſt* give him the whole ſum, that is, the which he would have been entitled to have recovered againſt the priſoner, viz. the ſum indorſed on the writ, and the legal fees of execution. Bonafous v. Walker, 2 Term Rep. 126. Hopkins v. Plomer, 2 Bl. Rep. 1048. But ſee the words of Buller, J. in 5 Term Rep. 40. It lies as well where the eſcape is negligent, as where it is voluntary. Stonehouſe v. Mullis, 2 Str. 873.

(*If a priſoner*) 1 P. Wms. 685.

By ſtat. 1 *Ann. c.* 6. § 2 "If any perſon ſo retaken by warrant as "aforeſaid, ſhall at any time make any eſcape out of the gaol to which he "ſhall be conveyed or committed as aforeſaid, the ſheriff, in whoſe cuſ-"tody he was, ſhall be liable to anſwer for ſuch eſcape, as in the caſe of "any other eſcape."

By § 3. "It ſhall be lawful for any perſon or perſons that ſhall be "bail in any of her Majeſty's courts of record at *Weſtminſter*, for any "ſuch perſon that ſhall be retaken and conveyed to ſuch gaol by virtue "of ſuch warrant as aforeſaid, to have and proſecute out of ſuch of her "Majeſty's courts where he or they ſhall be bail, a writ directed to the "ſheriff of the county, to the gaol whereof ſuch priſoner ſo retaken ſhall "be committed and detained, commanding him to detain and keep ſuch "priſoner in cuſtody in diſcharge of his bail; which writ, with an ac-"count whether he hath the ſaid priſoner in his cuſtody, ſhall be returned "by the ſaid ſheriff into court, at a day therein to be mentioned; and "the delivery of every ſuch writ to the ſheriff, or his deputy, ſhall be "deemed and taken to be an effectual render of ſuch priſoner to all in-"tents in diſcharge of the ſaid bail; and in caſe ſuch ſheriff, his deputy, "or other his inferior officer, ſhall thereafter ſuffer the perſon ſo rendered "in diſcharge of his bail to eſcape, they and every of them ſo offending "ſhall be liable to action and actions as the marſhal of the Queen's "Bench, or warden of the Fleet priſon, is or are liable to, for per-"mitting any perſon to eſcape out of his or their cuſtody or priſon, who "was committed to ſuch cuſtody or priſon upon render in diſcharge of "his bail."

It is enacted by ſtat. 5 *Ann. c.* 9. § 4. "That if any perſon ſhall be "in cuſtody of any ſheriff, or other officer, either by virtue of the above "ſtatute of 1 *Ann.* or of this preſent act, or otherwiſe, for not perform-"ing any decree of the high court of Chancery, or court of Exchequer, "whereby any ſum of money is ordered or decreed to be paid, and ſhall "afterwards make any eſcape from the ſaid ſheriff or other officer, then "and in ſuch caſe the perſon, his executors or adminiſtrators, to whom "the money was to be paid by the ſaid decree (*a*), ſhall have the ſame "remedy againſt the ſaid ſheriff, as if ſuch perſon ſo eſcaping had been in "cuſtody upon an execution at law, and ſhall and may recover the ſum of "money decreed to be paid in and by ſuch decree, againſt ſuch ſheriff or "other officer, together with his or their coſts of ſuit, in any action of "debt, or upon the caſe, to be brought or commenced againſt ſuch ſheriff "or other officer in any of her Majeſty's courts of record at *Weſtminſter*, "wherein no protection or wager of law ſhall be admitted, or any more "than one imparlance."

(*a*) If in a ſuit by huſband and wife, it appear by the decree that the wife is intereſted in the caſe, ſhe ought to join with her huſband in the action, notwithſtanding the order ſhould appoint the money to be paid only to the huſband. Huggins v. Durham, 2 Str. 726.

By 5 *G.* 2. *c.* 30. § 18. a penalty of 500l. is inflicted on gaolers ſuffering bankrupts to eſcape.

(G) Of the Manner of laying the Action.

(*If A. recovers*) But ſee Bonafous v. Walker, 2 Term Rep. 126. *contra*.

(*The plaintiff*) 4 Term Rep. 611. Alexander v. Macauley, S. P.

In

Blatch v. Archer, Cowp. 63. In debt againſt the ſheriff for an eſcape, the indorſement of *non eſt inventus* upon the *capias ad ſatisfaciendum*, is ſufficient evidence of its having been delivered to him. So, the bailiff's name indorſed on the writ is ſufficient evidence, that he was authorized by the ſheriff to arreſt, without proving the warrant.

(H) Of the Party's Defence who ſuffered the Eſcape: And herein of pleading freſh Suit.

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(*If a priſoner*) And a voluntary return of the priſoner, before action brought, is equal to a retaking upon freſh purſuit. Bonafous v. Walker, 2 Term Rep. 126. 2 Str. 873. Stonehouſe v. Mullins, S. P.

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(*If a debt*) 2 Term Rep. 126. Bonafous v. Walker, S. P. Under a count for a voluntary eſcape, the plaintiff may give evidence of a *negligent* eſcape. *Ibid.*

(*But now*) An affidavit that the eſcape mentioned in the declaration, (*if any ſuch eſcape there was,*) happened without the defendant's knowledge, was allowed to be ſufficient; for, if the defendant knows nothing of any eſcape, he is not to be bound to admit by his affidavit that an eſcape has actually happened. Weſt v. Eyles, 2 Bl. Rep. 1059.

Page 249 Eſtate in Fee-ſimple.

(A) Who may purchaſe or inherit ſuch Eſtate.

Page 251

(*As to Jews*) Jews, it ſeems, were not incapacitated from taking gifts of land, unleſs there was an expreſs clauſe, uſual in former times, in the original charter, forbidding an alienation to them. Bract. 13.

(B) The Import of the Word *Heir* that creates the Eſtate.

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(*Where a man*) But the blood of the perſon ſummoned is not ennobled, till he takes his ſeat in parliament. *Id.* 160.

(*There are ſome*) A fee will paſs to a ſole corporation without words of limitation or ſucceſſion, when the grant is made to the corporation by its corporate or collective name. Thus, a gift *eccleſiæ de A.* will paſs a fee, though the deed of gift contain no words of ſucceſſion. 11 H. 4. 84. b. 1 Atk. 437. That is, if the king takes them in his royal politick capacity, *jure coronæ.*

Eſtate

Eſtate in Tail.

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(A) What things may be entailed within the Statute *de donis conditionalibus*.

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(*If A*) *Vide* tit. "Annuity and Rent-charge. Tom. 1. 177. note.

(*No chattels*) Two things ſeem eſſential to an entail within the ſtatute *de donis*. One requiſite is, that the *ſubject* be land or ſome other thing of a *real* nature. The other requiſite is, that the eſtate in it be an *inheritance*. Therefore, neither eſtates *pur autre vie* in lands, though limited to the grantee and his heirs during the life of *ceſtuy que vie*, nor *terms for years*, are entailable any more than perſonal chattels; becauſe, as the latter not being intereſts either in things *real* or of *inheritance*, want *both* requiſites; ſo the two former, though intereſts in things *real*, yet not being alſo of *inheritance*, are deficient in *one* requiſite. However, eſtates *pur autre vie*, terms for years, and perſonal chattels, may be ſo ſettled, as to anſwer the purpoſes of an entail, and be rendered unalienable almoſt for as long a time as if they were entailable in the ſtrict ſenſe of the word. Thus, eſtates *pur autre vie* may be deviſed or limited in ſtrict ſettlement by way of *remainder* like eſtates of inheritance; and ſuch as have intereſts in the nature of eſtates-tail may bar their iſſue and all remainders over by *alienation* of the eſtate *pur autre vie*, as thoſe, who are ſtrictly ſpeaking tenants in tail, may do by *fine* and *recovery*: but then the having of iſſue is not an eſſential preliminary to the power of alienation in the caſe of an eſtate *pur autre vie* limited to one and the heirs of his body, as it is in the caſe of a conditional fee, from which the mode of barring by alienation was evidently borrowed. The manner of ſettling terms for years and perſonal chattels is diſſerent: for in them no *remainders* can be limited; but they may be entailed by *executory deviſe* or by deed of truſt, as effectually as eſtates of inheritance, if it is not attempted to render them unalienable beyond the duration of lives in being, and 21 years after, and perhaps in the caſe of a poſthumous child a few months more; a limitation of time not *arbitrarily* preſcribed by our courts of juſtice, but wiſely and reaſonably adopted in analogy to the caſe of freeholds of inheritance, which cannot be ſo limited by way of remainder, as to poſtpone a complete bar of the entail by fine or recovery for a longer ſpace. It is alſo proper to obſerve, that in the caſe of terms of years and perſonal chattels, the *veſting* of an intereſt, which in reality would be an eſtate-tail, bars the iſſue and all the ſubſequent limitations, as effectually as fine and recovery in the caſe of eſtates entailable within the ſtatute *de donis*, or a ſimple alienation in the caſe of conditional fees and eſtates *pur autre vie*; and further, that if the executory limitations of perſonalty are on contingencies too remote, the whole property is in the firſt taker. Upon the whole, by a ſeries of deciſions within the laſt two centuries, and after many ſtruggles in reſpect to perſonalty, it is at length ſettled, that every ſpecies of property is in *ſubſtance* equally capable of being ſettled in the way of entail; and though the modes vary according to the nature of the ſubject, yet they tend to the ſame point, and the duration of the entail is circumſcribed *almoſt* as nearly within the ſame limits as the difference of property will allow. As to the entail of eſtates *pur auter vie*, ſee 1 Vern. 184. 225. 3 P. Wms. 262. 1 Atk. 524. 2 Atk. 259. 376. 3 Atk. 464. 2 Vez. 681. As to the entail of terms for years and perſonal chattels, ſee Manning's caſe, 8 Co. 94. Lampet's caſe, 10 Co. 46. b. Child and Bailey, W. Jon. 15. Duke of Norfolk's caſe, 3 Ch. Ca. 1. a caſe in Carth. 267. and one in 1 P. Wms. 1. Foley v. Burnell, 1 Br. Ch. Ca. 274. Hargr. note, Co. Litt. 20. a. b.—The doctrine upon this part of the ſubject is ſtated in the above note with ſuch neatneſs, perſpicuity, and ſuccinctneſs, that the editor, feeling it impoſſible to deliver it in fewer or better words, has taken the liberty of tranſcribing it at length.

(B) What Words are requiſite to create an Eſtate-tail in a Deed or Gift.

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(*If lands are*) A ſettlement was made on *A.* for life, remainder on *B.* and the heirs-male of his body, with power of revocation to *A.* of *B*'s remainder.—*A.* reciting the ſettlement to be on *B.* and his heirs male, omitting the words *of his body*, revoked the old uſes, and by the new deed limited *the ſaid eſtate in the ſaid deed named* to *B.* and his heir male, omitting the words *of his body*, and ſubjected the eſtate thus limited to a charge of 100*l.* It was holden, that this was a good revocation, and a good limitation of a new eſtate-tail; for that the recital, though inaccurate, referred to the limitation in the ſettlement to the heirs *of the body*; the revocation was of thoſe uſes

uſes which the recital had referred to and profeſſed to ſtate; and the new limitation was of eſtate deſcribed in the ſettlement, ſubject only to the charge of 100*l.* Gilmore v. Harris, 3 L 213. Carth. 292 S. C. Skin. 325. S. C.

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(*If lands are given*) 2 Roll. Rep. 19. 23. In this caſe there was alſo a warranty to the gr tee and his heirs. However, the court intimated, that their opinion would have been the ſa if theſe ſpecial circumſtances had not occurred.

Hebblethwaite v. Cartwright, Ca. temp. Talb. 30. Long v. Beaumont, 1 P. Wms. 231. Hewitt v. Ireland, *id.* 427. Gore v. Gore, 2 P. Wms. 33. S. P.

Lands were given to one for life, remainder to the heirs male of body hereafter to be begotten. This was adjudged to be an eſtate-t and that the words *hereafter to be begotten* do not confine it to the iſſue b after, but will take in that born before, the words *procreatis et procrea* being of the ſame import, according to 1 *Inſt.* 20. and 24 *E.* 3. *pl.* And this is to prevent the great confuſion that would otherwiſe be in cents by letting in the younger before the elder.

But it hath been holden, that where the w were *in poſterum procreandis*, ſons born *before* ſhall be excluded, on account of the pecu force of *in poſterum*. Adj. M. 26 Eliz. B. R. 3 Leon. 87. Hargr. Co. Lit. 20. b. n. 3.

(C) Of the ſeveral Sorts of Eſtate-tail.

Goſſage v. Taylor, Sty. 325.

Where an eſtate for life was limited to *S.* wife of L, remainder to heirs to be begotten on the body of *S.* by *L.* her huſband, no eſtate be previouſly limited to the huſband himſelf; it was holden, that the w *heirs* related to both their bodies, and conſequently, did not create eſtate-tail in *S.*

Frogmorton v. Wharley, 2 Term Rep. 435. 2 Bl. Rep. 728. S. C. 3 Wilſ. 125. 144. S. C.

Sir *R. F.* on the marriage of his ſon levied a fine, and declared the u to himſelf during the joint lives of himſelf and his ſon *L. F.*, and af the deceaſe of either of them, to the uſe of *S. C.* for her life, and after deceaſe to the uſe of the iſſue male of the ſaid *S.* and *L.* and the heirs their bodies, and in default of ſuch iſſue, to the uſe of the heirs to begotten on the body of *S.* by the ſaid *L.*, remainder to the right heirs the ſaid Sir *R. F.* The marriage took effect, and *S.* died leaving daughters, but no ſon. Sir *R.* died leaving *L.* his ſon and heir. A qu tion aroſe on the eſtate which *L.* took; and the court reſolved, that, if had been joint-tenant with the wife for life, this had been an eſtate-tail both; as the word *heirs* is not applied to any body particularly, as *Litt.* 28. Secondly, that neither the huſband nor wife had an eſtate-tail: t the huſband, becauſe he had no prior eſtate for life: not the wife, beca though ſhe took an eſtate for life, yet the heirs are not applied to her body

Denn v. Gillott, 2 Term Rep. 431. Co. Lit. 26.

On a marriage the huſband covenanted to ſtand ſeiſed of lands to uſe of himſelf and his intended wife for their lives, and the life of longer liver, remainder to the uſe of the heirs of the huſband *on* the body his ſaid intended wife *by* him lawfully to be begotten, remainder to the of his own right heirs. The huſband having ſurvived the wife, levied fine of the lands, and after his deceaſe, a queſtion aroſe on the operat of this fine; which depended on the point, whether the words "to " uſe of the heirs *on* the body of the wife *by* the huſband to be begotte gave an eſtate-tail to the wife only, or a joint eſtate-tail to both? It decided, that the limitation gave an eſtate-tail to both, as well upon authority of the above caſe in *Styles*, as of the caſe cited by Lord *C* from 3 *E.* 3. *c.* 32., where, upon a gift to *I* and *M. uxori ejus et hered*

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eos idem I. de corpore ipsius M. procrearet, &c. it was adjudged an estate-tail in both, because the estate was equally entailed to the heirs of the baron, as to the heirs of the wife.

A freehold estate was settled on husband and wife for life, and on the survivor, remainder to the use of the heirs of the husband on the body of the wife to be begotten, remainder to the right heirs of the husband. A copyhold estate in borough-english was likewise settled to the use of husband and wife and the heirs of their two bodies to be begotten in like manner and to the same uses as the freehold was settled and conveyed. *De Grey*, C. J. This is an estate executed, and seems to be an estate-tail in the husband and wife. *Blackstone*, J. I think the freehold is clearly vested in the husband only in special tail; the copyhold in both husband and wife. Rose v. Aistrop, 2 Bl. Rep. 1228.

Lands were settled to the use of husband and wife for their lives, remainder to the use "*of the heirs of the husband on the body of the wife lawfully begotten or to be begotten, the male to be preferred before the female, and the elder before the younger.*" The lessor of the plaintiff claimed as heir male under this settlement, that is, as son of the second son of the marriage: the defendant claimed as heir at law, that is, as the son of a daughter of the eldest son of the marriage. It was argued on behalf of the defendant, that there was nothing to hinder the descent to the heir at law, though claiming through a female; that the limitation was to *all* the heirs; and that the words of regulation were referable merely to the immediate children of the marriage, to shew how they should take. But the court said, that if these words had any meaning, they described an estate-tail; and it was not to be supposed, that they were inserted without any meaning at all. Denn v. Hobson, 5 Burr. 2609. 2 Bl. Rep. 695. S. C. See Preston on Estates, ch. Estates Tail.

If lands be given to a man to have and to hold to him and the heirs male of his body, and to him and the heirs female of his body, the estate to the heirs female is in remainder, and the daughters shall not inherit any part so long as there is issue male; for the estate to the heirs male is first limited, and shall be first served; and it is as much as to say, and after to the heirs females, and males in construction of law are to be preferred. Co. Lit. 377. a.

Estate-tail after possibility of Issue extinct. Page 267

(A) Who may be Tenant in Tail after Possibility of Issue extinct, and how their Estates are to be created.

(*Such person*) "This long periphrasis, Sir William Blackstone saith, the law makes use of as absolutely necessary to give an adequate idea of such person's estate. For had it called him barely *tenant in fee-tail special*, that would not have distinguished him from others; and besides, he has no longer an estate of inheritance or fee, for he can have no heirs, capable of taking *per formam doni*. Had it called him *tenant in tail without issue*, this had only related to the present fact, and would not have excluded the possibility of future issue. Had he been styled *tenant in tail without possibility of issue*, this would exclude time past as well as present, and he might under this description

cription never have had any poſſibility of iſſue. No definition therefore could ſo exactly m him out, as this *of tenant in tail after poſſibility of iſſue extinct*, which (with a preciſion peculiar our own law) not only takes in the poſſibility of iſſue in tail which he once had, but alſo ſt that this poſſibility is now extinguiſhed and gone." 2 Comm. 124.

(B) The Power this Tenant has over the Inher ance, and in what Reſpects he is conſidered as bare Tenant for Life.

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(*For he is*) But a court of equity will reſtrain him at leaſt from committing malicious and travagant waſte. Abraham v. Bubb. 2 Freem. Rep. 53. 2 Eq. Ca. Abr. tit. Waſte (A), pl S. C. 2 Show. 69. S. C. Anon. 2 Freem. 278. S. P.

Page 270 Eſtate for Life and Occupancy.

(B) Who upon the Death of Tenant for Life is enjoy the Land: And herein of Occupancy.

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(*There can be*) That is, no *general* occupant; for Lord Coke writes in Co. Lit. 388. a. th heirs are named in the grant of a rent *pur autre vie*, they ſhall take, though this was form doubted. Dy. 186. ed. in marg. 1 Bulſtr. 155. Mo. 625. 664. Godb. 172.

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(*If a leaſe*) 3 Atk. 466. And now ſince the ſtatute, if an eſtate *pur auter vie* be limited man, his heirs, executors, adminiſtrators and aſſigns, and be not deviſed, it deſcends to the as a ſpecial occupant, and of courſe the perſonal repreſentative of the perſon laſt ſeiſed canno cover the title deeds from the perſon laſt ſeiſed. Atkinſon v. Baker, 4 Term Rep. 229.

(C) How far Tenant for Life may diſpoſe of Eſtate, either ſingly by himſelf, or by joini with him in Reverſion: And herein of his fo feiture, either by Common Law or Statute.

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(*So if B*) Between Garret v. Blizard, Roll. Abr. 855. Sty. 192. S. C the court divided; the reporter ſays, Qu. What judgment was given? S. C. cited in Sir Wm. Jon. 65. 70. 3 733.

Lady Whetſtone v. Saintſbury, 2 P. Wms. 147. Pr. Ch. 591. S. C.

By marriage ſettlement lands were conveyed to truſtees and their h to the uſe of huſband for life, remainder to the uſe of truſtees to pre contingent remainders, remainder to the uſe of the wife for life, remai to the firſt, &c. ſon of the marriage in tail male. The huſband and levied a fine, (they having then a ſon an infant,) and mortgaged the lan *J. S.* The huſband died; *J. S.* brought a bill againſt the wife and then of age. The ſon pleaded the ſettlement, and inſiſted that his moth eſtate was forfeited, and equity ought not to relieve. The lord chanc

argument allowed the plea. But the cauſe coming on to be heard by maſter of the rolls, he obſerved, that the uſe and the legal eſtate were ed in the truſtees; and the limitations to the huſband, wife, and ſons, e but truſts; and a truſt for life is not forfeited by a fine (*a*), and ſo the plaintiff to hold and enjoy during the life of the wife.

(*a*) So, Letheuillier v. Tracy, 3 Atk. 728.

EVIDENCE.

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(A) Who may be a Witneſs.

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(*All perſons*) An infant under the age of ſeven years may be a witneſs in a criminal proſecu-, provided ſuch infant appears upon examination to poſſeſs a ſufficient knowledge of the na- and conſequences of an oath. there is no preciſe or fixed rule as to the time within which nts are excluded from giving evidence: but their admiſſibility depends upon the ſenſe they rtain of the danger and impiety of falſehood, which is to be collected from their anſwers ſtions propounded to them by the court. But if they are found incompetent to take an , their teſtimony cannot be received. Rex v. Braſier, Leach's Caſes, 180. Powell's caſe, *Id.* —Mr. J. Rooke, in a criminal proſecution that was coming on to be tried before him at neſter, finding that the principal witneſs was an infant, who was wholly incompetent to an oath, poſtponed the trial till the following aſſizes, and ordered the child to be inſtructed e mean time by a clergyman in the principles of her duty, and the nature and obligation of ath. At the next aſſizes the priſoner was put upon his trial, and the child was produced as a ſs, and being found by the court, upon examination, to have a proper ſenſe of the nature of ath, was ſworn, and upon her teſtimony, the priſoner was convicted, and afterwards exe- d. Mr. J. Rooke mentioned this at the old Bailey in 1795, in the caſe of Patrick Murphy, was indicted for a rape on a child of ſeven years old; and the learned judge added, that upon nference with the other judges upon his return from the circuit, they had unanimouſly ap- ed of what he had done.

all that the law of England requires is, that the witneſs ſhould profeſs a belief in a ſupreme be- and his moral providence, and appeal to his omniſcience for the truth of his atteſtation. e form of the oath is not of the eſſence of it. 2 Sid. 6. It is immaterial what may be its ex- al form, provided it affect the conſcience of the party. An infidel therefore, that is, one believing in revealed religion, is, in general, an admiſſible witneſs, if ſworn according to the monies of his religion. Omychund v. Barker, 1 Atk. 21. 1 Wilſ. 84. But men wholly t religion (and many ſuch, at leaſt *profeſſedly* ſuch there are at preſent) ſhall not be permit- to bear teſtimony in any caſe whatſoever. 1 Atk. 44. Neither ſhall a perſon excommuni- d be a witneſs, becauſe being excluded out of the church, he is ſuppoſed not to be under the nce of any religion. Bull. N. P. 292. 3 Bl. Comm. 102.——A man deaf and dumb, whom communication could be held by means of ſigns, &c. was admitted to give material nce againſt a priſoner at the Old Bailey, January Seſſions 1786, by Mr. J. Heath, after an ment againſt his competency. The ſolemnity of an oath is required from all ranks. ds of parliament, when they give their teſtimony, muſt be ſworn. Their privilege to proteſt honour only is confined to their anſwers in courts as defendants. Sir W. Jon. 153-4-5. Car. 64. 2 Mod. 99. 2 Salk. 513. 1 P. Wms. 146. In the caſe of the king, his teſti- y has in one inſtance been admitted without oath. This was in the reign of James the Firſt, e certificate under his ſign manual, was received as evidence in a Chancery ſuit without ex- ion. Abignye v. Clifton, Hob. 213. But the legality of admitting this evidence, was juſtly ioned by a great contemporary authority. 2 Roll. Abr. 686. In one caſe the law diſpenſeth the formal manner of being ſworn in favour of certain ſects of our own people, and allows affirmation to have the force and effect of an oath. But this indulgence it confines to civil s. Stat. 7 & 8 W. 3. c. 34. 22 G. 2. c. 30. Perhaps the affirmation of one of theſe ſec- may be read in defence of a criminal charge againſt the ſectary himſelf, but not where his nce is collateral, and in exculpation of a third perſon, the ſectary himſelf not being charged . 2 Burr. 1117.

In

7 Parl. Hiſt. 43. 3 Wooddeſ. 276. Com. Dig. tit. Teſtmoigne, (A. 1).

In the ſecond year of *Charles* the firſt, the Houſe of Lords referred to the judges generally, whether, in caſe of treaſon and felony, the king's teſtimony is to be admitted: but the king prohibited them from giving their opinion. As to appearing perſonally, and being ſworn in court, that ſeems wholly inconſiſtent with the royal dignity.

Lunaticks may be witneſſes *in lucidis intervallis*.

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(*Huſband and wife*) 2 Term Rep. 265. 262. 4 Term Rep. 678, The huſband cannot be witneſs for the wife even on a queſtion touching her ſeparate eſtate. 1 Burr. 424.

(*Hence it hath*) Broughton v. Harper, 2 Lord Raym. 752. S. P. 2 Term Rep. 263. S. P.

1 Brownl. 47.

And by ſtat. 21 *J.* 1. *c.* 19. § 6. the wife of a bankrupt may be examined by the commiſſioners for the diſcovery of his eſtate: the contrary whereof was holden to be law before the paſſing of this act of parliament.

Salk. 289. Str. 925.

But no other relation is excluded, becauſe no other relation is abſolutely the ſame in intereſt: therefore in *Pendrel* and *Pendrel*, before Lord *Raymond*, which was an iſſue out of Chancery to try whether the plaintiffs were heir to *T. O.*, the marriage and birth being admitted by order, the mother was admitted to prove the father had acceſs to her. So, in *Lomax* and *Lomax*, before Lord *Hardwicke*, the mother was admitted to prove the marriage; and in an ejectment againſt *Sarah Brodie* at *Hereford* 17 Mr. J. *Wright* admitted the father to prove the daughter legitimate; the title being as heir to her mother.

Str. 940.

April 22d 1771. Goodright v. Moſs, Cowp. 591.

In Lord *Valentia*'s caſe in the Houſe of Lords, where the queſtion was whether the Earl of *Angleſea* was married to the Counteſs Dowager *Angleſea*, on 15th *September* 1741, prior to the birth of Lord *Valentia* their ſon, who was born in 1744, the counteſs dowager, having no intereſt, was admitted to prove the fact of the marriage. So, where the queſtion was, whether the leſſor of the plaintiff was the legitimate ſon of *Francis* and *Mary Stephens*, or was born of *Mary* before their marriage, the court determined, that general declarations by the parents, and the anſwer of the mother in Chancery, were good evidence, after the death of ſuch parents, to prove that the leſſor of the plaintiff was born before marriage. But they ſhall not be permitted to ſay after marriage that they have had no connection, and therefore that the offſpring is ſpurious, not eſpecially the mother, who is the offending party. But the wife may

Rex v. Rook, 1 Wilſ. 340.

permitted to prove the fact of adultery with her, though not to prove baron had no acceſs.

Rex v. Reeding, 8 G. 2. *per* L.d. Hardwicke.

1 Wilſ. 332.

A father who was a freeman of a borough by ſervitude, was admitted to prove the cuſtom whereby his ſon was entitled to his freedom as the ſon of a freeman.—If a legacy be given to a ſon, a father may be a witneſs to prove the will. *Per cur. ibid.*

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(*It ſeems agreed*) And to a perſon who acts as interpreter between the attorney and client. Madam du Barre's caſe, 4 Term Rep. 756. (*e*) In 1 Vez. 63. Lord Chancellor Hardwicke made to ſay, "that though an attorney or counſel concerned for one of the parties, may, "pleaſes, demur to his being examined as a witneſs; yet if he conſents, the court will not "the reading of his depoſitions: that the objection had been often made; and though "particular judges had doubted, it was always over-ruled." It ſhould ſeem from hence as right to object were the privilege of the attorney, not of the client; whereas nothing is than that the obligation to ſilence is for the ſake of the latter, not of the former. Bull.

So far from the right to object being in the attorney, the court takes upon itself to ſtop the ...'s, whenever it diſcovers an anxiety in him to reveal the confidential communications of his ... 4 Term Rep. 759. 2 Vez jun. 189. Nor is it true, that a court of equity will not re... the reading of the depoſitions in ſuch caſe; it will not indeed at once and without examina... merely upon this ground, ſuppreſs the whole of the depoſition; but it will direct a refe... to the maſter, and will expunge ſuch part as he ſhall find to be matter of that ſort, ... from the confidence between attorney and client ought not to be diſcloſed. Sandford v. ...ington, 2 Vez. jun. 189

But it ſeems now to be ſettled, that ſuch notice to a man's ſcrivener, attorney, agent, or coun... is ſufficient notice to the party himſelf. Merry v. Abney, 1 Ch. Ca. 38. Brotherton v. ..., 2 Vern. 574. Jennings v. Moore, *Id.* 609. 1 Br. P. C. 254. S. C. Le Neve v. Le Neve, ... 646. Sheldon v. Cox, Ambl. 624. The notice however, muſt be in the *ſame* tranſacti... The examination of a title by a counſel, or ſolicitor on a former occaſion, ſhall not be ſuch ...ſtructive notice, as to affect a client in a ſubſequent tranſaction. Fitzgerald v. Falconberg, ... 207. Warrick v. Warrick, 3 Atk. 291. Aſhley v. Baillie, 2 Vez. 368. Steed v. Whi..., Barnard. Ch. Rep. 220.

(*But at the inconveniency*) Collateral facts, and acts done by his client ... the courſe of the buſineſs in which he has been employed, he is bound ... give evidence of: nay, an attorney has been obliged to prove his ...ent's having ſworn and ſigned the anſwer upon which he was indicted ... perjury (*a*). Doe v. Andrews, Cowp. 845. Sandford v. Remington, 2 Vez. jun. 189. Lord Say and Seal's caſe, Bull. N. P. 284. (*a*) Rex v. Watkinſon, 2 Str. 1122. *contr.*

...th been adjudged too, that he was at liberty to give evidence of a ...verſation between him and his client touching the juſtice of his ſuit, ... a writ of enquiry executed on an interlocutory judgment, and a com... thereupon; for the purpoſe of the ſuit having been obtained, the ...unication could not be ſaid to be made by way of inſtruction for ...ducting the cauſe. Cobden v. Kendrick, 4 Term Rep. 431. In this caſe the communication was made ... the ſuit was at an end, and it was *that* which the judgment of the court turned upon. Had ... required his information, pending the ſuit, during the time he acted as attorney, he would ... have been permitted to diſcloſe it; for in that caſe, the obligation to ſecrecy continues after ...determination of the ſuit, and indeed ceaſeth at no period of time. 4 Term Rep. 759.

So, where it appeared that the attorney propoſed to be examined, *though* ...*dentially and profeſſionally* conſulted with by one of the parties, in parts ... buſineſs which conſtituted the ſubject-matter of the ſuit, was yet ...ctually employed as his attorney in that particular cauſe, it was ad... that he ought to be examined, for that the privilege of a client ... extends to the caſe of the acting attorney for him. Wilſon v. Raſtall, 4 Term Rep. 753.

This privilege is confined to the caſes of counſel, ſolicitor, and attor... and does not extend to any other profeſſions. Duchess of Kingſton's caſe, 11 St. Tr. 243. 4 Term Rep. 758 9.

Whether Plaintiffs or Defendants in the Cauſe may be Witneſſes.

...hall therefore, where in an information for a miſdemeanor the attor... general (*Trevor*) offered to examine a defendant for the king, which ... court would not permit, he entered a *noli proſequi*, and then examin... him. Bull. Ni. Pri. 285.

So, where two were indicted for an aſſault, and one ſubmitted, and ...ined one ſhilling, the Chief Juſtice admitted him as a witneſs for ... other. Rex v. Fletcher, 1 Str. 633.

If any perſon be arbitrarily made a defendant to prevent his teſtimony, ... ſaid, that if nothing be proved againſt him, he ſhall be ſworn, for ... he Bull. Ni. Pri. 285.

he does not ſwear in his own juſtification, but in juſtification of anoth
But *quære*, whether a verdict ſhould not be firſt taken for him?

Dormer and Forteſcue, M. 9 G. 2. *ibid.*

If a material witneſs for the defendant in ejectment be alſo made a d
fendant, the right way is for him to let judgment go by default: but
he plead, and by that mean admit himſelf to be tenant in poſſeſſion,
court will not afterward, upon motion, ſtrike out his name. But in ſu
caſe, if he conſent to let a verdict be given againſt him for as much as
is proved to be in poſſeſſion of, there ſeems to be no reaſon why he ſho
not be a witneſs for another defendant.

Poplet v. James, Tr. 5 G. 2. *ibid.*

In treſpaſs, the defendant pleaded in bar of the action that *R.*
named in the *ſimul cum* paid the plaintiff a guinea in ſatisfaction, and i
was joined thereon: the defendant produced *R. M.* and *per Eyre*, C.
he may be examined, for what he is now to prove cannot be given in
dence in another action, and in effect he makes himſelf liable by ſwea
he was concerned in the treſpaſs.

Reaſon v. Ewbank, H. 1 G. 1. *per omnes juſt. ibid.*

But if the plaintiff can prove the perſons named in the *ſimul cum* in t
paſs guilty, and parties to the ſuit, which muſt be by producing the
ginal or proceſs againſt them, and proving an ineffectual endeavour
ſerve them, or that the proceſs was loſt, the defendant ſhall not have
benefit of their teſtimony.

Ibbotſon v. Rhodes, 1 Eq. Ca. Abr. 229. 2 Vern. 554.

If there be but one witneſs againſt a defendant's anſwer, the court
direct a trial at law to try the credibility of the witneſs, and in ſuch
will order the defendant's anſwer to be read to the jury.

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(*Alſo it hath*) It was at one time doubted, whether the evidence of an accomplice, un
firmed by any other evidence that can materially affect the caſe, were ſufficient to warrant a
viction? But it is now ſettled, that an accomplice is a competent witneſs; and that a convi
ſupported by his teſtimony alone, is perfectly legal. Atwood's caſe, Leach's Caſes, 365.

Bull. Ni. Pri. 286. Say. Rep. 290.

It hath been adjudged, that a *particeps criminis* is a good witneſ
the plaintiff in treſpaſs: though he is left out on purpoſe to make hi
witneſs, and a recovery againſt the defendants in the action is a good
as to him.

Buſh v. Ralling, Say. Rep. 209., cited alſo by Ld. Mansfield, Cowp. 199.

In an information for bribery at an election on the ſtat. 2 G. 2
perſon bribed, and who had taken the bribery-oath, was called as a
neſs. He was objected to as a *particeps criminis*, and on the ground
the tendency of his evidence was to diſcharge himſelf, as the ſt
exempts from the penalty any perſon diſcovering another guilty o
offence. But it was holden, that a *particeps criminis* was in many ca
good witneſs even to obtain a reward or pardon for himſelf: that un
particeps criminis was admitted as a witneſs, the ſtatute would be
avail, as ſuch tranſactions are generally matters of ſecrecy; and *De*
J. cited a caſe, wherein C. J. *Eyre* admitted ſuch a witneſs.

Clerk v. Shee, Cowp. 197.

So, where a clerk had embezzled money and notes, the property
maſter, which he had laid out with the defendant in illegal inſuranc
the lottery; on an action brought by the maſter to recover the mone
notes, the clerk was allowed, on receiving a releaſe, to be a good w
to prove that they had been ſo diſpoſed of by him.

(*It ſeems now*) A conviction of any crime which amounts to the *crimen falſi* incapacitates
from being a witneſs, therefore conſpiracy, barratry, &c. Priddle's caſe, Leach's Caſes, 3
is now ſettled, that it is the infamy of the crime which deſtroys the competency of a witn
not the nature or mode of the puniſhment. Pendock v. Mackender, 2 Will. 18.

(*But no ſuch*) And it is not ſufficient to produce the conviction alone; it muſt be followed up by the judgment to conſummate the incapacity. Cowp. 3.

(*It is alſo agreed*) In the caſe of the Earl of Warwick, one French, who had been convicted of manſlaughter and allowed his clergy, but not burnt in the hand, was holden by the judges not to be a competent witneſs; for that though the ſtatute operates as a pardon; yet the words are, that the offender, after the allowance of his clergy and burning in the hand, ſhall be enlarged out of priſon; and therefore both conditions are precedent, and until they are complied with, the party remains convict of felony, and conſequently his teſtimony cannot be received. 3 P. Wms. 456. The ſtat. 19 Geo. 3. c. 74. § 3. ſubſtitutes a diſcretionary power of fining, or ordering to be whipped, felons convicted, and liable to be burnt in the hand in lieu of the latter puniſhment; and ordains, that ſuch fine or whipping ſhall have the ſame effect in reſtoring them to their credit. But felons convicted of petty larceny were never ſubject to burning in the hand; as they were never in need of praying their clergy. There was therefore this inconſiſtency: convicts of grand larceny, who had undergone the ſentence of the law, were competent witneſſes; convicts of petty larceny, who had alſo undergone the ſentence of the law, were incompetent. This is rectified by ſtat. 31 Geo. 3. c. 35. which provides, that no perſon ſhall be an incompetent witneſs by reaſon of a conviction for petty larceny. 3 Wooddeſ. 286. note.

A perſon who is employed to ſell goods, and is to have for himſelf whatever money he can procure for them beyond a certain ſum; is a competent witneſs to prove the contract between the buyer and the ſeller. Such a perſon is to be conſidered as a broker; there is no difference between an agent taking to him a part of the price for which he bargains, and taking a commiſſion from his employer upon that price. Benjamin v. Porteus, 2 H. Bl. 590. *Per* Heath and Rooke, J. againſt Eyre, C. J.

A perſon who has depoſited title-deeds of an eſtate with his creditor, as a ſecurity, and afterwards mortgaged the eſtate to another, is competent to prove that the mortgagee had notice of the depoſit Plumb v. Pluitt, Anſtr. 432.

By the 27 *Geo.* 3. *c.* 29. pariſhioners are made competent witneſſes in proſecutions where the penalty is given to the pariſh, unleſs it exceed twenty pounds. Rex v. Davis, 6 Term Rep. 177.

The informer under the ſtatutes of 17 *Geo.* 2. *c.* 40. & 9 & 10 *W.* 3. *c.* 41. againſt any perſon for having naval ſtores in his poſſeſſion, is a competent witneſs to prove the fact; for his intereſt is precarious, the court having a power to inflict at their diſcretion a corporal puniſhment, or to impoſe a fine, in caſe of conviction. Rex v. Cole, Eſpin. Caſ. 169.

The reputed father or mother is a competent witneſs to diſprove the fact of marriage on a queſtion of ſettlement. 6 Term Rep. 330.

In an action by huſband and wife in right of the wife as executrix, no act or declaration of the wife can be given in evidence by the defendant. Alban v. Pritchett, 6 Term Rep. 680.

(B) How far a Perſon is diſabled from being a Witneſs in reſpect of his being intereſted in the Succeſs of the Cauſe.

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(*It has been always*) The incompetency of a witneſs by reaſon of his being intereſted, may be aſcertained, either by examining the witneſs himſelf on a *voir dire*, or bringing other proof, whether he is intereſted in the event of the ſuit; but a party, it is ſaid, cannot have recourſe to both theſe methods. 10 Mod. 151. Ambl. 593. Ca. temp. Hardw. 358. It was formerly the rule to diſallow objections to the competency of a witneſs, as too late, after he was ſworn in chief: and though this rule is in ſome meaſure relaxed; ſtill the objections muſt be taken at the trial. 1 Term Rep. 719-20. 4 Burr. 2256. Hence, he who is bail for another cannot be a witneſs for him, for he is directly and immediately intereſted; for if a verdict be given againſt the principal, he becomes immediately liable. 2 Hawk. P. C. c. 46. § 24. 1 Term. Rep. 164.

So, a *prochein ami*, by whom an infant ſues, cannot be a witneſs, becauſe liable to the coſts. Hopkins v. Neal, 2 Str. 1026. Clutterbuck v. Lord Huntingtower, 1 Str. 506.

(*Therefore it has been held*) For the bare poſſibility of an intereſt in the witneſs will not exclude his teſtimony. Hence, a liability to be rated to the poor is no objection to a witneſs in queſtions touching an exiſting rate, or the ſettlement of a pauper. Rex v Proſſer, 4 Term Rep. 17. Rex v. South Lynn, 5 Term Rep. 664. So, a co-obligor in a bond to the ordinary, under 21 & 23 Car. 2. c. 10. may be admitted to prove a tender by the adminiſtratrix. Carter v. Pearce, 1 Term Rep. 163. So, a creditor of the adminiſtratrix is admiſſible for the ſame purpoſe. *Ibid.*

(*It ſeems to be agreed*) If the iſſue be on a right of common, which depends on a cuſtom pervading the whole manor, the evidence of a commoner is not admiſſible, becauſe, as it depends on a cuſtom, the record in that action would be evidence in a ſubſequent action brought by that very witneſs to try the ſame right. But the ſame reaſon does not hold where common is claimed by preſcription in right of a particular eſtate; for it does not follow, that if *A.* has a preſcriptive right of common belonging to his eſtate, that *B.* who has another eſtate in the ſame manor must have the ſame right; neither would the judgment for *A.* be evidence for *B.* *Per* Buller, J. 3 Term Rep. 302-3. So, by Lord Holt, in 1 Ld. Raym. 731. If *A.*, *B.*, *C.*, *D.*, and *E.* claim common excluſively of all others, and *A*'s right be diſputed, *B.* may be a witneſs for him, for it tends to narrow his own right. But if there be a cuſtom that all the inhabitants of Blackacre ought to have common there, one of the inhabitants in that caſe cannot be a witneſs.

Duke of Somerſet v. France, 1 Str. 658.

So, where the queſtion reſpected the rights of lords of cuſtomary manors, the lords of other manors were deemed incompetent witneſſes, becauſe the queſtion concerned a general right.

Doe v. Williams, Cowp. 621 (*b*) Bourne v. Turner, 1 Str. 632.

A tenant in poſſeſſion is not an admiſſible witneſs to prove the eſtate of his landlord, for this would be to uphold his own poſſeſſion. So (*b*), where a motion was made to admit the landlord a defendant in ejectment, inſtead of the tenant, upon an affidavit that the tenant was a material witneſs, the court refuſed it, becauſe the tenant was liable to anſwer for the meſne profits, and therefore could not be a competent witneſs.

Bell v. Harwood, 3 Term Rep. 308. Rex v. Woodlands, 1 Term Rep. 262.

If two perſons are contending for the poſſeſſion, who are to pay rent on different rights, the landlord cannot, in that caſe, be admitted as a witneſs to prove the demiſe in the ejectment. But where the queſtion is merely touching the ſettlement of the tenant, the landlord may be received to explain the terms of his demiſe. So, where in action of covenant for rent upon a leaſe by *A.* to *B.*, the point in iſſue was, whether *C.* (whoſe hand was both admitted) demiſed firſt to *A.* or to another perſon, *C.* was allowed to be a competent witneſs to prove that point.

Ridout v. Johnſon, Bull, Ni. Pri. 283. (*c*) Bent v. Baker, 3 Term Rep. 27.

It hath been uſual in actions on policies of inſurance, not to admit underwriters on the ſame policy to be witneſſes for each other. But this is now treated rather as an objection to the credit, than the competency of the witneſs.

(*In an action*) But without a releaſe, the teſtimony of the ſervant in ſuch caſe is not admiſſible. Green v. The New River Company, 4 Term Rep. 559.

(*The maſter*) But there are many caſes where ſervants and ſailors, though parties intereſted, will be admitted *ex neceſſitate*. In actions by informers for ſelling coals without meaſuring by buſhel, the ſervants are witneſſes for their maſter, notwithſtanding 3 Geo. 2. inflicts a penalty upon them for not doing it; though Eyre, C. J. did on that account, in two or three inſtances, refuſe to receive them. *Per* Lee, C. J. in E. I. Company v. Goſling, Bull. N. P. 284, where the queſtion was, whether the maſter had deſerted the ſhip without ſufficient neceſſity; a ſailor, who had given a bond to the maſter (as a truſtee for the company) not to deſert the ſhip during the voyage, was admitted evidence for the maſter, it appearing all the ſailors entered into ſuch bonds. *Ibid.* So, if a man pays money by his ſervant, the ſervant may be a witneſs from the neceſſity of the thing. Tybbald v. Tregott, 4 Mod. 26. So, where a ſon, having a general authority to receive money for his father; received a ſum, and gave it to the defendant

…ſon was admitted as a good witneſs (his teſtimony being corroborated by other circumſtances) …his father in an action of trover for the money. 1 Salk. 289. So, in trover againſt a pawn-…broker, the ſervant embezzling his maſter's goods and pawning them, will be admitted to prove …the fact. Mich. 1752. C. B. at Weſtminſter, Bull. N. P. 290. So, in an action to recover …money from a lottery-office keeper which the plaintiff's clerk had embezzled, and paid to the de-…fendant upon the chances of the coming up of tickets in the ſtate-lottery, contrary to the lot-…tery act, the clerk was admitted as a witneſs to that fact. Clark v. Shee, Cowp. 197. In this …caſe indeed the clerk had a releaſe from the plaintiff and his ſureties: but *qu.* if he would not …have been admiſſible without a releaſe? So, in actions by maſters for aſſaulting a ſervant, *per quod …ſervitium, &c.*, it is every day's practice to admit the ſervant as a witneſs for the maſter. Duel v. …Snelling, 1 Str. 595. Lewis v. Fog, 2 Str. 944. Cock v. Wartham, *Id.* 1054. Tullidge v. …Wade, 3 Wilſ. 18. *contr.* Dauſley v. Weſtbrowne, 1 Str. 414.——So, for the ſake of trade and …the common uſage of buſineſs, an intereſted ſervant will be admitted. As, a porter is evidence to …prove a delivery of goods: a banker's apprentice to prove the receipt of money. Bull. N. P. 289. …A factor, who made the agreement between the parties, was allowed to be a witneſs to prove …the contract, though he was to have a ſhilling in the pound; for, as factor he was concerned …both for vendor and vendee, was a mere *go-between*, and might be a witneſs for either. Dixon …v. Cooper, 3 Wilſ. 407.

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…(*ſums agreed clearly*) See tit. "Wills and Teſtaments" (D), and 25 Geo. 3. c. 6.

…But in a *qui tam* action on the ſtatute of uſury, againſt the aſſignee of a bankrupt for taking …exceſſive intereſt on a loan of money to the bankrupt before his bankruptcy, the bankrupt is not a …competent witneſs to prove the offence, if he has not obtained his certificate, or re-paid the …money; notwithſtanding he is ready to releaſe to his aſſignees all benefit which may ariſe from …the debt in particular, and all claim to allowance and ſurplus in general; and notwithſtanding the …aſſignee has proved his demand for the money lent under the commiſſion. Maſters v. Drayton, …Term Rep. 496.

…(*Diſſeiſ*) An executor in truſt is a good witneſs for the will. And though in the caſe of a …deviſee, it hath been uſual to have a releaſe, yet that is not neceſſary, for ſuch perſon has in fact …no intereſt to releaſe. Nor is it any objection to an executor's teſtimony, that he may be liable …to actions as executor *de ſon tort*. Lowe v. Jolliffe, 1 Bl. Rep. 365. Holt v. Tyrrell, 1 Barnard. …Goodtitle v. Welford, Dougl. 139. Baillie v. Wilſon, 4 Burr. 2254. In Goſs v. Tracy, …Mich. 1715, Lord Cowper determined, that a grantee, where he appears to be a bare truſtee, …is good evidence to prove the execution of the deed to himſelf. 1 P. Wms. 287.

…An informer under a penal ſtatute, who is entitled to part of the penalty, …cannot be admitted a witneſs againſt the offender. Rex v. Stone, 2 Ld. Raym.

…Rex v. Piercy, Andr. 18. Rex v. Blaney, *Id.* 240. Rex v. Tilly, 1 Str. 316.—But ſome …ſtatutes declare the informer to be a competent witneſs; as the act of 32 Geo. 3. c. 56. § …for preventing the counterfeiting of certificates of the characters of ſervants.

…The plaintiff had been appointed huſband of a ſhip by a deed executed …by the joint owners; by which deed he was impowered generally to lend …advance money, *&c.* He inſured for all the owners; and brought ſe-…veral actions of covenant againſt two of them: they were each of them …charged for the amount of the whole ſum paid. It was agreed, that a …direction to inſure given by one part-owner did not bind the reſt, without …expreſs or implied authority for that purpoſe from the reſt. The plaintiff …did not pretend that any expreſs general direction to inſure had been given …by the owners; but inſiſted that they were all informed of it, and acqui-…eſced in it, and called a witneſs to prove it. This the defendant denied, …and offered to diſprove it by calling the defendant in the other cauſe, inſiſt-…ing that he was a competent witneſs, becauſe he was not intereſted in the …event of that ſuit, for that each of the two cauſes was to ſtand on its own …bottom. But Lord *Mansfield*, at the trial, and afterwards, the court of …K. B. rejected this witneſs as incompetent; for unleſs there was a general …direction to inſure, the plaintiff could not recover in this action; and a ver-…dict (*b*) Accord-ing to this ſtatement, the court conſidered the witneſs as intereſted *in the event of the cauſe*; though Buller J. in the caſe of Walton v. Shelley, 1 Term Rep. 303. treats the French v. Backhouſe, 5 Burr. 2727.

decision as having proceeded upon the ground merely of *an interest in the question*. His words are, "In that case, the second de-
"dant was certainly not interested to support the defence in the first cause; for if the plai-
"had recovered in that, the second defendant, who was offered as the witness, could not
"been charged with any part of the damages recovered in the first action."

dict against one of these joint-owners would affect the other of them; cause that other would be obliged to contribute (*b*).

Trelawney v. Thomas, 1 H. Bl. 303.

A. gave a general bond to *B.* for the payment of a sum of money. appeared upon examining *A.* on a *voir dire*, that it was understood betw them, that this money was to be applied towards indemnifying *B.* from expences of an election in which *B.* was a candidate. In an action bro by *C.* against *D.*, an active member of a committee for carrying on election, for money advanced and services performed in supporting interest of *B.* at the request of *D.*, it was holden that *A.* was not a c petent witness; for he was interested in the event of the cause, inas as by procuring the plaintiff to be nonsuited or a verdict against him would save himself from the consequences of this action, since, if he ceeded, as the defendant would call upon *B.* to be reimbursed the dam and costs, *A.* would be liable by his engagements to *B.*; and if the plai having failed in this action, should bring another against *B.*, *A.* might te to *B.* the amount of the plaintiff's demand, and thereby escape the for if *B.* should proceed against him on the security, he would be restr in equity from having execution for more than the damages recovere the plaintiff in the former action, which would have been tendered.

(*He who*) Shank *q. t.* v. Payne, 1 Str. 633. S. P. In which case he is a competent ness, though the fact of payment should be proved by no other person but himself. Abrah Bunn, 4 Burr. 2251.

(*Hence also*) Rex v. Broughton, 2 Str. 1229. *contr.* In the case of the King v. Bray, Ca. Hardw. 359. Lord Hardwicke saith, that if the case of the King and Whiting were exa into, it would be found to be rather an objection to the credit than the competency.

(*Also it seems*) Shanke *q. t.* v. Payne, 1 Str. 633. S. P. Rex v. Rhodes, 2 Str. 728. Though a person, as it is said, whose hand is forged, is not admissible to prove the forgery under many circumstances, he may be admitted, where he is not directly interested in the que as in Wells' case, who was indicted for forging a receipt from a mercer at Oxford, the having before recovered the money in an action against Wells, was admitted by Willes, C prove the forgery. Bull. Ni. Pri 289. So, where Newland forged a bank-note in the na William Lander one of the cashiers; Lander was admitted, *without a release*, to prove that not his signature; because the interest and liability to pay must be immediate and ap either upon the face of the instrument forged, or on a *voir dire*; and Lander, the cashi only *mediately* liable over to the bank upon his security. O. B. 1784.—A bond was forged Dodd in the name of Lord Chesterfield, and the obligees executed a release; upon wh lordship was admitted to prove, that the signature was not in his hand writing. Leach's 2 vol. c. 46. § 24 note. But on an indictment for forging a seaman's will, a person nam cutor in a will of a subsequent date, was holden an incompetent witness to prove that the t the testator to the first will was a forgery; for that went to establish the second will in w was named executor. Rhodes's case, Leach's Cr. Cas. 25.

(*So upon this*) Rex v. Nunez, 2 Str. 1043. S. P. But see Rex v. Broughton, 2 Str. 1229 However, in the case of Rex v. Eden, Lord Kenyon held, that the defendant in the action, against whom the verdict went, was an incompetent witness, he not having paid th and costs. Hil. 34 G. 3. Espinasse's Ca. at Ni. Pr. 97.

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(*If the warden*) See Fitzg. 80. The King against Huggins, S. P. ruled on the auth this case.

(*Hence in an*) The *quantum* of interest will not affect the case at all: if the party h interest, he is disabled from being a witness. Hence, where a corporation, being lord of a

approved part of a common, and leaſed it, reſerving rent to the corporation, a freeman was admitted to prove, that there was a ſufficiency of common left for the commoners. Burton Hinde, 5 Term Rep. 174.

(*So in the caſe*) 4 Burn's E. L. 95.

A perſon, who has acted in breach of an alledged cuſtom, is not a competent witneſs to diſprove the exiſtence of the cuſtom; for if the cuſtom ſhould not be eſtabliſhed, he would be diſcharged from any actions he may be liable to for the breach of it. The Company of Carpenters, &c. v. Hayward, Dougl. 374.

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(*In one action*) But now by ſtat. 8 Geo. 2. c. 16. § 15. inhabitants of hundreds are made competent witneſſes at trials on the ſtatutes of hue and cry.

(*But it has*) See Baron v. Bury, Vin. Abr. tit. Evidence (I), pl. 33. S. P. and ſame diſtinction as in the text. In Str. 652. Rex v. Fox, on an indictment for an aſſault, it was proved, that the proſecutor had laid a wager that he ſhould convict the defendant: And Lord C. J. Raymond held him to be a good witneſs for the king, though it might go to his credit. And the better opinion ſeems to be, that it is no objection to the *competency* of a witneſs, that he has laid a wager on the ſubject of the ſuit, though it may affect his *credit*. Cowp. 736. 3 Term Rep. 37. And it ſeems now to be a ſettled rule, that where a perſon makes himſelf a party in intereſt after the plaintiff or defendant has acquired an intereſt in his teſtimony, he ſhall not by this deprive the plaintiff or defendant of the benefit of his teſtimony. Therefore, a broker who underwrites a policy after getting it underwritten by others, is a competent witneſs for the defendant in an action againſt any of thoſe who underwrote before him. Bent v. Baker, 3 Term Rep. 27.

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(*It has been held*) 1 P. Wms. 287. S. C. 1 Atk. 615. 2 Vez. 42. Tully's caſe, 2 Ld. Raym. 1008. 1 Salk. 286, Holcroft v. Smith, 1 Eq. Ca. Abr. 224. Baker v. Lord Fairfax, 1 Str. 1001. *contr.* But depoſitions have been allowed to be read at law, where the witneſs was beyond the reach of judicial proceſs. Lord Altham v. Lord Angleſey, Gilb. Ca. in Eq. 16. 11 Mod. 210 S. C. So, where he could not be found, or was diſabled from attending by ſickneſs. Fry v. Wood, 1 Atk. 449. Bull. Ni. Pri. 239. As, where he becomes executor or adminiſtrator to the obligee of a bond. Godfrey v. Norris, Str. 34. Goſs v. Tracy, 1 P. Wms. 289. So, where he becomes infamous. Jones v. Maſon, Str. 833. But if the ſubſcribing witneſs be intereſted both at the atteſtation and at the trial, he can neither be examined as a witneſs to prove the execution, nor can his hand-writing be proved. Swire v. Bell, 5 Term Rep. 371.

(*But is not good*) But Sir Matthew Hale is of a different opinion. 2 Hal. H. P. C. 280.

A perſon cannot be a witneſs who apprehends himſelf to be intereſted, though in fact he be not ſo; or, who admits himſelf to be under honorary engagements, though not under any legal obligation, to contribute to the conſequences of the action. Fotheringham v. Greenwood, 1 Str. 129.

But *qu.* whether the being under mere honorary engagements ought not to go rather to the credit, than the competency of a witneſs, ſince it is impoſſible to render the witneſs competent, a notional honorary intereſt not being the ſubject of a releaſe.

A perſon ſhall not be permitted to give evidence to invalidate a negotiable inſtrument which he has ſigned. Walton v. Shelly, 1 Term Rep. 296.

But this rule is confined to *negociable* inſtruments; for in the caſe of Mr. Jolliffe's will, all the ſubſcribing witneſſes were allowed to give evidence of the inſanity of the teſtator at the time of making it. Love v. Jolliffe, 1 Bl. Rep. 365.

If a perſon who is tendered as a witneſs does every thing in his power to get rid of the objection to his teſtimony, it ſhall not be competent to the other party by an obſtinate refuſal to prevent him from being examined. Goodtitle v. Welford, Dougl. 139.

(D) Of

(D) Of compelling a Witneſs to appear and gi Evidence.

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(*It is held*) This is now not law. See 4 Term Rep. 340,

(*From hence*) Four witneſſes only can be put in one writ of *ſubpœna*. Cowp. 846, and a ti ſhould be made out for each witneſs, and perſonally delivered to him, a reaſonable time be the day of trial, 2 Str. 1054; for witneſſes ought to have a convenient time to put their affairs in ſuch order, as that their attendance on the court may be of as little prejudice to th ſelves as poſſible. 1 Str. 510.

But the action for the further recompence will not lie, unleſs ſuch recompence hath been p viouſly aſſeſſed by the court out of which the proceſs iſſued, neither the jury, nor the jud *niſi prius* being competent to do it. Pearſon v. Iles, Dougl. 556. Upon ſuch aſſeſſment debt be brought. However, the more uſual way is to proceed by attachment againſt the wit neglecting to attend. But in order to ground this ſummary mode of proceeding, it is neceſſ to prove that the witneſs was perſonally ſerved. Smalt v. Whitmill, 2 Str 1054. Wakefi caſe, Ca. temp. Hardw. 313. and that his reaſonable expences were paid or tendered to him. Ch man v. Pointon, 2 Str. 1150. Stephenſon v. Brookes, Barnes, 33. Bowles v. Johnſon, 1 Rep. 36.

Tidd's Pr. 528. (*a*) Forteſc. 396. (*b*) Cowp. 627. (*c*) Imp. K. B (*d*) Dougl. 419. (*e*) 3 Burr. 1440 2 Cr. Pr. 248, 9.

Where a witneſs is detained in perſon, a *habeas corpus ad teſtificandu* neceſſary to bring him up; for which an application is made to a jud upon an affidavit, ſworn by the party applying (*a*), ſtating that he is a m terial witneſs, and willing to attend (*b*): Upon this application, the jud if he think proper, will grant his *fiat* for the writ, which is then ſued o ſigned, and ſealed (*c*. But a *habeas corpus ad teſtificandum* will not lie bring up a priſoner of war (*d*); and where the application for it appea to be a mere contrivance to remove a priſoner in execution, the court fuſed to grant it (*e*). The writ being ſued out, ſhould be left with ſheriff, or other officer in whoſe cuſtody the witneſs is detained, who bring him up, on being paid his reaſonable charges (*f*).

Qu. Whether the officer may not require an indemnity againſt the priſoner's eſcape? *Ll. ibid.*

(E) Of the Manner of giving Evidence: A herein.

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(*But it is ſaid*) The order for this purpoſe cannot be obtained without conſent; the depoſit of witneſſes, upon interrogatories, not being the beſt evidence the nature of the caſe admit Tidd's Pr. 529. The court, however, will do every thing in their power to make the pa conſent, when neceſſary; as by putting off the trial, at the inſtance of the defendant, if plaintiff will not conſent, Cowp 174. Dougl. 419.; and if the defendant refuſes, the court not give him judgment as in caſe of a nonſuit. Tidd's Pr. 529.

(*By the practice*) But a ſolicitor cannot be compelled, and ought not to diſcloſe matters c dentially communicated to him by his client. The like indulgence will be given to a pri but he cannot demand it as of right. 4 Str. Tr. 9.

Roe v. Perkins, 3 Term Rep. 749.

A witneſs ſhall not be allowed to read his evidence, but he may ref his memory by any book or paper, if he can afterwards ſwear to the from recollection: but if he cannot ſwear to the fact from recollection further than as finding it entered in a book or paper, the *original* book paper muſt be produced.

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(*It having been*) No examination is allowed to points that would admit of a croſs-examinat 2 Vez. 480.

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(*But now*) A witneſs may be examined *de bene eſſe* on affidavit that the thing to be examined into lies in the knowledge only of the witneſs, though there be no affidavit of his being old, or infirm, or in danger of dying. Shirley v. Ferrers, 3 P. Wms. 78. Hankin v. Middleditch, 2 Br. Ch Rep. 641.

(F) Of written Evidence: And herein of admitting Exemplifications or Copies of Records, &c. as Evidence.

THE firſt ſort of records are acts of parliament; theſe are the memorials of the legiſlature, and therefore are the higheſt and moſt abſolute proof: and they either relate to the kingdom in general, and then are called general acts of parliament, or only to the concerns of private perſons, and are thence called private acts. Gilb. L. E. 11.

On general acts of parliament, the printed ſtatute book is evidence; not that the printed ſtatutes are the perfect and authentic copies of the records themſelves, for there is no abſolute aſſurance of their exactneſs, but every perſon is ſuppoſed to apprehend and know the law which he is bound to obſerve, and therefore the printed ſtatutes are allowed to be evidence, becauſe they are the hints of that which is ſuppoſed to be lodged in every man's mind already. *Id.* 12. 2 Salk. 566. 10 Mod. 216. 126. 181. Keb. 2. Jenk. Cent. 280. pl. 5. Hale's Hiſt. of the Common Law, 15, 16. Style, 462. L. E. 89. Tri. per Pais, 226, 232. Stra. 446. 3 R. S. L. 90.

In private acts of parliament the printed ſtatute book is not evidence, though reduced into the ſame volume with the general ſtatutes, but the party ought to have a copy compared with the parliament roll; for private ſtatutes do not concern the kingdom in general, and therefore no man is underſtood to be poſſeſſed of them, as he is of thoſe general laws which are ſet up as the regulation of his own actions, and, conſequently, the private ſtatutes are no intimation to what is already known, but they are the rules and decrees that relate to the private fortune of this or that particular man, which no one elſe is under any obligation to underſtand or take notice of, and therefore they ought to be proved with the ſame punctuality as the copies of all other records.

But my Lord Chief Juſtice *Parker*, in the caſe of the college of phyſicians and doctor *Weſt*, allowed the printed ſtatute to be evidence of the truth of a private act of parliament touching the inſtitutions of the college. 10 Mod. 353 But this matter of evidence does not appear there. Ld. Raym. 472.

And a private act of parliament in print that concerns a whole country, as the act of *Bedford Levels*, for re-building *Tiverton*, &c. may be given in evidence without comparing it with the record. And theſe things are the rather admitted, becauſe they gain ſome authority by being printed by the king's printer; and beſides, from the notoriety of the ſubject of them, they are ſuppoſed not to be wholly unknown. And for this reaſon, printed copies of other things of as publick a nature have been admitted in evidence without being compared with the original; as the printed proclamation for a peace was admitted to be read without being examined by the record in Chancery. So, the Gazette is evidence of all acts of ſtate. Bull. N. P. 225. *Vide* Dougl. 594. n. R. v. Holt, 5 Term Rep. 436. So,

So, the articles of war, as printed by the king's printer, are evidence of such articles.

The next thing is the copies of all other records, and they are twofold under ſeal, and not under ſeal.

10 Mod. 125, 126. Firſt, under ſeal, and theſe are called by a particular name, exemplifications, and are of better credit than any ſworn copy: for the courts of juſtice that put their ſeals to the copy, are ſuppoſed more capable to examine, and more exact and critical in their examinations, than any other perſon is or can be: and beſides, there is more credit to be given to their ſeal, than to the teſtimony of any private perſon; and therefore we are more ſure of a fair and perfect copy when it comes atteſted under their ſeals, than if it were a copy ſworn to by any private perſon whatſoever.

Exemplifications are twofold; under the broad ſeal, or under the ſeal of the court.

Sid. 145, 146. Hard. 118. Pl. Com. 411. a. 3 Inſt. 173. Under the broad ſeal; ſuch exemplifications are of themſelves records of the greateſt validity, to which the jury ought to give credit, under the penalty of an attaint.

When a record is exemplified under the great ſeal, it muſt either be a record of the court of Chancery, or be ſent for into the Chancery by *certiorari*, for the Chancery is the centre of all the courts, and thence the ſubjects receive a copy under the atteſtation of the great ſeal: for in the firſt diſtribution of the courts, the Chancery held the broad ſeal, whence the authority iſſued to all proceedings, and thoſe proceedings cannot be copied under the great ſeal, unleſs they come into the court where the ſeal is lodged.

Bull. N. P. 227. Nothing but records may be given in evidence exemplified under the broad ſeal; for theſe being preſerved by the proper officer of every court from all raſure and corruption, are ſuppoſed to be ſo fair and unblotted that there can be no danger in the exemplification. But the exemplification of deeds under the broad ſeal cannot be admitted in evidence, for theſe being in the cuſtody of the party and not of the law, are ſubject to raſures and interlineations, and therefore ought to be produced themſelves as the beſt evidence of the contract.

3 Inſt. 173. But this rule is to be taken with exceptions as ſee hereafter. When any record is exemplified, the whole record muſt be exemplified, for the conſtruction muſt be taken from the view of the matter taken together.

The ſecond ſort of copies under ſeal are the exemplifications under the ſeal of the court, and theſe are of higher credit than a ſworn copy, for the reaſons formerly given.

Copies not under ſeal are of two ſorts, 1. Sworn copies, and 2. Office copies.

1. Sworn copies; theſe muſt be of the records brought into court in parchment, and not of a judgment in paper ſigned by the maſter, though upon ſuch judgment you may take out execution, for it does not become a permanent matter till it be delivered into court, and there fixed as memorandums or rolls of that court, and until it be a roll of that court it is transferable any where, and ſo doth not come under the reaſon of law that permits us to give a copy in evidence.

Where

Where a record is loſt, a copy of it may be read without ſwearing it to a true copy, for the record is in the cuſtody of the law, and not of the party, and therefore if loſt, there ought to be no injury ariſing to the party's private right; and, conſequently, if it be loſt, the copy muſt be admitted without ſwearing any examination concerning it, ſince there is nothing with which the copy can be compared, and therefore it muſt be preſumed true without examination. Vent. 257. Styl. Pr. Reg. 205. Mod. 117. Salk. 285. L. E. 89. pl. 18.

But in ſuch caſes as theſe, the inſtruments muſt be according to the rules required by the civil law: they muſt be *vetuſtate temporis, aut judiciariâ cautione roborata*. Carvin. Dig. 292. Mod. 117.

So, the copy of the decree of tithes in *London*, has been often given in evidence without proving it a true copy, becauſe the original is loſt. Vent. 257.

So, a recovery of lands in ancient demeſne was given in evidence, where the original was loſt, and poſſeſſion had gone a long time according to the recovery. *Ibid.*

When a man gives in evidence the ſworn copy of a record, he muſt give the whole copy of the record in evidence, for the precedent and ſubſequent words and ſentence may vary the whole ſenſe and import of the thing produced, and give it quite another face; and therefore ſo much at leaſt ought to be produced as concerns the matter in queſtion. Tri. per Pais, 166. 3 Inſt. 173. Poſt. 27. Ante, 17.

Secondly, Office copies may be given in evidence.

Here the difference is to be taken between a copy authenticated by a perſon truſted to that purpoſe, for there that copy is evidence, and a copy given out by the officer of the court that is not truſted to that purpoſe, for that is not evidence, without proving it actually examined.

The reaſon of the difference is, that where the law hath appointed any perſon for any purpoſe, the law muſt truſt him as far as he acts under the authority that the law has lodged in him; otherwiſe it would be to give credit to another officer and not to him at the ſame time.

Therefore the chirograph of a fine is evidence to all perſons of ſuch a fine, for the chirographer is appointed to give out copies between the parties of thoſe agreements that are lodged of record, and therefore his copy muſt be admitted as evidence without further diſpute. Pl. Com. 110. b.

So, where a deed is enrolled, the indorſement of that enrolment is evidence, without further proof of the deed, becauſe the officer is intruſted to authenticate ſuch deeds by enrolment; and when ſuch officer indorſeth, that he hath done it purſuant to the law, then the law which intruſted him with the authority of doing it, ought to give credit to what he has done. See 10 Ann. c. 18. 8 Geo. 2. c. 6. § 21. In a duchy leaſe, the certificate of the auditor on the margin, is ſufficient evidence of the enrolment. Doug. 56.

But if an officer of the court, who is not intruſted to that purpoſe, gives out a copy, they ought to prove it examined; the reaſon is, becauſe being no part of his office, he is but a private man, and a private man's mere writing or word ought not to be credited without his oath.

Therefore it is not enough to give in evidence a copy of a judgment, though it be indorſed to have been examined by the clerk of the Treaſury, becauſe it is not part of the neceſſary office of ſuch clerk: for he is not intruſted to keep the records for the benefit of all men's peruſal, and to make out copies of them.

So, if the deed enrolled be loſt, and the clerk of the aſſize make out a copy of the enrolment only, this is no evidence, without proving it examined,

mined, becauſe the clerk is intruſted to authenticate the deed itſelf by e rolment, and not to give out copies of the enrolment of that deed.

The office copies of depoſitions are evidence in Chancery, but not common law, without examination with the roll; for the court of Ch cery have for convenience allowed their office copies to be evidence their own court, and have empowered their officers to make out ſuch pies as ſhould be evidence, but the particular rules of their court are taken notice of by the courts of common law.

Chutel and Pound. Trin. Aſſ. 1700.

Where a fine with proclamations is to be a bar to a ſtranger, there proclamations muſt be examined from the roll, for although the chiro pher is authorized by the common law to make out copies to the pa of the fine itſelf, yet he is not appointed by the ſtatute to copy the clamations, and therefore his indorſement on the back of the fine is binding.

See Tri. per Pais, 209.

Having thus ſhewn how the record is to be given in evidence, by proving of a copy, we muſt in the next place ſee in what manner, in what caſes, they ought to be evidence.

And here, in the firſt place, it is regularly true, that when the re is pleaded and appears in the allegations, it muſt be tried on the iſſ *tiel record;* but where the iſſue is upon fact, the record may be give evidence to ſupport that fact.

Style, 22. Sid. 145.

When the iſſue is *nul tiel record*, the record muſt be brought *ſub ſigilli;* but where the record is offered to a jury, any of the forementi copies are evidence.

Sid. 145, 146.

But out of this rule there is an exception, that where the record i ducement, and not the giſt of the action, there, it is not of itſelf verſable, but muſt be given in evidence on the proof of the action nothing can be of itſelf traverſable, that doth not make a full end o matter in queſtion.

Tri. per Pais, 166. 3 Inſt. 173. Mod. 117. Ant. 23.

Where any perſon produces a record, it muſt be ſo much at le concerns the matter in queſtion, for it is no evidence unleſs you ſhe whole import of the matter; for the preceding or following word give it quite another face.

Mod. 117.

Where a recovery is ancient, you need not prove any ſeiſin in the to the *præcipe*, but otherwiſe it is in a modern recovery; for in a ent recovery, the preſumption is for the recoveror, for the rec ſhall be ſuppoſed to be ſeiſed at the time of the recovery, ſince h been ſeiſed ever ſince; but in a modern recovery the ſeiſin m proved, becauſe the *præcipe* doth not lie againſt the perſon that is ſe the freehold, and ſo the recovery wants a foundation, becauſe the is not proſecuted againſt the tenant of the freehold.

Green v. Froud, Vent. 257.

Tenant for life, the remainder in fee; he in the remainder in fee a common recovery with ſingle voucher, and this recovery is a

It is laid down in the caſe of Warren v. Greaville, 2 Str. 1129. that

The court will preſume a ſurrender of the tenant, becauſe when hath been a conſtant enjoyment under that recovery, it ſhall be ſupp be a lawful foundation, for unleſs there had been a lawful tenant *præcipe*, it muſt be ſuppoſed, that it would have been controverted a thrown.

after a recovery of 40 years ſtanding, the court will, *without any other circumſtances*, p ſurrender of the eſtate for life. But in that very caſe, the court did admit other eviden ſurrender, namely, the attorney's book, the attorney himſelf being dead, wherein, a charges for ſuffering the recovery, were two *items* for drawing and engroſſing a ſurrend life-eſtate. Neither doth the above caſe of Green v. Froud, (for there poſſeſſion had nied the recovery,) nor what is ſaid in Pig. 41., warrant this general poſition. And

the caſe of Goodtitle v. Duke of Chandois, 2 Burr 1065., where tenant in tail of a conſiderable eſtate, part in poſſeſſion, the reſidue held by a widow on whom it was ſettled for life, ſuffered a recovery of the whole, and ſettled it on the Duke of Chandois, and the duke on the death of the tenant in tail entered into that part of which he died in poſſeſſion, and on the death of the widow on the remainder; on which the reverſioner brought an ejectment to recover this remainder, on the ground that there was no ſurrender of the widow's life-eſtate; for that no actual ſurrender was proved, and no ſort of evidence having been offered to make ſuch ſurrender probable, it could not be preſumed; the court of K. B. held, that the length of time was not to be reckoned from the date of the recovery, but from the poſſeſſion going with the recovery: that in this caſe there was no poſſeſſion after the death of the tenant for life, for the reverſioner brought his ejectment immediately: that where the perſon ſuffering the recovery, has a right to ſuffer it, the court will preſume all things to have been regular, unleſs the contrary appear; but that here, the recoveror, being only tenant in tail in remainder, and the life-eſtate under the ſame ſettlement ſtill ſubſiſting at the time of ſuffering the recovery, it was moſt clear he had no power to alien or bar.—And even where the perſon ſuffering the recovery, has a clear right to alien, yet the court will not, from mere length of time, preſume proper tenants to the *præcipes*, where it appears from the deeds that proper parties did not join, and the uſes are declared to have been warranted by thoſe deeds. Keen v. Earl of Effingham, 2 Str. 1267.

But if there be tenant for life, the remainder in fee, and he in remainder ſuffer a common recovery with ſingle voucher, and this recovery is modern, this record will not give a title, for the freehold is in tenant for life, and the *præcipe* ought to be brought againſt him; and ſo there is no lawful action commenced. Vent. 257.

If there be tenant for life, with remainder in tail, and they both join in a common recovery with ſingle voucher, this will not bar the tail, becauſe the remainder-man is not tenant to the *præcipe*; and in this caſe the *præcipe* is brought againſt them both as joint-tenants, and he in remainder hath no immediate eſtate of freehold in him, and the remainder-man is not bound by the recovery had againſt the tenant for life, unleſs he comes in upon the aid prayer, though the remainder is turned to a right by ſuch recovery. Moor, 256. pl. 402. 2 Roll. Abr. 395. Pig. of Rec. 36.

But if there be tenant for life, the remainder in tail, and they ſuffer a recovery, and comes in as vouchees on the double voucher, then he in remainder is barred, becauſe he in remainder is as properly called in as vouchee, as if he had been called in on the aid prayer of tenant for life, and then when he takes up the defence, and makes default, he muſt be barred by the judgment, as for the want of a title appearing; for where any perſon is properly in court, and doth not defend his title, he is as properly barred as he who hath no title at all: and when tenant in tail is barred for want of title, the iſſue can never after recover in his *formedon*. 2 Roll. Abr. 396.

Although, regularly, no recovery or judgment is to be admitted in evidence but againſt parties or privies, yet under ſome circumſtances they may; as in an information in nature of a *quo warranto*, a judgment of ouſter was allowed to be given in evidence to prove the ouſter of a third perſon, the mayor, by whom the defendant was admitted. And ſuch evidence is concluſive, unleſs the judgment can be impeached as obtained by fraud. Bull. N. P. 231. R. v. Hebden, 2 Str. 1109. Andr. 389. 5 Term Rep. 72.

As to verdicts; if a verdict be had on the ſame point, and between the ſame parties, it may be given in evidence, though the trial was not had for the ſame lands; for the verdict in ſuch caſes is a very perſuading evidence, becauſe what twelve men have already thought of the fact, may be eſteemed fit to direct the determination of the preſent jury; for to go contrary to what a former jury have decided in relation to any fact, is to arraign the honeſty and ſincerity of their judgment; and there is that common Lewis and Clerges, Term Paſch. 1700. Trial at bar.

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mon credit to be given to twelve men of the country, diſcerning of the fact upon their oaths, that no ſecond jury ought raſhly to depart from their judgment: Their verdict alſo further ſtands in credit, becauſe the jury muſt be ſuppoſed honeſt men, and men of clear reputation, their verdict not having been attainted by the party againſt whom it was given.

Lewis and Clerges.

But then the verdict ought to be between the ſame parties, becauſe otherwiſe a man would be bound by a deciſion, where he had not the liberty to croſs-examine, and nothing can be more contrary to natural juſtice, than that any body ſhould be injured by any determination that he was not at liberty to controvert; for that is to ſet up a deciſion unexamined, in prejudice of a cauſe that is under examination. Beſides, one that is not party to the trial has no redreſs for the injury if the verdict were falſe, for he cannot have an attaint, and therefore ought not to be injured by the verdict.

Ibid. See Stra. 308. 2 Str. 1151. See Carth. 79. 181. 5 Mod. 386. 2 Jones, 221. 3 Mod. 142. 2 Sid. 325.

But it is not neceſſary that the verdict ſhould be in relation to the ſame land, for the verdict is only ſet up to prove the point in queſtion; and if the verdict ariſe upon the ſame queſtion, then it is no doubt a good evidence; for every matter is evidence that amounts to proof of the point in queſtion.

In an action of treſpaſs, the indictment for the ſame treſpaſs and verdict thereupon, ſhall not be given in evidence, if the indictment be only found on the party's own oath; for if the party's oath be no evidence in his own cauſe (as we ſhall hereafter ſhew that it is not) then cannot the verdict be any evidence that is founded only on the party's own oath; for what cannot be evidence directly, cannot be made evidence by any ſuch circuity.

This is the practice *ex relatione* Mr. Phipps, 1700.

But where the verdict on the indictment is founded on another evidence, beſides the party's own oath, there, the verdict may be given in evidence; for, there, this verdict ſeems to be under the ſame general rule with all others, and there the judgment of twelve men on the fact ought to ſway in determination of the ſame fact, whether the verdict be on indictment or action: But yet it may be objected, that the fact might find credit from the party's own oath, which ought not to ſupport the action, and ſince the evidence is ſo intermixed, that it doth not appear on what it was founded, the verdict cannot be produced in corroboration of the evidence on the action.

Objection.

Anſwer.

It is true, this doth in part take off the force of ſuch evidence; for as when a verdict is produced in evidence, it may be anſwered, that it did not ariſe from the merits of the cauſe, but from ſome formal defect in the proof, and that makes it no evidence, toward gaining the point in queſtion; ſo a verdict may be diminiſhed in point of authority, by ſhewing that it was in part founded on the oath of the party intereſted in the action; and the jury are to reſpect it no further than as they preſume it given, and ſupported by the credit of other teſtimony that are not concerned in the cauſe.

Yet others have ſaid the verdict given on the indictment cannot be given in evidence, becauſe on that proſecution there is no liberty left the party to attaint the jury, as he hath power to do, if injured on a civil action; therefore *quære*.

A verdict in a criminal caſe, where the matter was capital, was denied to be given in evidence in a civil caſe; as where the father was acquitted on an indictment, for having two wives, this could not be given in de-

dence, in a civil caſe, where the validity of the ſecond marriage was controverted: the reaſon ſeems to be, becauſe much leſs evidence is neceſſary to maintain the action, than to attaint the criminal, and therefore his acquittal was no argument that the fact was not true.

If a verdict be given againſt the defendant on the ſame point, though another party were plaintiff, yet in ſome caſes it may be given in evidence; as if there be a trial of title between *A.* leſſee of *E.* and *B.*, and afterwards there be a trial of the ſame title between *C.* leſſee of *E.* and *B.*; *C.* may give the verdict found againſt *B.* in evidence upon the trial between him and *B.*, for this was the ſenſe of a former jury on the fact. To which trial *B.* had the liberty to croſs-examine, though the ſame fact had been already decided againſt *B.* Trin. Aſſ. 1701.

If there be ſeveral ejectments brought againſt ſeveral perſons, though for lands under the ſame title, and there be a verdict againſt one, that verdict cannot be given in evidence againſt the reſt, for it is the party againſt whom the verdict is given that can have relief by attaint, inaſmuch as the reſidue are not prejudiced; and theſe parties ſhall not be injured by a verdict they had not the power to controvert. 3 Mod. 142. Ld. Raym. 1292. Vern. 413. Ch. Pre. 212. 12 Mod. 319. 339.

10 Mod. 292. Gilb Rep. 2 Stra. 1151. See Carth. 79. 181. 5 Mod. 386. 2 Jones, 221. 2 Mod. 142. L. E. 91. pl. 23.

If a man has two wives, and be thereof convicted, and dies, and the ſecond wife claims dower, the verdict and conviction cannot be given in evidence, but in this caſe the writ muſt go to the biſhop; for whether the marriage be lawful or not, is the point in controverſy, and that is of eccleſiaſtical juriſdiction, and is not to be decided at common law. 3 Mod. 164. Ld. Raym. 68. 809. 850. 1101. 12 Mod. 35. 40. 319. 339. 432.

Etc. 11 Mod. 224. 10 Mod. 386. 8 Mod. 181. Gilb. Rep. 156., &c. Fitzgib. 164. 175. 176, &c. 204, &c. Stra. 79. 2 Stra. 960, 961.

But the verdict may be made an exhibit in the cauſe before the biſhop to induce him to believe there was a former marriage.

The record of a conviction in a civil cauſe, cannot be given in evidence in a criminal proſecution. Ca. temp. Hardw. 312.

But this rule of giving verdicts in evidence on the ſame point, is to be taken with great reſtriction; for no body can take benefit by a verdict that had not been prejudiced by it, had it gone contrary; and therefore if a termor for years had recovered againſt *B.* the reverſioner might give ſuch verdict in evidence, for *B.* has no prejudice, becauſe he hath the liberty to croſs-examine the witneſſes, and to attaint the jury, and it is fit the reverſioner ſhould make uſe of the verdict, and have benefit by it, ſince he had been diſpoſſeſſed by the verdict, if it had gone againſt the termor, and therefore he may offer it in evidence. So, if there were tenant for life, the reverſion in fee, and *B.* bring his action in ejectment againſt the tenant for life, and a verdict be given againſt the plaintiff, it ſeems that the reverſioner might have given this in evidence againſt *B.*, becauſe he would have been prejudiced in caſe *B.* had recovered, for his reverſion would have been turned to a naked right in him. *Quere, et vide infra.* Lord Howard and Lady Inchiquin, 1700. Hard. 472.

But a perſon that hath no prejudice by the verdict can never give it in evidence, though his title turns upon the ſame point, becauſe if he be an utter ſtranger to the fact, it is perfectly *res nova* between him and the defendant, and if it be no prejudice to the plaintiff, had the fate of the verdict been as it would, he cannot be entitled to reap a benefit; for it would Hard. 472.

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be unequal, that since the cause is a new matter between the parties, the jury should be swayed by any prejudice; for the letting in of pre-judgment supposes that the cause has been already decided, and that it is not tried and debated as a new matter, but as the effect of some litigiousness in the defendant that holds out the possession, when the cause has been decided against him, and this prejudice ought not to be thrown upon him on a new inquiry.

Ibid Rushworth. Viscountess of Pembroke and Courier. L. E. 108. pl. 622.

As if *A.* prefers a bill against *B.*, and *B.* exhibits his bill, in relation to the same manner against *A.* and *C.*, and a trial at law is directed, cannot give in evidence the depositions in the cause between *A.* and *B.*, but it must be tried entirely *ut res nova*.

A. lessee of *B.* brings an ejectment against *D.* and the verdict goes for the defendant; this may at any time be given in evidence against *B.*, for the possession of *B.*'s lessee is his own possession, inasmuch as the lessee *tenet in nomine alieno*, and *B.* might in this case give any thing in evidence, as well as the plaintiff himself, and challenges might have been made to the jury for consanguinity to *B.* the reversioner: now then since *A.* hath the possession of *B.* as his bailiff, if there be a verdict against the possession, it must conclude *B.*, since he hath in this case, all liberty to cross-examine as well as *A.* himself, and by consequence, this verdict must be evidence against any other lessee of *B.*

Hard. 426. *per* Glynn.

But if there be a recovery against tenant for life, by verdict, this is evidence against the reversioner, for the tenant for life is seised in his own right, and the possession is properly his own, and he is at liberty to pray aid of the reversioner or not, and the reversioner cannot possibly controvert the matter where no aid was prayed, for he had no permission to interest himself in the controversy.

2 Roll. Abr. 680. 3 Mod. 142. Ante, 33.

If a verdict were given against *J. S.*, and then judgment were arrested and then *J. S.* alien to *J. N.*, it seems that the verdict given against *J.* may be given in evidence against *J. N.*, for the alienation of *J. S.* cannot put *J. N.* in a better condition than *J. S.* was, for the substitute of *J.* can but succeed into his place, and at the time of the alienation the verdict might have been given in evidence against *J. S.*, and *J. S.* cannot by alienation destroy the advantage that his adversary ought to derive from the verdict; for though *J. N.* had not the liberty to cross-examine upon the title, yet *J. S.* had, and *J. N.* has but his title, and therefore cannot be supposed to make the fact better on the examination.

Per opinn. J. Dod. in the case of the Vicar of Rolvend.

On an ancient verdict in prohibition, where the custom of tithing is out, whether it might be given in evidence agginst another parishioner that was not party to the verdict, nor had the lands in question, was doubted, but by the better opinion it might be given in evidence, because it could not be supposed to have been a contrivance to alter the custom, it appearing to be ancient, and because there can be no other proofs but of this sort of what was then thought to be the custom.

Bull. N. P. 233. Carth. 181.

The exception of its being *res inter alios acta* is not allowed against verdicts in case of customs and tolls; for the custom or toll is *lex loci*, and facts tending to prove that may be given in evidence by any person, as well those who have been parties to such facts or to such verdicts as have found and determined them. And it is not material in this case whether the verdicts be recent or ancient.

A commis

A commiſſion under the ſeal of the Exchequer, and the inquiſition Tookes v. Duke of Beaufort, 1 Burr. 146.
en thereupon, is admiſſible, though not concluſive evidence; and ſo are
eſtions taken thereon, though the parties in the cauſe had no notice of
nor any opportunity of defending it.

Where the fact to be proved is ſuch, whereof hearſay and reputation are Bull. N. P. 233.
idence, a ſpecial verdict between other parties ſtating a pedigree would
evidence to prove a deſcent; for in ſuch caſe, what any of the family,
o are dead, have been heard to ſay, or the general reputation of the fa-
y, entries in family books, &c. are allowed. And of this opinion was
. Juſtice *Wright* in the Duke of *Athol's* caſe; which opinion is generally 2 Str. 1151. Ca. K. B. 343.
roved, though the determination by the reſt of the court was contrary;
haps founding themſelves on the caſe of Sir *William Clarges* and *Sherwin*,
ere, in a trial at bar, the only queſtion was on the legitimacy of the
ke of *Albemarle*, and the court would not ſuffer a former verdict be-
een other parties concerning other land depending upon the ſame queſtion
title to be read in evidence. But there, it did not appear, either from
iſſue or verdict, that the ſame queſtion was inquired into or determined.
ides, the giving a verdict in evidence to prove a particular fact, *viz.*
John had a ſon *Thomas*, is very different from giving it in evidence to
the opinion of a former jury, which is only their deduction from a
ery of facts proved to them.

A verdict, with the evidence given, in an action brought by the carrier Bull. N. P. 243.
goods delivered to him to be carried, may be given in evidence in an
on brought by the owner againſt the carrier for the ſame goods, for it
ſtrong proof againſt him that he had the plaintiff's goods.

But a verdict will not be admitted in evidence without likewiſe produc- *Id.* 234. Montgomery v. Clarke, 1745, at the Delegates.
a copy of the judgment founded upon it, becauſe it may happen that
judgment was arreſted, or a new trial granted. This rule, however,
es not hold in the caſe of a verdict on an iſſue directed out of Chancery,
cauſe it is not uſual to enter up judgment in ſuch caſe; and the decree of
court of Chancery is equally proof, that the verdict was ſatisfactory and
cluſive.

In an information by the attorney general for the king, when the jury are 2 Roll. Abr. 679. pl. 10. Vent. 28. Raym. 84. 2 Str. 984. * Holt ſays it was the opinion of all the judges of England, that it muſt be by conſent. Carth. 465. 2 Keb. 507.
dy to give a verdict, the attorney general may withdraw a juror, for this
art of the prerogative, and is in room of the nonſuit of the ſubject, for
king cannot be nonſuited, being always in court, and this prerogative is
ived out of a general reaſon of the king's employment for the publick
ſy; and therefore if he hath failed in any point of proof, ſo that diſ-
ntage may be expected from the verdict, it ſhall be at his election,
ther he ſhall receive his verdict or not, and therefore in a ſecond in-
mation, none of the firſt jury ſhall be admitted to give in evidence, that
y were agreed in their verdict, for ſuch evidence would be of the ſame
ght, as if the verdict had been given, and thereby the king would be
ſeſſed of the benefit of his prerogative.

But if the king aliens the eſtate on which the trial was had, ſo that it 2 Roll. Abr. 680. Trials per Pais, 213.
es into private hands, there on a ſecond trial between private perſons,
agreement of the jury may be given in evidence, for the prerogative is
xed to the crown, and cannot extend to any private perſon, and there-
e they take the eſtate with the diſadvantage of having a verdict againſt
m.

But then on ſuch trial they muſt have the record of the proceedings, on 2 Roll. Abr. 679. a. 3.
firſt information, becauſe as a verdict cannot be given in evidence, with-

out

out the record, which gave authority to the jury to proceed, no more they give in evidence the agreement of the jury without the record which they were impannelled.

But a verdict cannot be thus avoided in criminal cases: for there party must consent to the withdrawing of a juror; since he is in charac and estimation so highly interested, and hath a right, if he so prefer, entitle himself to a solemn acquittal by his peers.

Tri. per Pais, 167. As to writs, when a writ out of court is only inducement to the act the taking out the writ may be proved without any copy of it, because p sibly it might not be returned, and then it is no record, and therefore copy of it is not required; but where a writ itself is the gist of the act you must have a copy from the record, inasmuch as you are to have the termost evidence the nature of the thing is capable of, and it can become the gist of the action till it is returned.

1 Ld. Raym. 733. In an action of trespass against a bailiff for taking goods in executi if it be brought by the party against whom the writ issued, it is sufficient the officer to give in evidence the writ of *fieri facias* without shewing a c of the judgment. But if the plaintiff be not the party against whom writ issued, but claim the goods by a prior execution (or sale) that fraudulent, there, the officer must produce not only the writ, but a c of the judgment. For in the first case, by proving that he took the g in obedience to a writ issued against the plaintiff, he has proved him guilty of no trespass: but in the other case, they are not the goods of party against whom the writ issued, and therefore the officer is not j fied by the writ in taking them, unless he can bring the case within 13 for which purpose it is necessary to shew a judgment.

5 Burr. 2631. S. P. Dougl. 41. S. P. 2 Bl. Rep. 1104. S. P.

Guildhall, *per* Holt. Tri. per Pais, 227. In *plene administravit*, the execution executed cannot be given in dence, without judgment, because there appears to be no authority for execution without the judgment; for where the execution is of rec and the authority for such execution is also of record, they must appear to the jury, otherwise they have not the uttermost evidence of fact in question.

Silby and Hinckly, Trin. Ass. 1701. *per* Gold. In an action brought by an attorney for his fees, it is sufficient to p the taking out the writ by a warrant made by the coroners, for the may not be returned of record, and by consequence is no record, then the warrant made by the coroners is sufficient to prove a title t fees, for the attorney in this case is entitled to his fees, whether the be returned or not.

Jones v. Randall, Cowp. 17. Among the records of the kingdom are to be ranked the journals of House of Lords. And a copy of the minute book of the House of L may be given in evidence; for as Lord *Mansfield* said, "The minut "the judgment are the solemn judgment itself;" not a word is added the journals, and a copy of them may certainly be read in evidence, fo inconvenience would be endless if the journals were to be carried all

Dougl. 594. the kingdom. Formerly a doubt was entertained whether the minut the House of Commons were admissible; because it is not a court o cord; but that doubt seems now to be done away: and those of the H of Lords have always been admitted even in criminal cases.

The things that stand second in point of probability are all publick ters that are not of record.

The publick matters that are not of record all come under this ge definition; they must be such matters as have an evidence in thems

...r do not expect an illuſtration from any other thing; ſuch are the copies ...f court rolls, and tranſactions in Chancery, and the like; and the copies ...f ſuch matters may be given in evidence, inaſmuch as there is a plain and ...herent proof; for the matters themſelves are ſuppoſed to be ſelf-evident, ...d by conſequence, when a copy of them is produced upon oath, you ...ve a full proof, becauſe you have proved upon oath a matter which when ...oduced would carry its own light with it, and, by conſequence, would ...ed no proof.

But here it will be objected, that this is not the utmoſt evidence that the ...ture of the thing is capable of, for theſe teſtimonies themſelves muſt be ...ter than the copies of them. Objection.

To this the anſwer is, that the copy upon oath is reckoned as an equiva...t to the thing itſelf; and the teſtimony itſelf muſt not be rigidly required, ...cauſe ſince theſe matters lie for the publick ſatisfaction, every man has a ...ht to their evidence, and in ſeveral places they cannot be at the ſame ...e, and therefore the things themſelves cannot be demanded but only ...e copies of them.

The firſt ſort of teſtimonies that are not of record are the proceedings ...f the court of Chancery on the *Engliſh* ſide.

The reaſon why the proceedings in Chancery and the rolls of the court ...e not records is this, becauſe they are not the precedents of juſtice; for ...e proceedings in Chancery are founded only on the circumſtances of each ...rate caſe, and they cannot be rules to any other; and the judgment there *ſecundum æquum & bonum*, and not *ſecundum leges & conſuetudines*; and ...e reaſon why any record is of validity and authority is, becauſe it is de...rative of the ſenſe of the law, and is a memorial of what is the law of ...e nation: now Chancery proceedings are no memorials of the laws of ...gland, becauſe the chancellor is not bound to proceed according to ...w. Co. Lit. 260. a. But ſee 3 Bl. Com. c. 27.

Now becauſe theſe ſeveral proceedings before-mentioned are not records, ...y are by conſequence, not ſuch memorials as are lodged inſeparably in ...y certain place, but are transferable from one place to another, and there...e may be themſelves given in evidence.

The bill in Chancery is evidence againſt the complainant, for the allega...ns of every man's bill ſhall be ſuppoſed to be true; nor ſhall it be ſup...ſed to be preferred by the counſel or ſolicitor without the party's privity, ...d therefore is evidence as to the confeſſion and admittance of the truth of ...y fact by the party himſelf; and if the counſel hath mingled in it what ...not true, the party may have his action: but where a bill is exhibited, ...d there are no proceedings upon it, then it cannot be given in evidence, ...leſs they prove a privity in the party, for a man may file a bill in another's ...me to rob him of his evidence by a ſham confeſſion; and therefore a bill ...d without any proceedings upon it has not the force of an evidence, for ...man can ſuppoſe that the party did himſelf file the bill, for the bill, ...hout any proceedings to bring the adverſary to anſwer it, is of no uſe to ...e party, and therefore it muſt be ſuppoſed rather to be filed by a ſtranger ...do him an injury. This is accounted to ſtand in point of credibility in ...e ſame circumſtances, as a confeſſion by letter under the party's own hand ...re no body ſaw the writing of it, though ſome have ranged it in an in...ur degree, becauſe the one is the party's own immediate confeſſion, and ...e other is only the counſel's draught; yet it ſeems the allegation in a ...rt of juſtice, that amounts to the confeſſion of any fact, ought to have ...re weight and authority with it than any private owning. Chan. Caſ. 64, 65. 2 Sid. 221. Eq. Abr. 227. pl 1. Nelſ. Ch. Rep. 102. Chan. Caſ. 64, 65. 2 Sid. 221. Keb. 780. L. E. 105. pl. 55.

Bull. N. P. 235. But a mere general ſuggeſtion of facts, in order to a diſcovery, ſhall not be read in evidence; for this is no more than a ſurmiſe of the counſel, in order to come at facts: otherwiſe, of a fact ſtated in the bill on which the plaintiff founds his prayer for relief.

Keb. 780. 2 Sid. 221. If a patron ſues a ſimoniacal bond, and the parſon prefers a bill in Chancery to be relieved, the bill and proceedings upon it ſhall be given in evidence on ejectment to make void the parſon's living.

Godb. 326. L. E. 106. pl. 57. And if the bill be evidence againſt the complainant, much more is the anſwer againſt the defendant, and carries ſtill a higher weight of probability along with it, becauſe this is delivered in upon oath, and therefore over and above the ſingle confeſſion it has an authority from the ſanction of an oath.

Brochman's caſe, Trin. Aſſ. 1701. *per* Gold. 2 Vern. 194. 288. 5 Mod. 10. But when you read an anſwer, the confeſſion muſt be all taken together, and you ſhall not take only what makes againſt him, and leave out what makes for him: for the anſwer is read as the ſenſe of the party himſelf, and if it is to be taken in this manner, you muſt take it entire and not broken. See Ch. Caſ. 154.

2 Vent. 72. 3 Mod. 259. Carth. 79. 3 Will Rep. 237. L. E. 106. pl. 59. An infant's anſwer by his guardian ſhall never be admitted in evidence againſt him on a trial at law, for the law has that tenderneſs for the affairs of infants, that it will not ſuffer them to be prejudiced by the guardian's oath, for the authority the law gives to the guardian is for the infant's benefit, and not to his prejudice, and therefore the infant cannot be hurt by the guardian's oath.

Anſwer of a feme covert, ſee 3 Will. Rep. 238. Salk. 350. Vern. 60, 109, 110.

Bull. N. P. 237. The anſwer of the truſtee can in no caſe be admitted as evidence against the *ceſtuy que truſt*.

Anon. Hil. Vacat. 1707. *per* Cowper. A bill was brought by creditors againſt an executor, to have an account of the perſonal eſtate, the executor ſets forth by anſwer, that there were 1100*l.* left by the teſtator in his hands, and that coming afterwards to make up his accounts with the teſtator, he gave bond for 1000*l.*, and the other 100*l.* was given him as a gift for his trouble and pains taken in the teſtator's buſineſs, and there was no other evidence in the caſe, that the 1100*l.* was depoſited but merely by the executor's own oath; and it was argued that the anſwer, though it was put in iſſue, ſhould be allowed, ſince there is the ſame rule of evidence in equity as at law; and therefore if a man were ſo honeſt as to charge himſelf when he might roundly have denied it, and no teſtimony could have appeared, he ought to find credit where he ſwears in his own diſcharge.

But it was anſwered and reſolved by the court, that when an anſwer is put in iſſue, what was confeſſed and admitted need not be proved, but it behoved the defendant to make out by proofs what was inſiſted upon by way of avoidance: but this was held under this diſtinction; where the defendant admitted a fact, and inſiſted on a diſtinct fact by way of avoidance there, he ought to prove the matter of his defence, becauſe it may be probable that he admitted it out of apprehenſion that it might be proved, and therefore ſuch admittance ought not to profit him ſo far as to paſs for truth whatever he ſays in avoidance; but if it had been one fact, as if the defendant had ſaid the teſtator had given him 100*l.* it ought to have been allowed unleſs diſproved, becauſe nothing of the fact charged is admitted, and the plaintiff may diſprove the whole fact as ſworn, if he can do it; but it

ged that here the probability was on the defendant's ſide, becauſe he did t take a bond for this ſum as for the reſidue, but the Chancellor ſaid there as ſome preſumption in that, but not enough to carry ſo large a ſum ithout better atteſtation.

In an information for perjury, an anſwer may be given in evidence with- t any perſon to prove that the defendant ſwore it, for the identity may be oved by many things out of the anſwer itſelf: beſides, the party is liged to ſign his anſwer; and the perjury may be further illuſtrated by e compariſon of hands, which poſſibly may be evidence in concurrence ith other proof, that out of the anſwer itſelf evince the identity of the rſon. 3 Mod. 116, 117. See Ld. Raym. 451. 2 Ld. Raym. 894. 936. 1221. 12 Mod. 511. 10 Mod. 74. 108, 109. 194, 195. 3 Will. Rep. 196. Stra. 545.

Although an anſwer is good evidence againſt a defendant, yet it is not ainſt his alienee: nor is it any evidence for the defendant in a court of w (except ſo ordered on an iſſue out of Chancery) unleſs the plaintiff ke it evidence by producing it firſt. As, where on an iſſue out of ancery to try the terms of an agreement, which was proved by one neſs, but denied by the defendant, the witneſs being dead before the al, the plaintiff was under the neceſſity of producing the bill and anſwer order to read his depoſition, and by that means made the whole anſwer idence, which was accordingly read by the defendant. But where an ſwer in Chancery of the witneſs was produced to ſhew him incompetent, having there ſworn that he had an annuity out of the land in queſtion, d Serjeant *Maynard* inſiſted to have the anſwer read through, the court ſed it, as it was produced only to ſhew that he was not a competent wit- in the cauſe, and not to prove the iſſue. Bull. N. P. 237, 8. Bourn v. Sir Thomas Whitmore. Salop. 1747 Sparin v. Drax, M. 27 Car. 2. C. B. at bar.

Analogous to this is a man's own voluntary affidavit, which may alſo be en in evidence againſt him. Brochman's caſe, Trin. Aſſ. 1701. *per* Gold. Str. 35. Will. Rep. 675.

But there is a very great difference between the evidence of an anſwer, d that of a voluntary affidavit.

An anſwer cannot be given in evidence without producing the bill, be- e without the bill there does not appear to be a cauſe depending. But there be proof by the proper officer that the bill has been ſearched diligently in the office, and cannot be found, there, the anſwer hath en allowed to be read without a ſight of the bill; and this Lord Chan- *Broderick* allowed, though the loſs of the bill was not proved by the per officer, but by the clerk only who wrote in the office, and ſwore he ched carefully with the officer and could not find the bill. Michaelmas Term, 1714, in Canc. inter Roch & Rix, Adminiſtrators of Howard & al.

An anſwer is proved by ſhewing the allegations in the court, *viz.* by wing the bill which is the charge, and the anſwer which is as it were the ence to the bill; and this in civil caſes ſhall be intended to be ſworn, cauſe the proceedings upon ſuch defence are upon oath. And ſince the ceedings of any court of judicature within the kingdom are good evi- ce in other courts, and the proceedings in this caſe are upon oath, it ows of conſequence, that in all civil caſes the anſwer is to be taken as oath, without any further proof but from the proceedings in the ſe. Hil. Aſſ. 1700.

But a voluntary affidavit is not part of any cauſe in a court of juſtice, d therefore it muſt be proved to be ſworn; for if you only prove it ſigned by Vern. 53. 413. Ld. Raym. 311. 734.

2 Ld. Raym. 893. 936. 2 Vern. 471. 547. 555. 591. 603. Ch. Pre. 59. 116. 212. 3 Mod. 36. 9 Mod. 66. 11 Mod. 210. 262. 12 Mod. 136. 231. 305. 310. 319. 339. 342. 394. 414. 494. 500. 521. 553. 565. 579 607. L. E. 121. pl. 92.

by the party, the proof goes no farther than to ſuppoſe it as a note or lett and as ſuch you may not give it in evidence without more proof, for a no or letter is a bare acknowledgment under the hand of the party, and t is no more unleſs you prove it to be ſworn alſo, for it cannot be preſum to be ſworn, being not filed as an oath in a court of juſtice.

Such are the affidavits made before a Maſter in Chancery by the ven of the eſtate, in ſatisfaction of the purchaſer, that the eſtate is free fr all charges and incumbrances.

Vicary's caſe in the Exch.

In an action of covenant brought againſt two, the affidavit of one them was given in evidence as an acknowledgment of them both, beca the acknowledgment of one of them where they had a joint intereſt was be looked upon as a truth relating to them both, and the conſideration the matter is to be left to the jury how far it is evidence againſt other.

3 Mod. 116. *Ante*, 54.

The ſecond difference between them is, that the copy of an anſwer be given in evidence, but the copy of a voluntary affidavit cannot; reaſon is, becauſe the anſwer is an allegation in a court of judicature, being matter of publick credit, the copies of it may be given in evid for the reaſon formerly mentioned. But a voluntary affidavit hath no tion to any court of juſtice, and therefore is not entitled to publick cr and being a private matter, the affidavit itſelf muſt be produced as the

Bull. N. P. 238-9. Chambers v Robinſon, Tr. 12 G. 1.

evidence. Beſides, it muſt be proved to be ſworn, which it cannot unleſs it be produced. Therefore, where in an action for a malicious ſecution, the plaintiff to increaſe damages offered the office copy o affidavit made by the defendant in Chancery of his being worth 2,5 Lord *Raymond* refuſed to let it be read, and the plaintiff was obliged ſend for the original which was filed in Chancery. And notwithſta the office copy of an anſwer may be given in evidence in a civil ſuit, will not be ſufficient on an indictment for perjury, though perhaps ſuch would be ſufficient for the grand jury to find the bill; but upon the the original muſt be produced, and poſitive proof made that the defen

3 Mod. 116.

was ſworn by a witneſs acquainted with him. But proof that a p calling himſelf *J. S.* was ſworn, and that he ſigned the anſwer (or a vit), and proof alſo by another witneſs of the hand-writing, would be ſ

2 Burr. 1189.

ent. So, an anſwer being brought out of the proper office, and *jurat* the maſter's hand, and proof of its being ſigned by the defendant by of his hand-writing, is ſufficient to prove it ſworn by him even on a

3 Mod. 117.

dictment for perjury. But no return of commiſſioners (or of a Maſ Chancery) of the party's ſwearing will be ſufficient, without ſome proof of the identity of the perſon.

Style, 446.

But the voluntary affidavit of a ſtranger can by no means be giv evidence, becauſe the oppoſite party had not the liberty to croſs-exam

The next thing is the depoſitions; and here we muſt in the firſt conſider what rank they ſtand in, in point of credibility. To enl this matter we muſt give an account of their original uſe. They ev came over to us from the civil law. It is very plain that the parties bited their interrogatories upon their ſeveral allegations, but that th neſſes were privately examined upon theſe interrogatories by the ſame that tried the cauſe; ſo that the courſe anciently among the *Romans* different from the modern pleadings of the Chancery, where the ſ

witneſs is ſtated by the examiner, on which the Chancellor is to judge.

That this which I have mentioned was the ancient courſe of the civil law, is very plain from *Adrian's* epiſtle to *Varus* the legate of *Cilicia*, *Tu ergò ſcire potes quanta fides habenda ſit teſtibus, qui & cujus dignitatis, & cujus eſtimationis ſint, & qui ſimpliciter viſi ſint dicere, utrum unum eundemque conſtatum ſermonem attulerint, an ad ea quæ interrogaveras, ex tempore verisimila reſponderint.* Dig. lib. 22. tit. 5. § 3. de Teſt.

Now theſe examinations were firſt made privately, that the judge might in the firſt place be poſſeſſed of the naked fact, and the ſenſe of theſe witneſſes was after taken in writing, and then publication paſſed, that the judges might have all due aſſiſtance from the obſervation of the advocate, if he had not ſufficiently compared and weighed the examination. As the trials of the civil law thus ſtood when the judges viewed the behaviour of the witneſſes, there is very little difference between this trial and that of the jury, ſave only that this ſort of trial by jury is much more ſpeedy, and the evidence is more entire, whilſt in the other way the judges take up the evidence at one time and the gloſs at the other, and ſuch breaking of the evidence may be dangerous to a weak and leſs conſidering judge: beſides, the judge not being of the neighbourhood cannot ſo eaſily diſtinguiſh the credit of the witneſſes, and upon this account alſo the trial by jury is preferable to the examination of the civil law when under the beſt regulation.

And, no doubt, in our Chancery proceedings the witneſſes were formerly examined by the maſters, who ſat in the court to inform the Chancellor of their credibility, till cauſes ſo multiplied, that the maſters were employed in other affairs, and ſo the examination of witneſſes was left to the examiners.

Now, ſince this practice has been uſed, no doubt, but that the credit of depoſitions *cæteris paribus* falls much below the credibility of a preſent examination *vivâ voce*, for the examiners and commiſſioners in ſuch caſes often uſe ſecret examinations, and give a quite different air to them from what they would have, if the ſame teſtimony had been plainly delivered under the ſtrict and open examination of the judge at the aſſizes.

But though the depoſitions fall ſhort of examinations *vivâ voce*, yet they are ſuperior to what a witneſs ſaid at a former trial; for what is reduced to writing by an officer ſworn to that purpoſe from the very mouth of the witneſs, is of more credit than what a ſtander-by retains in memory of the ſame oath; for the images of things decay in the memory, by the perpetual change of appearances; but what is reduced to writing continues conſtantly the ſame; ſo that we cannot be certain on a verbal atteſtation, but that ſome circumſtances of the fact may be loſt in the recollection. We muſt in the next place ſee in what caſes depoſitions may be read.

1ſt, They may be read where the witneſſes are dead, for where the witneſs is living, they are not the beſt evidence the nature of the thing is capable of, and therefore cannot be read, but where the witneſs is dead, the depoſition is allowable: for as records are the invention that perpetuate the deciſions of law, ſo are depoſitions the only method to perpetuate the memory of the fact, and therefore they muſt be truſted where the witneſs is not in being. Godb. 192. 326. 2 Stra. 920. Barnard. K. B. 348. 2 Bac. Abr. 305. Gilb. Chan. 140. Salk. 278.

286. 4 Mod. 146. S. C. Show. 363. 2 Salk. 555. 691. T. Raym. 170. See Hob. 112. Ca. Rep. 679. Hardr. 232. 315. T. Raym. 335, 336. Lil. Abr. 388. 554. 5 Mod. 9. 163. 277.

2dly,

Godb. 326. L. E. 106. pl. 27. 2dly, Where a witneſs is ſought and cannot be found, you may, upon oath of the matter, uſe his depoſitions; for when it appears by oath that he cannot be found, it is the beſt evidence that poſſibly can be had of the matter; for when a witneſs is ſought and cannot be found, he is in the ſame circumſtances as to the party that is to uſe him, as if he were dead.

Mod. 283, 284. 11 Mod. 210. 225, 226. 263 Fitzgib. 197. 3dly, If it be proved that a witneſs was ſubpœnaed and fell ſick by the way, his depoſition may be allowed to be read, for in this caſe the depoſition is the beſt evidence that poſſibly can be had, and that anſwers what the law requires.

12 Mod. 215. 231. 305. 319. 339. 375. 403. 607. Will. Rep. 288, 289. 414, 415. 557. 2 Rep. 563. Ld. Raym. 729, 730. 734, 735. 2 Ld. Raym. 873. 1166. 1371. Vern. 331. 4 pre. Ch. 64. Eq. Abr. 227. 2 Stra. 920. L. E. 180. pl. 13.

Chan. Caſ. 73. Eq. Abr. 227. pl. 2. But depoſitions taken thirty years ſince were admitted to be read in Chancery, though the parties were not the ſame, inaſmuch as the cauſe related to the ſame land, and the tertenants were parties to it, and the witneſſes were ſince dead, the plaintiff's title then not appearing. And this is an indulgence of the Chancery beyond the ſtrict rules of the common law, and is admitted for the pure neceſſity, becauſe evidence ſhould not be loſt: beſides, Chancery hath great faith in its own examiners, who are ſuppoſed indifferent perſons that by themſelves take the ſenſe of the parties ſtrictly, ſo that by that means the depoſitions ſtand the fairer to be read at any time. *Quære.*

Hard. 472. 4thly, A depoſition cannot be given in evidence againſt any perſon that was not party to the ſuit, and the reaſon is, becauſe he had not liberty to croſs-examine the witneſſes, and it is againſt natural juſtice that a man ſhould be concluded in a cauſe to which he never was a party.

Ibid. But in caſes of cuſtoms and tolls, and, in general, in all caſes where hearſay and reputation are evidence, depoſitions, 5thly, A man ſhall never take advantage of a depoſition that was not party to the ſuit; for if he cannot be prejudiced by the depoſition, he ſhall never receive any advantage from it, for this would create the greateſt miſchief that could be; for then a man that never was party to the Chancery proceedings, might uſe againſt his adverſary all the depoſitions that made againſt him, and he in his own advantage could not uſe the depoſitions that made for him, becauſe the other party not being concerned in the ſuit had not the liberty to croſs-examine, and therefore cannot be encountered with any depoſitions out of the cauſe.

under theſe circumſtances, may be given in evidence.

Raym. 335. L. E. 114, pl. 76. 6thly, Depoſitions before an anſwer put in are not admitted to be read unleſs the defendant appears to be in contempt, for if a cauſe do not appear to be depending, then, are the depoſitions conſidered as voluntary affidavits; for unleſs a ſuit is ſhewn to be commenced, it doth not appear that the adverſe party had liberty to croſs-examine: but if the adverſe party be in contempt, then the depoſitions of the witneſſes ſhall be admitted, for then it is the fault of the objector that he did not croſs-examine the witneſſes ſince he would not join the examination of the witneſſes.

Ch. Caſ. 175. Ld. Raym. 735. Backhouſe and Middleton. When the bill is diſmiſſed, the rule as to the reading of the depoſitions is this: where the bill is diſmiſſed becauſe the matter is not proper for equity to decree, yet the depoſitions on the fact in the cauſe may be read afterwards in a new cauſe between the ſame parties: for though the matter is not proper for equity to decree, yet there was a cauſe properly before the court; for it is proper for the juriſdiction of equity to conſider how far the

law ought to be relaxed and moderated; and where there is a cauſe properly before the court, for whomſoever that cauſe be decided, yet the depoſitions in that cauſe muſt be evidence, as well as in all others.

But if a cauſe in equity be diſmiſſed, for the irregularity of the complaint, the depoſitions in that cauſe can never be read; as where a deviſee, on a ſuit pending by his deviſor, brings a bill of revivor, and ſeveral depoſitions are taken, and then the cauſe on the hearing is diſmiſſed, becauſe a deviſee claiming as a purchaſer, and not by repreſentation, cannot bring a bill of revivor; in this caſe, and in a new original bill exhibited, the deviſee cannot uſe the former depoſitions; for in the firſt cauſe, miſtaking the bill that he ought to bring, there was no complaint before the court, ſince the court doth not allow any deviſee to complain in that manner by right of repreſentation, and there being no cauſe regularly before the court there could be no depoſitions in it. Cha. Caſ. 175.

In croſs cauſes in equity, an agreement was proved in one of the cauſes, and in that cauſe it was not ſet forth in the allegations of the bill or anſwer: in the other cauſe the agreement was ſet forth in the bill, and not proved in the cauſe; and an order was obtained before publication, that the ſame depoſitions ſhould be read in both cauſes: and by the better opinion this might be, but ſince the order was before publication in the ſecond cauſe, the defendant had liberty to croſs-examine the witneſſes on which particulars he pleaſed, and the ſight of the depoſitions was to his advantage. *Ibid.* 236.

If a witneſs, after his depoſition taken, become intereſted, his depoſition ſhall not be read; for the intent of taking ſuch depoſition is only to perpetuate his teſtimony in caſe the witneſs die. 1 Salk. 286.

If a witneſs be examined *de bene eſſe*, and before the coming in of the anſwer, the defendant not being in contempt, the witneſs die, yet his depoſition ſhall not be read, becauſe the oppoſite party had not the power to croſs-examine him, and the rule of the common law is ſtrict to this, that no evidence ſhall be admitted, but what is or might be under the examination of both parties. Hard. 315. 2 Jon. 164. Will. Rep. 414, 415. 2 Will. Rep. 563. L. E. 111. pl. 72.

But in ſuch caſes as theſe, the way is to move the court of Chancery, that ſuch a witneſs's depoſitions ſhould be read, and if the court ſee cauſe, they will order it, and this order will bind the parties, to aſſent to the reading of ſuch depoſitions, though it doth not bind the court of *niſi prius*: and this is thought juſt, becauſe the witneſſes are examined by the officers of the court, who are ſuppoſed to favour neither party. 2 Jon. 164. L. E. 213. pl. 74.

Formerly, they did not enrol their bill and anſwer, but as it ſeems the bill was left looſe in the office with the clerks of the office, and was thereby ſubject to be loſt; and therefore ancient depoſitions may be given in evidence without the bill and anſwer. So, depoſitions taken by the command of Queen *Elizabeth*, upon petition, without bill and anſwer, were, upon a ſolemn hearing in Chancery, allowed to be read. 2 Keb. 38. L. E. 113. pl. 75. Hob. 112.

The ancient practice was alſo, that they never publiſhed the depoſitions in the lifetime of the witneſſes, becauſe the depoſitions *in perpetuam memoriam* were of no uſe till after the death of the witneſſes; but this practice was found very inconvenient, becauſe witneſſes became thereby ſecure in ſwearing whatſoever they pleaſed, inaſmuch as they could never be proſecuted for perjury, the effect of their oaths not being known till after their deaths. Practice of Chan. 7.

On an information for perjury, the depoſitions in Chancery ſigned by the commiſſioners are not ſufficient evidence, without proof, that the party ſwore 3 Mod. 116, 117.

ſwore them; for there is no proof of the identity of the perſon, but b
the compariſon of hands, which is not a ſufficient evidence in a crimin
caſe (*a*). for another man might perſonate me, and thereby ſubject me
the penalty of perjury.

(*a*) *Sed vide infra.*

Styl. 446. Sacheverel and Sacheverel, 5 Mar. 1716, at Delegates. May and May, K.B. at bar.

From what has been ſaid, it is evident, that a voluntary affidavit befo
a maſter in Chancery is no evidence between ſtrangers, becauſe here is
croſs-examination, ſince there appears to be no cauſe depending; a
therefore ſuch evidence cannot be admitted, except in thoſe caſes whe
a confeſſion of the perſon making the affidavit would be evidence,
where a widow came for adminiſtration, the marriage being conteſted,
affidavit of the man himſelf was read. So, on an iſſue directed out
Chancery to try the legitimacy of the plaintiff, the father's oath before t
judges on a private bill was allowed to be evidence.

Bull. N. P. 242. 2 Roll. Abr. 679. Lit. Rep. 367.

As the ſpiritual courts are not of record, depoſitions taken in the
cannot be read in evidence, though the witneſſes be dead.

1 Lev. 180. Sir T. Jones, 53. J. Anſon v. Wilſon, Dougl. 244 Bowles v. Langworthy, 5 Term Rep. 366.

Depoſitions taken before commiſſioners of bankrupts cannot be read
evidence, becauſe there cannot be a croſs-examination. However, by t
ſtatute 5 *G.* 2. *c.* 30. § 41. which directs proceedings on commiſſions
bankrupt and the certificates to be entered of record, true copies ſign
and atteſted as therein required are to be given in evidence. Therefo
an office copy of the depoſition of the witneſs who ſwore to the act
bankruptcy was admitted after the witneſs's death, to be evidence to pr
the preciſe time when the act of bankruptcy was committed. A
where an examinant produces a deed before the commiſſioners, un
which he claims a title to the bankrupt's goods, the examination may
uſed afterwards in a queſtion between him and the aſſignees as evide
againſt him to prove the execution of the deed, without calling the ſ
ſcribing witneſs.

If witneſſes examined on a coroner's inqueſt be dead, or beyond ſ
their depoſitions may be read; for the coroner is an officer appointed
behalf of the publick, to make inquiry about the matters within his ju
diction; and therefore the law will preſume the depoſitions before him
be fairly and impartially taken. And by 1 *P.* & *M. c.* 13. and *P.*
M. c. 10. juſtices of the peace ſhall examine of perſons brought bef
them for felony, and of thoſe who brought them, and certify ſuch e
mination to the next gaol-delivery; but the examination of the priſo
ſhall be without oath, and the others upon oath, and thoſe examinati
ſhall be read againſt the offender upon an indictment, if the witneſſes
dead. However, if the offender be not preſent at the time when
witneſſes are examined againſt him, the examinations cannot be recei
in evidence.

Woodcock's caſe, Leach's Caſes, 397. 12 Mod. 318. See Stra. 162. Barnard. K.B. 243.

Another way of perpetuating the teſtimony of a perſon deceaſed i
giving the verdict in evidence, and the oath of the party deceaſed. Wh
you give in evidence any matter ſworn at a former trial, it muſt be betw
the ſame parties, becauſe otherwiſe you diſpoſſeſs your adverſary of
liberty to croſs-examine: beſides, otherwiſe you cannot regularly give
verdict in evidence, and where you cannot give the verdict in evide
you cannot give the oath on which it was founded, for if you cannot ſh
there was ſuch a cauſe, you cannot ſhew that any perſon was exami
in that cauſe, and without ſhewing there was a cauſe, no man's oath

given in evidence, inaſmuch as it appears to be merely a voluntary

What a man himſelf that is living has ſworn at one trial, can never be 12 Mod. 318.
ſworn in evidence at another trial to ſupport him; though what the witneſs 4 St. Tri.
has ſaid in diſcourſe may be given in evidence to ſupport him; becauſe 265 to 272.
the ſame oath at another trial is no evidence of the truth of any man's 2 Hawk.
swearing; for if a man be of that ill mind to ſwear falſely at one trial, he P. C. 430.
may do the ſame on the other on the ſame inducements; but what a man § 9. 12.
says in diſcourſe, without premeditation or expectation of the cauſe in 2 Keb. 384.
queſtion, is good evidence to ſupport him: but if a man hath ſworn at
the trial different from what he hath at another, this is good evidence as
to his diſcredit.

A witneſs was ſworn in a trial at bar in *C. B.* between the ſame parties Green v.
in the ſame iſſue, and he was ſubpœnaed by the defendant to appear at a Gatewick,
ſecond trial in *K. B.* and his charges were given him; but he not appear- Mich.
ing, perſons were admitted to give evidence of what he ſwore in *C. B.*, 24 Car. 2.
for the court ſaid, they would preſume he was kept away by the plaintiff's Bull. N. P.
practice. This preſumption was ſtrengthened by his having been produ- 243.
ced by the plaintiff at the former trial.

On an appeal of murder, the appellant cannot give in evidence the in- 2 Sid. 325.
dictment, and what a perſon deceaſed ſwore at the trial; for in this caſe 2 Hawk.
we have already ſhewn that the indictment cannot be given in evidence P. C. 430.
againſt the defendant, and, by conſequence, the oath cannot be given in § 8. L. E.
evidence on the indictment: beſides, the appeal is tried as a new cauſe, 31. pl. 66.
and therefore it is neceſſary to have his accuſers face to face. 2 Roll Rep.
460, 461.
See 2 Keb.
384.

If the indictment be given in evidence for the priſoner, and the oath Sid. 325.
of a perſon deceaſed, the account of that oath muſt be upon oath; for L. E. 31.
nothing can be given in evidence as an oath but upon oath. pl. 66.

A decree in Chancery may be given in evidence between the ſame 2 Mod. 231.
parties, or any claiming under them, for their judgments muſt be of 2 Str. 960,
authority in thoſe caſes where the law gives them a juriſdiction; for it 961. Eq.
were very abſurd that the law ſhould give them a juriſdiction, and yet Abr. 227,
not ſuffer what is done by force of that juriſdiction, to be a full proof, &c. Ch.
for that were to ſuppoſe they were incompetent judges, where they had Pre. 59. 64.
juriſdiction. 116. 212.
10 Mod. 42,
43, 44. 74.

109. 126. Vern. 53. 413. 2 Vern. 471. 591. 547. 555. 603. Fitzgib. 197. Ld. Raym.
893. 936. Will. Rep. 414, 415. 8 Mod. 75. 181. 322. 9 Mod. 66. 11 Mod. 210 to
Gilb. Eq. Rep. 2. 203. &c. 12 Mod. 24. 85. 136. 215. 231. 305. 310. 319. 339. 342,
375. 394. 414. 494 500. 521. 555. 565. 579. 607. Stra. 95. 162. 308. See Barnard. K. B.
2 Stra. 960. 1151 1242. 2 Roll. Abr. 679. L. E. 125. pl. 101.

So, a decretal order in paper with proof of the bill and anſwer, or with- 1 Keb. 31.
out ſuch proof (if they are recited in the order) may be read.

Wherever a matter comes to be tried in a collateral way, the decree, Bull. N. P.
ſentence, or judgment of any court, eccleſiaſtical or civil, having compe- 244.
tent juriſdiction, is concluſive evidence of ſuch matter; and in the caſe Ambl. 756.
the determination be final in the court of which it is a decree, ſentence,
or judgment, ſuch decree, ſentence, or judgment will be concluſive in any
other court having concurrent juriſdiction. But here the following diſ-
tinctions muſt be attended to.—The judgment of a court of concurrent *Per* De
juriſdiction *directly upon the point*, is as a plea, a bar, or as evidence con- Grey, C. J.
cluſive *between the ſame parties, upon the ſame matter directly in point* in ano- 11 St. Tr.
ther 261. Carth.
225. Lane

v. Degberg, H. 11 W. 3. Bull. N. P. 244. 2Show. 232. Carth. 32. Cowp. 315. Bull. N. P. 244, 5. 1 Salk. 290. 1 Show. 6.

ther court. And the judgment of a court of exclusive jurisdiction *der on the point* is in like manner conclusive *upon the same matter*, be *same parties* coming *incidentally* in question in another court for a di rent purpose. But neither the judgment of a court of concurrent or clusive jurisdiction is evidence of any matter which came *collaterall* question, though within their jurisdiction; nor of any matter incident cognisable, nor of any matter to be inferred by argument from the ju ment.

As to the proceedings in the spiritual court, these are in cases ma monial and testamentary, and all other ecclesiastical causes. How t courts gained the jurisdiction in causes testamentary, which was origin of temporal conusance, is not here to be considered further than is ne sary to determine the weight of credibility that is to be given to their tences. The way of authenticating testaments by the civil law was t The testator and his witnesses subscribed the will, bound it up and se it with their seals: after the decease of the testator it was opened in presence of the prætor, and he delivered copies of it, and kept the o nal in a public treasury; and hence it is, that the spiritual court keeps original will, and gives out the probate, which is but a copy of the under their seals.

But originally among the *Germans*, the goods as well as the feud i belonged to the lord: afterwards it was thought fit that the feudary sh dispose of them, and then the will was proved in the country courts be the alderman and bishop, and if any man died intestate, they were di buted among his kindred: but after the Conquest, the probate of the and the commission of administration was indulged to the bishop, never had it in the times of the empire, under pretence that the prov would be better made for the souls of the deceased. If the spiritual co exceed their commission, they have plainly no authority, and there they must confine themselves to the bequest of the personal estate: the feud was not devisable until the 32 *H.* 8. for reasons mentione another place.

Roll. Abr. 678. Nor will an exemplification of the will under the great seal be evidence of it: be produced.

Therefore, if a man devise lands by force of the statute of wills, o custom, the probate of the will in the spiritual court cannot be give evidence, for all their proceedings, so far as they relate to the lands, plainly *coram non judice*, for they have no power to authenticate any devise, and therefore a copy produced under their seals is no evidence true copy.

Comb. 46. in questions relative to lands devised, the original will ought alway

Roll. Abr. 678. 4 Term Rep. 258.

But the probates of wills are good evidence as to the personal e and they are the records of that court, and therefore a copy of under the seal of that court must be good evidence: and this is still more reasonable, because it is the use of the court to preserve the ori will, and only to give back to the party the copy of that will under seal of the court.

Kempton v. Cross, E. 8 G. 2. K. B. 1 Lev. 25.

The ecclesiastical court never grants an exemplification of letters of ministration, but only a certificate that administration was granted: th fore, when a lessee pleads an assignment of a term from an administra such certificate is good evidence. So, would the book of the eccl stical court, wherein was entered the order for granting administra

, would the copy of the probate of the will be evidence of *J. S.* being ecutor, but a copy of the will would not be evidence of it. Smartle v. Williams, Bull. N. P. 246.

Where a perſon in ejectment would prove the relation of father and n by his father's will, he muſt have the original will, and not the pro- te only, for where the original is in being, the copy is no evidence, and e probate is no more than a true copy under the ſeal of the court of a rate inſtrument, and the law which ſeeks the beſt evidence, will not w of the copy only: beſides, this is not proved to be a true copy, for ſeal doth not prove the truth of the copy, unleſs the ſuit relate to the ſonal eſtate only. Polhill and Polhill, Hil. 1701.

But the ledger-book is evidence in ſuch caſe, becauſe theſe are not ſidered merely as copies, but they are the rolls of the court itſelf; and ugh the law doth not allow theſe rolls to prove a deviſe of lands where e claim is by the words of the deviſe, for the reaſons already given, when the will is only to prove a relation, the rolls of the ſpiritual rt, that have authority to enrol all wills, are ſufficient proofs of ſuch ament. Polhill and Polhill, Hil. Aſſ. 1701. Under particular circumſtances the ledger-book may

evidence even in the deviſe of a real eſtate: as, where in an avowry for a rent-charge, the ant could not produce the will under which he claimed, that belonging to the deviſee of land; but producing the ordinary's regiſter of the will, and proving former payments, it holden to be ſufficient evidence againſt the plain iff, who was deviſee of the land charged. K. B. 375.

But the copy of the ledger-book was not allowed to be read in this e, becauſe common practice had prevailed that it ſhould not; though Lord *Holt* ſaid that ſince the original would have been read as a roll the court without further atteſtation, it was fit the copies ſhould be d, and that the practice ſhould be altered. And the practice ſeems to founded on the miſtake, that the ledger-book is read as a copy, and ſo copy of that is but the copy of a copy, whereas the ledger-book is read a roll of the Prerogative Court.

In a ſuit relating to a perſonal eſtate, the probate of the will under the l of the court is ſufficient evidence, and no evidence contrary to it can given, that ſuch will was not the laſt will and teſtament of the party ceaſed, for the ſpiritual court are the proper judges of what is, and what not the will of the teſtator; and ſince the authority of judging is com- ted to them, the temporal courts are bound by their judgments. Raym. 404. to 406. 2 Sid. 359. Lev. 235. 2 Keb. 337. 343. 641. Comyns, 150. Anon.

Ld. Raym. 262. Stra. 481. Will. Rep. 388. L. E. 125. pl. 103.

But the adverſe party may give in evidence, that the probate is forged, cauſe ſuch evidence ſuppoſeth that the ſpiritual court hath given no judg- t, and ſo there is no reaſon for the temporal court to be concluded, re the ſpiritual court hath made no judgment in this matter, for a forged ate is none at all. Raym. 404 to 406. 2 Sid. 359.

So, they may alſo give in evidence, that ſuch probate was obtained by priſe, for that is as much as to ſay, that the ſpiritual court hath made no l deciſion in the matter, and therefore that the temporal court ought not be concluded by their authority. Raym. 404. to 406. 2 Sid. 359.

So, if letters of adminiſtration be ſhewed under ſeal, you may give in dence, that they were revoked; for this is in affirmance of the pro- ings in the ſpiritual court, and doth not at all controvert the righteouſ- of their deciſions. 2 Sid. 359.

A will

Mod. 117. Vent. 257. 3 Keb. 310. See 2 Danv. Abr. 539. L. E. 89. pl. 18.

A will that hath partly the form of a will, and partly the form of a de may be given in evidence as a will, for if the intent of the party ſufficien appear to make a diſpoſition after his deceaſe, the informality of the wo ſhall not vitiate it.

Keb. 40. 117. See L. E. 276. pl. 106.

Where a will remains in Chancery, by order of that court, a copy m be given in evidence, for then it becomes a roll of that court, and, conſequence, a copy of it is ſufficient evidence. See more of w after.

Hil. Aſſ. 1701.

The rolls of a court-baron are evidence, for they are the publick ro by which the inheritance of every tenant is preſerved, and they are rolls of the manor court, which was anciently a court of juſtice relatin all property within the diſtrict.

1 Keb. 567. 720. Comb. 138.

A copy of a court-roll under the ſteward's hand is good evidence prove the copyholder's eſtate.

Comb. 337. 12 Mod. 24.

So, an examined copy of the court-roll is good evidence, if ſworn to a true one.

Jenkins v. Barker, *per* Tracy, 1705.

If copyhold-rolls make mention of a ſurrender to the uſe of the tena laſt will, and then admit *A.* as deviſee under the will, yet this is no dence of the ſeiſin or title of *A.* without the will itſelf; becauſe the h doth not paſs by the ſurrender without the will, and therefore the will m be ſhewn as the beſt evidence of *A.*'s poſſeſſion and title.

Roe v. Parker, 5 Term Rep. 26.

An entry in the court-rolls of a manor is admiſſible evidence of the m of deſcent of lands in the manor, although no inſtances of any pe having taken according to it be proved.

Denn v. Spray, 1 Term Rep. 466.

A cuſtomary of a manor, which appeared to be of great antiquity, had been delivered down with the court-rolls from ſteward to ſteward, admitted to be good evidence to prove the courſe of deſcent within manor, notwithſtanding it was not ſigned by any one.

Ibid. 1700. Sid. 71. Godol. 145. Noy, 146. Brownl. 207. 2 Roll Ab. 115. pl. 11. Cro. Eliz. 411. Moor, 451. Salk. 281. 12 Mod. 86. L. E. 81. pl. 2. Godol. 164. 2 Str. 1073.

The regiſter of chriſtenings, marriages, and burials is good evidence a copy of it. The regiſter began in the 30 of *H.* 8. by the inſtigation the Lord *Cromwell*, who at that time was veſted with all the authority t the pope's legates formerly had, under the title of vicar general to king, and all wills that were above the value of two hundred poun were to be proved in this court; and therefore it ſerved his purpoſe to on foot a regiſtry of all perſons that were chriſtened and buried. And might be very well appointed by the king's authority, as ſupreme head the church, ſince chriſtening and burying are eccleſiaſtical acts: and w a book was appointed by publick authority, it muſt be a publick evide This was afterwards confirmed by the injunction of *Edward* 6. and particular manner of regiſtering appointed; as that the regiſtering ſho be in the preſence of the parſon and churchwardens on *Sunday*, and t the book ſhould be kept locked in the church, to which the vicar churchwardens ſhould have keys.

2 Str. 1073.

Though it appear in evidence that the regiſter was made from a day-b kept by the miniſter for that purpoſe, yet the day-book will not be mitted to contradict the entry in the regiſter, *e. g.* to prove a child b born, where no notice is taken of it in the regiſter, which would there be evidence to prove him legitimate.

2 Sid. 71, 72. The ſtat. 21 Geo. 2 c. 33. § 16.

On an indictment for entering a falſe marriage in the regiſter book, defendant was fined two hundred marks; for ſince the regiſter is pub evidence, it muſt be guarded by the law, that it be not counterfeited. makes this a capital offence.

The pope's licence without the king's has been held good evidence of impropriation, becauſe anciently the pope was held to be ſupreme head of the church, and therefore was held to have a diſpoſition of all ſpiritual benefices with the concurrence of the patron, without any leave of the prince of the country; and theſe ancient matters muſt be admitted according to the error of the times in which they were tranſacted. A pope's bull is no evidence on a general preſcription to be diſcharged of tithes, becauſe that ſhews the commencement of ſuch a cuſtom, and a general preſcription ſhews that there was no time or memory of things to the contrary, and that the bull doth itſelf contradict ſuch preſcription. Palm. 427. See L. E. 6. pl. 20. Palm. 38.

But the pope's bull is evidence on a ſpiritual preſcription, when you only ſay the lands belonging to ſuch a monaſtery as was diſcharged of tithe at the time of the diſſolution, for then they continue diſcharged by act of parliament. Palm. 38.

But the copy of the bull will not be allowed in evidence; the bull itſelf muſt be produced. Brett v. Ward, Winch. 70.

If the queſtion be, whether a certain manor be ancient demeſne or not, the trial ſhall be by *Domes-day* book, which ſhall be inſpected by the court. Ancient demeſnes are the ſocage tenures that were in the hands of *Edward* the Confeſſor, which *William* the Conqueror, in honour of him, endowed with ſeveral privileges: *Domes-day* book was a terrier or ſurvey of the king's lands, which was made in the time of the Conqueror, and which aſcertains the particular manors which had this privilege. Hob. 188. Tri. per Pais, 342.

To know whether any thing be done in or out of the ports, there lies in the *Exchequer* a particular ſurvey of the king's ports, which aſcertains their extent. Term. Paſch. 1701. in *Scaccario.*

An old terrier or ſurvey of a manor, whether eccleſiaſtical or temporal, may be given in evidence, for there can be no other way of aſcertaining old tenures or boundaries.

A terrier of glebe is not evidence for the parſon, unleſs ſigned by the churchwardens as well as the parſon; nor even then if they be of his nomination: and though it be ſigned by them, yet it ſeems to deſerve very little credit, unleſs it be likewiſe ſigned by the ſubſtantial inhabitants. But in all caſes it is ſtrong evidence againſt the parſon. Bull. N. P. 248.

A ſurvey of religious houſes taken in 1563, upon the diſſolution of monaſteries, was allowed to be good evidence to prove a vicar's right to ſmall tithes. 1 Wilſ. 170.

An old map of lands was allowed to be evidence, where it came along with the writings and agreed with the boundaries adjuſted in an ancient purchaſe. Yates and Harris, Hil. Aſſ. 1702.

So, an entry in a father's family bible, an inſcription on a tomb-ſtone, a pedigree hung up in the family manſion, are evidence in queſtions of pedigree. Cowp. 594.

The regiſter of the Navy-Office, with proof of the method there uſed to return all perſons dead, with the mark Dd. is ſufficient evidence of a death. *Ex. dim.* Whitecomb P. 6 Ann. C. B. B. N. P. 249.

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(*Books*) It is eſſential in motions of this kind, that the party applying ſhould be concerned in intereſt. He muſt therefore be a member of the company, or tenant of the manor, the books of which he applies to inſpect. Hodges v. Atkis, 3 Wilſ. 398. 2 Bl. Rep. 877. S. C. Mayor, &c. of Exeter v. Coleman, Barnes, 228. Anon. 2 Vez. 620. Shelling v. Farmer, 1 Str. 646. Murray v. Thornhill, 2 Str. 717. Rex v. Dr. Bridgman, *Id.* 1203. Allan v. Tap, 2 Bl. Rep. 850. Biſhop of Hereford v. Duke of Bridgewater, Bunb. 269. Smith v. Davis, 1 Wilſ. 324. Smith v. Tillebois, cited 3 Term Rep. 142. But in Mayor of Lynn v. Denton, 1 Term Rep.

Rep. 689., Corporation of Barnſtaple. v. Lathey, 3 Term Rep. 303., and Mayor, &c. London v. Mayor, &c. of Lynn, 1 H. Bl, 211., the courts ſeem to have over-ruled the ca Hodges v. Atkis, 3 Wilſ. 398. and Mayor, &c. of Exeter, &c. v. Coleman, Barnes, 228, an have holden, that in ſuch actions as are brought to ſupport claims of duties made by a corpora upon the publick, of the validity of which the beſt evidence muſt be in the documents of corporation, and of which documents equity would grant an inſpection; ſuch, for inſtance claims of tolls; that, in theſe caſes, individuals who are intereſted to diſpute the claims hav intereſt in the books which will entitle them, upon motion, to an inſpection of the entries lating to the ſubject-matter of the diſpute—Or, if the party applying be not a member, the bo muſt be the common evidence of the tranſactions between him and the body in whoſe cuſ they are, ſo as to be for this purpoſe the books of both. Such are the caſes of entries in cuſtom-houſe books, of the India Company, Bank ſtock, and transfer books. Geery v. Hopk 2 Ld. Raym. 851. Warriner v. Giles, 2 Str. 954. Crew v. Saunders, *Id.* 1005. But the co will not grant theſe motions unleſs the evidence contained in the books be directly material in cauſe, nor will they permit the party applying to inſpect and copy any more than what relate himſelf. Benſon v. Port, cited 1 Wilſ. 240. 1 Bl. Rep. 40. S. C. Mayor, &c. of Londo Swinland, 1 Barnard, 455. Crew v. Saunders, 2 Str. 1005. Rex v. Fraternity of Hoſtmen, *Id.* 1223. Tenants of a manor ſeem to have a right to a general inſpection of the court-r Rex v. Shelly, 3 Term Rep 141. How far corporators have ſuch right with reſpect to corporation-books ſeems doubtful. Rex v Babb, 3 Term Rep. 581. Nor will the courts per an inſpection for the purpoſe of collecting evidence to ſupport a criminal proſecution. Re Worſenham, 1 Ld. Raym. 705. Crew v. Saunders, 2 Str. 1005. Rex v. Cornelius, *Id.* 1 Rex v. Mead, 2 Ld. Raym. 927. Rex v. Dr. Parnell, 1 Wilſ. 329. 2 Bl. Rep. 37. S. C. v. Heydon, 1 Bl. Rep. 351. Roe v. Hanway, 4 Burr. 2489.

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(*By the 7 Jac. 1. c. 12.*) But when the plaintiff to prove delivery, produced a book w belonged to his cooper, who was dead, but his name ſet to ſeveral articles, as wine delivered the defendant, and a witneſs was ready to prove his hand-writing; Lord C. J. Raymond w not allow it, ſaying, it differed from Lord Torrington's caſe, becauſe, there, the witneſs ſa drayman ſign the book every night. Clerk and Bedford, M. 5 G 2. Bull, N. P. 282.—Upo iſſue out of Chancery to try whether eight parcels of Hudſon's Bay ſtock, bought in the nam Mr. Lake, were in truſt for Sir Stephen Evans, his aſſignees (the plaintiffs) ſhewed, firſt, there was no entry in Mr. Lake's books relating to this tranſaction. Secondly, ſix of the rece were in the hands of Sir Stephen Evans, and there was a reference on the back of them Jeremy Thomas (Sir Stephen's book-keeper) to the book B. B. of Sir Stephen Evans. This Jeremy Thomas was proved to be dead, and upon this the queſtion was, Whether the boo Sir Stephen Evans referred to, in which was an entry of the payment of the money, ſhou read? And the court of K. B. at a trial at bar, admitted it not only as to the ſix, but likewi to the other two in the hands of Sir Biby Lake, the ſon of Mr. Lake.

Smartle v. Williams, Bull. N. P. 283. Comb. 249. S. C. 1 Ld. Raym. 745. Barry v. Bebbington, 4 Term Rep. 514. Stead v. Heaton, *Id.* 669. 5 Term Rep. 123. In the caſe of Searle, v.

Beſides the caſe of ſhop-keepers' books, there are other caſes wh entries in private books or memorials are admitted in evidence to affect rights of third perſons, upon proof that the writer is dead, and that t are in his hand-writing. Any entry under ſuch circumſtances is admiſſi when it is in reſtraint, not in advancement of the right of the party made it; as where the party charges himſelf by the entry with the rec of money, for the entry in this caſe derives its authority from the impro bility that he would commit a falſehood to writing which muſt operat his diſadvantage. An entry again is admiſſible in thoſe caſes where dea evidence of the writer's declarations reſpecting the ſame fact would received in evidence (*a*). And in the caſe of eccleſiaſtical dues, it is e day's practice to admit entries in the parſon's books as evidence for his ceſſor (*b*).

Lord Barrington, 2 Str. 826. the indorſement of the payment of intereſt made under the h of the obligee within the twenty years from the date of the bond, was admitted as evidenc an action on the bond by the repreſentative of the obligee to repel the preſumption ariſing length of time of its being ſatisfied. 2 Vez. 43.——(*a*) Lill Pr. Reg. 552. Woodnoth v. Cobham, Bunb. 180. Glyn v. Bank of England, 2 Vez. 40. Outram v. Morewood, 5 T Rep. 123. In a recent caſe in the Exchequer, the effect of this kind of evidence was very a tively conſidered. The plaintiff claimed the lands in queſtion as part of old incloſures demiſe ninety-nine years under a rent reſerved to the lord of the manor, which term was alleged t expired. In ſupport of his title, he produced the rental of the family of fifty years date, w

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ed the ſteward with the receipt of ſuch and ſuch ſums, and expreſſed that thirteen ſhillings ſixpence had been annually received for theſe premiſes by the name of incloſure on leaſe. defendants contended, that the rentals were evidence only of the receipt of ſo much money, were not admiſſible to prove in what right it was received, whether as a conventionary or a rent. And it was urged, that if they were admitted to that extent, a ſteward of a manor, ſuch inſertions in his rentals, might convert all the quit-rents in the manor into conventionary s on terms for years, and might even expreſs when ſuch terms would expire, and ſo get all the holds into the poſſeſſion of the lord. But the court, *viz.* Smythe, Chief Baron, Perrott, , and Burland, barons, ſaid, fraud is not to be preſumed; and the rentals are admiſſible not to prove the receipt of the money, (which was agreed on all hands) but alſo to ſhew in what it was received. For otherwiſe the receipt of a groſs ſum of money proves nothing; it be allowed to ſhew, that it was in reſpect of certain lands, which is evidence of tenure; and fore it may ſhew the particular kind of tenure. The rentals in the hands of executors are nce to charge or diſcharge them, which they could not do, unleſs they were allowed to ſhew particular right in which the money was received. The ſteward, if living, would be a com- witneſs: as he is dead, this is the next beſt evidence, and therefore admiſſible. Harpur ook, Tr. 14 G. 3. on a motion for a new trial. 3 Wooddes, 332.—(*b*) 2 Vez. 43. Bunb. 46.

If *A.* be ſeiſed of the manors of *B.* and *C.*, and during his ſeiſin of *B.*, he cauſe a ſurvey to be taken of the manor of *B.*, and afterwards the manor of *B.* be conveyed to *E.*, and after a long time there be diſputes between the lords of the manor of *B.* and *C.*, about their boundaries; the old ſurvey may given in evidence. *Secùs*, if the two manors had not been in the hands of the ſame perſon at the time the ſurvey was taken. Bridgman v Jennings, 1 Ld. Raym. 734.

With reſpect to deeds, the general rule is, that where any perſon claims by a deed in the pleadings, there, he ought to make a profert of it in the court; and where he would prove any fact in iſſue by a deed, the deed itſelf muſt be ſhewn.

The deed conſiſts of three things: 1ſt, Of ſealing by the parties. 2dly, The delivery to the party to whom the deed is made. 3dly, Of a right transferred, or obligation created.

1ſt, The ſeal was very ancient in the *Roman* and *Grecian* governments, and from them it came to the northern nations, who anciently paſſed all manner of right, by the actual tradition of the thing itſelf; the ſeal followed from the invention of coins, and is a derivation from the ſame conſcience; for as coins were invented as tickets, to facilitate the exchange of all manner of commodities, ſo when coin was wanting, or not ready for payment, tickets were given by impreſſion in wax, and theſe paſſed inſtead of the coin itſelf, and theſe impreſſions were made with great diſtinction, as they contained the arms or ſome notorious ſymbol of the perſon conſigning; now when ſuch diſtinctions were taken up and found of uſe, they were at laſt required in the authenticating of all manner of written contracts, and from hence the law grew, that there could be no ſolemn contract without the diſtinction of the ſeal.

2dly, The delivery was always a ſolemn ſign uſed by the northern nations, in the transferring of right, and as they anciently delivered the thing itſelf, and by that delivery made the alienation; ſo, when contracts took the place of the things themſelves that were to be delivered, they annexed the ſolemnity to the contract, and the contract was completed by the delivery, and from thence it became neceſſary that a delivery ſhould be made of all contracts.

3dly, In every contract there muſt be ſome right transferred, or obligation created, and therefore there muſt be apt words to ſhew what right was transferred, and to whom, to ſhew what obligation was created, and to whom: and the ſenſe and ſignification of the words muſt be expounded by the law, ſince it is the province of the law to determine the forms and ſolemnities

lemnities, and operation of all manner of contracts; for the operation
effect of a contract cannot be determined but by the rules of law that
appointed as the measures of transferring right, and of creating obligation
and without such stated rules in every society, no man could be certain
any property, for then the sense of the contract must be at the mercy
the judge or jury, who might construe or refine upon it at pleasure.

There must therefore be a profert made of all solemn contracts in
action founded on such contracts,

1st, For the security of the subject, that what right is transferred,
what obligation is created, may be judged of according to the rules
law.

2dly, Because all allegations in a court of justice, must set forth
thing demanded: now the thing demanded cannot be set forth without
instrument shewn, upon which the demand arises, for since the demand
by the instrument, there can be no demand at all without shewing that
which it arises.

Co. Lit. 226. Therefore parties to a deed cannot found any claim without shewing
deed to the court.

Ibid. 267. Nor can privies in estate take any advantage of a deed without shew
10 Co. 92. it.

Ibid. 93. As, if there be tenant for life, remainder in fee, and there be a rel
to him in remainder, tenant for life cannot take advantage of it with
shewing the deed, for since the right passed merely by the deed, to say
person released without deed will not be a good plea.

6 Co. 38. a. When a man shews a title in himself, every thing collateral to that
shall be intended whether it be shewn or not, for though the law requ
an exactness in the derivation of the title, yet when that title is shewn,
law will presume all collateral circumstances in favour of right; for w
lawful conveyances, which are made with care, and on consideration,
brought forward, it would create too great nicety to require an exac
in the shewing of every collateral matter, and would tend to the entang
of right with too many difficulties, and therefore by the benignity of jus
they shall be intended: besides, a matter collateral to a title is what
not enter into the essence or being of a title, but arises *aliundé*, so that t
must be a good derivation of your right without it.

Co. Lit. 310. Cro. Eliz. 401. *See 4 Ann. c. 16. § 9. whereby all attornments of tenants are taken away. As, when a man declares of a grant or feoffment of a manor, the
tornment shall be intended; for when a title is shewn to the manor
tornment of the tenant which is collateral to that title, shall be inten
till the contrary is shewn on the other side*.

6 Co 38. Cro. Jac. 102. So in trespass, the defendant conveys the house in which, &c. by
ment from *J. S.* and justifies damage feasant; the plaintiff replies,
J. S. before the feoffment made a lease to *J. N.* who assigned to him
defendant rejoins, that the lease was made on condition, that if
assigned over without licence, by deed from *J. S.* that then *J. S.* m
re-enter; the plaintiff sur-rejoins, that *J. S.* did give licence by
without any profert of the deed, and yet this surrejoinder was good, be
the plaintiff's title was by assignment of the lease from *J. N.*, and, co
quently, the licence from *J. S.* is but a matter collateral to the assign
and, by consequence, the deed must be intended to be well and le
made, though it be not shewn to the court.

But if the matter be collateral to the plaintiff's title, then there is another difference, and that is where the deed is neceſſary *ex proviſione hominis*, and where it is neceſſary *ex inſtitutione legis*; for where the deed is neceſſary *ex inſtitutione legis*, there, you muſt ſhew it, for it is repugnant that the law ſhould require a deed, and not put you to ſhew that deed when it is made; as if you are obliged to ſhew the attornment of a corporation, there you muſt ſhew a deed, inaſmuch as corporeal bodies, by the rules of the law, cannot act but by corporeal inſtruments; for the body conſiſts in agreement and union, by creation of law, by patents or inſtruments under ſeal, and there is no act of the aggregate body but in the ſame manner, ſo that there can be no attornment without a deed, and the law cannot allow the attornment of ſuch a body without it; therefore no attornment is ſhewn, unleſs a deed is ſhewn alſo. 6 Co. 38.

But when a deed is neceſſary *ex proviſione hominis*, there, when it is collateral, as in caſe of the licence before mentioned, it need not be ſhewn, for the private act of the parties ſhall not controul the judgment of the law, that intends all ſuch collateral matters without ſhewing. *Ibid.*

There is a difference to be taken between things that lie in livery, and things that lie in grant; for things that lie in livery may be pleaded without deed, but for a thing that lies in grant, regularly, a deed muſt be ſhewn.

1ſt, Of things in livery; it is well known that livery was the ancient conveyance which was a ſolemn delivery of land in ſight of the inhabitants; and becauſe this was done *coram paribus curiæ*, and the tenant ever after reſided in the poſſeſſion, it was reckoned the moſt notorious way of conveyance; and ſince this was the ancient *Gothick* way, and becauſe they reckoned it of itſelf moſt manifeſt, the ſolemnities of a deed were not neceſſary.

And therefore a man may plead that *J. S.* infeoffed him without ſaying *per indenturam*, and yet give the indenture in evidence, becauſe the indenture is not the feoffment, but the feoffment is made by the livery, and by that only the party is inveſted with the feud, and the indenture is only evidence of ſuch feoffment. 2 Roll. Abr. 682.

But if a man pleads, that *J. S.* hath infeoffed him *per fait*, whether a man may give a parol feoffment in evidence, hath been reaſonably doubted, becauſe he has bound himſelf up to a feoffment by deed, and if the jury have only evidence of a parol feoffment, and yet find the iſſue, the deed may be uſed by way of eſtoppel ever after, where in truth there was no ſuch deed. *Ibid.*

So, a demiſe may be had without deed, as well as a feoffment, for here the party reſides in the poſſeſſion, and therefore the old way of contracting governs in this caſe; and ſo a man may plead a demiſe without deed, and give the indenture in evidence, for the indenture may be uſed as an evidence of the contract that would be good, whether there were any indenture or not; but if the demiſe were laid by indenture, it ſeems that they could not give a parol demiſe in evidence. 2 Roll. Abr. 682.

Livery alſo is an eſtoppel, and is by *Coke* called an *eſtoppel in pais*, becauſe it is a fact a man cannot impeach or deny, and this is from the notoriety of the ceremony; for when ſolemnities are ſettled for transferring a poſſeſſion, they ought to be held as ſacred by the law; and therefore a man is concluded from deſtroying that of which he himſelf is the author, or from impeaching that which is held as ſacred to transfer all poſſeſſions. Co. Lit. 352.

Ibid. 229. Lit. § 365. Therefore, if the defendant pleads the livery and ſeiſin of the plaintiff the plaintiff cannot reply that the livery was conditional, without ſhewing the deed, inaſmuch as the plaintiff is eſtopped to defeat his own livery by naked averment and parol evidence only.

Co. Lit. 226 Lit. § 366. But the jury are not eſtopped on the general iſſue, from finding ſuch conditional feoffment, for the jury are men of the neighbourhood that are ſuppoſed to be preſent at the ſolemnity, and they are ſworn *ad veritatem dicendam*, and therefore they cannot be eſtopped from finding the truth of the matter, and, by conſequence, may exhibit the condition on the feoffment.

But ſince the uſe of the ſolemnities before the men of the country have ceaſed, by allowing ſecret liveries only in the preſence of two witneſſes, therefore the ſtatute of frauds and perjuries hath enacted, that no leaſes, eſtates, or intereſts of freehold, or for a term of years, or uncertain intereſt (not being copyhold) ſhall be aſſigned, granted, or ſurrendered, unleſs it be by deed or note in writing, under the hand of the party or his agent thereunto lawfully authoriſed in writing, or by act and operation of law.

Buck's caſe, Trin. 1701. ſo that by this ſtatute the ceremony of livery only is not ſufficient to paſs eſtates of freehold or terms for years; but it is not neceſſary to ſet forth ſuch contract on the pleadings, for they are, as they were formerly, *feoffavit et demiſit*.

Co. Lit. 225. Lit. § 365. A man may plead a condition to determine an eſtate for years, without deed; for this begins without any livery, and therefore the party is not eſtopped by any notorious ceremony from averring the condition.

But where a man ſets out a feoffment, the other party may reply, that it was by deed, and ſhew the condition, for then there is an eſtoppel; and ſo the matter is in equal balance, and therefore muſt be determined according to truth.

2dly, Of things lying in grant,—and theſe are all rights, as fairs, markets, advowſons, and rights to lands, where the owner is out of poſſeſſion; and theſe being rights, they cannot poſſibly paſs by inveſtiture of the poſſeſſion, becauſe they cannot poſſibly be delivered over, or poſſeſſed, and therefore they muſt paſs by the next ſort of grants that holds the ſecond place in point of ſolemnity, and that is by grant under the hand and ſeal of the party.

Now a perſon that claims any thing lying in grant, muſt ſhew his deed from the party that had the original grant, or otherwiſe he muſt preſcribe for the thing he pretends to, and the preſcription being immemorial and ſo poſing a grant, ſupplies the place of the grant.

10 Co 94. He alſo that has a particular eſtate, by the agreement of the parties muſt ſhew not only his own conveyance, but the deeds paramount, for there can be no title made to a thing in agreement, but by ſhewing ſuch agreement, and the particular tenant ought to covenant to have the power of the deeds, inaſmuch as he has no title, unleſs he can derive the eſtate that ariſes in agreement, up to the firſt original grant.

10 Co. 93. 94. But where any perſon claims any eſtate, by particular act in law, there he may make his claim without ſhewing the deeds; as tenant in dower, by elegit, or the guardian in chivalry, may claim an eſtate in a thing lying in grant without the deed; for when the law creates an eſtate, and doth not give the particular tenant the property of the deeds, it muſt be allowed that the eſtate be defended without them, otherwiſe the creation of the eſtate were altogether in vain.

So, they may plead a condition without ſhewing the deeds, becauſe they claim an eſtate by the act of the law, and therefore are not eſtopped by the livery; ſo that they may claim an eſtate defeated by the condition without a deed: alſo, they are not ſuppoſed to have the deeds and muniments of the eſtate, and therefore for the reaſon formerly given, may do it without deed. Co. Lit. 225.

Note; 10 *Co.* 94. does not warrant this diſtinction, between tenant in dower, and tenant by the curteſy generally, but only in the caſe of a releaſe made to the wife.

But tenant by the curteſy cannot claim an eſtate lying in grant, without deed, becauſe he has the property in and cuſtody of the deeds, in right of his wife, and that property cannot be deveſted out of him, during the continuance of his eſtate. 10 Co. 94. Co. Lit. 226. a.

So alſo he cannot defeat an eſtate of freehold without ſhewing the deed, nor can the lord by eſcheat do it without ſhewing the deed; for the act of livery is an eſtoppel that runs with the land, and bars all perſons to claim it, by virtue of any condition without the condition appears in a deed; for the notoriety and ſolemnity of the act is that which makes it obligatory to all perſons, ſo that they cannot impeach it, without ſhewing a precedent title, for that livery cannot be defeated, but by ſhewing ſomething equally notorious; and ſince in both theſe caſes the cuſtody of the deeds reſides with them, they muſt ſhew the condition. 10 Co. 94. Co. Lit. 226. a.

So that the general rule is, where any perſon ought to have the cuſtody of the deeds, there, where ſuch perſon is compelled to ſhew his title, he ought to make a profert of thoſe deeds to the court, for every man ought to have his deeds, and cannot take advantage of his own negligence in loſing them; therefore in the caſe formerly put, of tenant for life, the remainder in fee, and a releaſe is made to him in remainder, in ſuch caſe tenant for life ought to make a profert of the deed, for in this caſe they have both parts of the ſame feud, and therefore tenant for life is ſuppoſed to be equally entitled to the deeds as he in remainder. Co. Lit. 267 10 Co. 94. b.

But where a perſon is an utter ſtranger to any deed, there, in pleading, he is not compelled to ſhew it; for where he is not ſuppoſed by the law to have the cuſtody of the deeds, he cannot be compelled in pleading to ſhew ſuch deeds to the court, for that were to compel the party to impoſſibilities. Co. Lit. 226 Styl. Regr. 205.

As, if a man mortgageth his land, and the mortgagee leaſeth the land for years, reſerving a rent, and then a condition is performed, the mortgagor re-enters; the leſſee in bar of an action of debt ſhall plead the condition and re-entry, without ſhewing the deed, for the leſſee was never, nor could be, entitled to the cuſtody of the deed, and therefore it were altogether unjuſt to compel him to produce it. Co. Lit. 226. a.

So, if a man bring a *præcipe* againſt *A.*, he ſhall plead that he was only a mortgagee, and that the mortgage was performed, ſo that he hath no longer ſeiſin of the eſtate, and this without ſhewing the deed; for upon performance of the condition, the property of the deed was no longer in the mortgagee, but it ought to be re-bailed to the mortgagor, and having no longer any title to the deed, he may plead the condition, without ſhewing it. Co. Lit. 226

So, in an action of waſte, or in diſcharge of the arrears of rent, the tenant pleads a grant of the reverſion and attornment, after ſuch waſte committed, or ſuch arrear due, the tenant cannot ſhew the grant, *eauſa qua ſupra*. 10 Co. 94

5 Co. 74. b. A deed enrolled muſt be offered to the court in pleading, though the deed be enrolled in the ſame court in which the plea is depending, for this is no record but a deed recorded; for a record muſt be the act of the court, and therefore the deciſions of juſtice by the court, that lie as precedents for future obſervation, are the record of the court, and letters patent, which are the king's acts, are the higheſt ſort of records; but a deed enrolled is only a private act of the party authenticated in court; and from thence this difference is drawn, that letters patent enrolled in the ſame court, or records of the ſame court, need not be proffered to the court, but a deed enrolled muſt; for all records that are publick acts, and that lie for the direction of the court, in matters of judicature, muſt be taken notice of, and therefore they need but refer to it with a *prout patet per recordum*, for the court will take notice of the courſe and orders of court upon reference to them; but deeds are no more than the private act of the parties authenticated by the court, and they do not lie for the direction of the court, but take hold of the authority of it to give them credit, and therefore the court doth not take notice of them, unleſs they be pleaded. But the letters patent of another court the court doth not take notice of, unleſs they be offered, for ſince they are none of the records that are directed to this court of juſtice, it is not the office of the court to take notice of them, and therefore it is their duty to offer them as they do all other allegations.

10 Co. 92. Stra. 520.

To a deed acknowledged in court, a man cannot plead *non eſt factum* for being done in the court, the truth of the fact is ſo far to be credited that he ſhall never deny the deed, but he may avoid the operation of the deed by pleading *reins paſſa par le fait*, for that doth not impeach the credit of the court, in which it was acknowledged.

5 Co. 74, 75. Since the term, to avoid the entering up the ſeveral continuances of buſineſs, is reckoned as one continued law day, therefore deeds pleaded ſhall be in the cuſtody of the law during the whole term, this being conſidered as the day wherein they are pleaded; and being then before the court, any body may take advantage of them. But ſince they belong to the cuſtody of the party, if the deed be not denied, it ſhall go back to the party, after the term is over, and then nobody can take advantage of it without a new profert; for then it is not before the court; and therefore the plaintiff in the King's Bench may take advantage of a condition in a deed in his replication, becauſe it is *et prædictus A. dicit*, as of the ſame term; but he cannot take advantage in a replication of a deed in the Common Pleas, becauſe they enter an imparlance to another term: but when the deed comes in, and is denied, it remains in court for ever, becauſe that is the only point in debate on which the deciſion of the court is founded, and therefore like all other deciſions, it muſt remain among the other records of the court; and becauſe it is tied up to this court, and is not poſſible to be removed, it ſhall be pleaded in another court without ſhewing.

Co. Lit. 226. 2 Stra. 1186 1198. As no party ſhall take advantage of his own negligence, in not keeping his deeds, which in all caſes ought to be fairly produced to the court that his adverſary ſhall not take any advantage in his violent detaining of them, for the one by a violent taking away of the deeds gives a juſt excuſe to the other for not having them at command, and no man can ever make an advantage of his own injury; and therefore it is a good plea for one party to ſay, that the other entered and took away the cheſt wherein the deeds were.

In an action of debt upon a bond, it is matter of ſubſtance to make a profert of the deed, becauſe this is the contract on which the court ought to found their judgment, and therefore it ought to be exhibited to the court. Cro. Jac. 32.

It is not matter of ſubſtance to ſhew letters of adminiſtration, for whether they are legally granted or not belongs to the ſpiritual courts, who are governed by the rules of the civil law, and therefore their legality cannot be weighed at common law, ſince it has different meaſures of judicature. 2 Saund. 402. 3 Keb. 61. 2 Stra. 1261.

Evidence of Deeds.

Secondly, of giving deeds in evidence to the jury—and here the general rule is, that where any thing is to be proved, the deed itſelf muſt be given in evidence, and not the copy of it; and the deed muſt regularly be proved by one witneſs at leaſt. 10 Co. 92. b. 93.

This is now to be underſtood where the deed is of a late date, for if the deed be of thirty years ſtanding, which now makes an ancient deed, and the perſon to whom the deed was made, or thoſe deriving under him, have been in poſſeſſion under the deed, ſuch ancient deed ſhall be read, without proof, though the witneſs to it be alive; and this the Lord Chief Baron *Gilbert* declared to be the rule of evidence at *niſi prius*: and if the perſon to whom the deed was made hath been in poſſeſſion of the lands contained in the deed, ſuch poſſeſſion ſhall be preſumed to be under the ancient deed, unleſs the contrary be proved. Mich. 1718. in the Exch. *per Curiam.*

Firſt, the deed ought to be given in evidence, and not the copy only, for though in records the copy was admitted in evidence, yet the law will not regularly allow it in private deeds, for they are not within the ſame reaſon as copies of records, for a record is fixed in a certain place, and therefore the original cannot be had, and, by conſequence, the copy is the beſt evidence.

But deeds are only private evidences, and not fixed or confined to a certain place, but are lodged in the cuſtody of the party, and not of the law, and therefore they muſt be produced in evidence; for the law requires the beſt evidence that the nature of the thing is capable of, and the deed is much better evidence than the copy of it; for the raſure and interlineation that might vacate the deed, might appear in the deed itſelf, and the very offering a copy carries a preſumption, as if the original were defective, and therefore the copy is not to be admitted: beſides, ſince the deeds are in the cuſtody of the party, the deeds themſelves muſt be produced, for a man cannot make his own fault in loſing the deeds, any part of his excuſe.

But there are ſome Exceptions out of this General Rule.

1ſt, And that is where they prove the deeds themſelves to be burned with fire, for the proof of this matter will excuſe the deed from being produced to the jury: but notwithſtanding a profert is neceſſary to the court, for there is that conveniency in keeping to known rules, that they cannot be broken, though they tend to the miſchief of particular perſons; and there cannot be a more convenient rule, than that the cauſe of every complaint ought to be ſhowed to the court, but the jury muſt go according to the evidence of the fact. 10 Co. 92. b. 93. Mod. 4. 94. 114. 266. L. E. 99. pl. 31. It hath been lately determined by the court of K. B. that a deed may be pleaded as loſt and deſtroyed by time and accident without a profert. Read v. Brookman, 3 Term Rep. 151.

Now

Now to prove the import of the deed, that it was in ſuch an houſe, and that the houſe was burned, is the beſt evidence that can be had of ſuch deed, and gives reaſonable grounds for the jury to find it.

Mod. 265. 2dly, A copy of a deed is good evidence, where the deed is in the defendant's hands, and he will not produce it; for when the original is in the defendant's hands, the copy is the beſt evidence; for the preſumption that oppoſes the copy is, becauſe the original deed is, or ought to be, in the party's hands that would produce the copy: now that preſumption is deſtroyed where the plaintiff proves the deed itſelf to be in the hands of the defendant, for then it cannot be preſumed, that there was any better evidence, or that there was any interlineation that obliged the plaintiff to cover it, for if the copy were not perfect and exact, it would be overthrown by the defendant's producing the original.

Bunb. 191. A copy of an agreement between the abbot of *Quarrer* and the monks of *Lyra* was produced in evidence; to which it was objected, that it could not be read, being neither a record, nor a publick inſtrument. But a copy of the *Oxford* ſtatute (*a*) was exhibited, forbidding any book to be taken out of the *Bodleian* Library: and then the court allowed the copy of this agreement, though they conſidered it as not within the general rule of evidence, but received it on the very particular circumſtances of this caſe.

(*a*) This ſtatute, it ſeems, ſhould have been proved by a ſworn copy.

See Mod. 4. 94. 114. 266. 2 Keb. 31. 540. 3 Keb. 1, 2. 477. 5 Mod. 211. 386. 6 Mod. 225. 248. 10 Co. 92. b. 93. 2 Vern. 471. 591. 60 Eq. Abr. 228. Stra. 401. 526. See L. E. 104. pl. 51.

But the copy of a deed muſt be proved by a witneſs that compared it with the original, for there is no proof of the truth of the copy, or that it hath any relation to the deed, unleſs there be ſomebody to prove it's compariſon with the original.

Vaugh. 77. Where the effect or contents of a deed are proved, and where the deed is afterwards given in evidence, and they diſagree, there, the deed itſelf ſhall control the other evidence. So it is, where the jury on a ſpecial verdict collect the contents of a deed, and yet afterwards find the deed in *hæc verba*, the court, there, is not to regard the collection they have made of the ſubſtance of the deed, but the deed itſelf, for that collection derives its authority from the deed, and therefore muſt of itſelf fall and come to nothing, when it is oppoſite to the deed of which it is a collection.

3dly, Where the poſſeſſion has gone along with any deed for many years, there, a very old copy of the deed may be given in evidence with proof alſo that the original is loſt; and that is according to the rule of the civil law, *Si vetuſtate temporis et judiciariâ cognitione ſint roborata*, for poſſeſſion could not be ſuppoſed to go along in the ſame manner, unleſs there had been originally ſuch a deed, and ſo executed as the copy mentions, and the copy cannot be ſuppoſed to be only offered in evidence to avoid ſight of the original, ſince it is ſo ancient, that the antiquity alone prevents all ſuſpicion of its being counterfeit, and the antiquity known from the ancientneſs of the poſſeſſion. But,

Qu. Whether ſuch a copy ſhall be required without the proof of it being a true copy, by compariſon with the deed itſelf?

5 Co. 54. Style, 445. Keb 217. Tri per

4thly, The inſpection of a deed enrolled, ſhall be given in evidence and where the deed needs enrolment, there, the enrolment is the ſign the lawful execution of ſuch deed, and the officer appointed to authentica

ch deeds by enrolment is alſo empowered to take care of the fairneſs d legibility of ſuch deeds, and therefore a copy of ſuch enrolment muſt ſufficient; for when the law hath appointed them to be made publick s, the copy of ſuch publick acts ſhall be, like all other publick acts, ſufficient atteſtation. Pais, 355. Salk. 280. Notwithſtanding that deeds of bargain and ſale enrolled have frequently in trials at *Niſi Prius* been given in evidence without being proved; yet e law may well be doubted. In ſupport of the practice, the caſe of Smartle and Williams in lk. 280. is much relied; but that caſe is wrong reported; for it appears by 3 Lev. 387. that the knowledgment was by the bargainor, and ſo it is ſtated in Salk MSS. Beſides, it appears m both the books that it was only a term that paſſed, and, conſequently, it was no enrolment within the ſtatute. Bull. N. P. 255-6.

But where a deed needs no enrolment, there, though it be enrolled, e *inſpeximus* of ſuch enrolment is no evidence, becauſe ſince the officer h no authority to enrol them, ſuch enrolment cannot make them pubk acts, and, conſequently, cannot entitle the copy of them to be given evidence, becauſe ſuch practices may be improved to very ill purpoſes; then if the deed were doubtful, it were but to enrol it, and bring the py or inſpection of it in evidence, and thereby avoid the giving in evince a deed that was any way ſuſpicious. 5 Co. 54. Style, 445. Keb. 117. Tri per Pais. 355. Saly. 280. 2 Vern. 471. 591. However, though the deed needs enrolment, yet if it be enrolled, it is now the practice to admit it in evidence without proof of execution. 1 Ventr. 296-7. In the caſe of Smartle and Williams, Salk. 280. the deed did not need enrolment, yet being enrolled on the acknowledgment of the bargainor, it was read againſt him without being proved. Bull. N. P. 256.

But the *inſpeximus* on an ancient deed may be given in evidence, Style, 445.
ough the deeds need no enrolment; for an ancient deed may be eaſily ppoſed to be worn out or loſt, and the offering the *inſpeximus* in evince induces no ſuſpicion that the deed is doubtful, for it hath a ſanction m antiquity, and if it had been ill executed, it muſt be ſuppoſed to be ected when it was newly made.

thly, The recital of one deed in another is no evidence of the deed cited, though the deed containing the recital be well proved, becauſe re ſtill wants an atteſtation of the firſt deed; but if the perſon obting to the evidence of the recited deed, claims under the perſon who ecuted the deed that recites the former deed, the reciting deed is evince againſt him of the reality of the recited deed, becauſe he that claims der me ſtands in my place, and therefore what is evidence againſt me, ſt be evidence againſt him.

Thus in the caſe of *Fitz-Gerald* and *Euſtace*: *Euſtace* the plaintiff Mich. 1718. in the Exchequer, *per* Gilbert, Chief Baron. imed in equity a debt on the defendant's eſtate, by virtue of a power erved in the grandfather's ſettlement on the defendant's father, to arge the eſtate for payment of debts and younger children's portions; re, defendant objected that there were not proper parties, becauſe the ndfather had made a mortgage, purſuant to that power, to one *Cox* o was not party to the bill, and did not produce the original mortge, but only an aſſignment thereof to *Wybrants*, to which the grandfaer was party; yet the court allowed it to be evidence of the original rtgage, becauſe the plaintiffs claimed under the grandfather who was y to the aſſignment.

And in the following caſe, the recital of a bond in a deed executed by Marchioneſs of Annandale v. Harris, 2 the ſame party who was the obligor in the bond, was allowed to be ſuffi- evidence of the bond. *A.* gave a bond to *B.* for payment of 2000*l.*

P. Wms. 432. 2000*l.* within a year after his death, he having ſeduced her and had child by her, and afterwards *A.* by deed-poll reciting that he had giv ſuch bond, agreed the 2000*l.* ſhould be laid out in an annuity for the of *B.* and the child for their lives. *A.* died. *B.* ſued the adminiſt trix on the bond, but there being only one witneſs to it, and (though hand-writing was proved, yet) he ſwearing that he did not ſee the bo ſealed and delivered, *B.* was nonſuited, upon which ſhe brought her to be paid out of the aſſets. Lord Chan. *King* held, that the recital the deed that *A.* had given ſuch a bond was ſufficient evidence of th having been ſuch, that it was a confeſſion by the obligor himſelf, and ſtr ger than a verbal confeſſion, being under his hand and ſeal; and his lo ſhip decreed accordingly.

2dly, As to the ſecond part of the rule, the deed muſt be proved the jury by one witneſs at leaſt, for though the deed be produced un hand and ſeal, and the hand of the party that executes the deed proved, yet this is no full proof of the deed, for the delivery is neceſ to the eſſence of the deed, and the deed takes effect from the deliv ſo that unleſs the delivery be proved, there is no perfect proof of deed, and there is no proof of the delivery, but by a witneſs who ſaw delivery.

But to this Rule there are ſeveral Exceptions.

Trin. Aſſ. in Kent, 1700. Tri. per Pais, 339. 346. L. E. 101. pl. 40. Sid. 146. Co. Lit. 6. b. Keb. 877. 2 Keb. 826. Skin. 239. First, if the deed be (*a*) forty years old, that deed may be give evidence, without any proof of the execution of it, for the witneſſes not be ſuppoſed to live above forty years, and forty years is proof ficient of a preſcription; for the age of a man is no more than ſixty y and a man is ſuppoſed to be twenty years before he is of age ſufficien underſtand the nature of right and wrong, and the general forms of tracting; ſo that after forty years, the witneſs muſt be ſuppoſed to be and therefore ſince no perſon living can be ſuppoſed to be coeval ſuch deeds, therefore they may be offered in evidence without proof. 2 Mod. 320 323. 3 Salk. 154. See Lev. 25. (*a*) Now reduced to thirty An ancient writing likewiſe (not being a deed) proved to have been found amongſt deed muniments of an eſtate, may be given in evidence, although the due making of it cannot certained; for it is difficult to develope ancient facts, and finding theſe inſtruments and mem in ſuch a place, affords a preſumption, that they were fairly obtained, and preſerved fo Tr. per Pais, 370. But an admittance into a tenement, holden of a manor, purporting under the ſteward's hand, though above forty years old, was rejected in evidence, becauſe could not prove the ſteward's hand. Fort. 43.

Aſſ. 1702. *per* Haſlet. But it has been ruled, that if a deed be forty years old, and poſſe have not gone along with the deed, they ought to give ſome accou the deed, becauſe the preſumption fails that was eſtabliſhed in beha ſuch deeds, where there is no poſſeſſion, for it is no more than old p ment, if they give no account of its execution.

Trin. Aſſ. 1700, in Kent. But if there be any blemiſh in the deed, by raſure or interline then the deed ought to be proved, though it be forty years old: i witneſſes be living, they ought to prove it by the witneſſes, but if the neſſes be dead, they ought to prove the hands of the witneſſes, for th there muſt be (as is ſaid) a preſumption in favour of the deed when i worn out of the memory of the witneſſes, yet that preſumption is en tered by another preſumption from the blemiſhes of the deed itſelf, therefore the credit of the deed ought to be reſtored by the proof o execution of it.

So that if the deed imports a fraud, as where a man conveys a reversi- Chattle and
to one, and afterwards conveys it to another, and the second purchaser Pound,
ves his title, there, the first deed must be proved, though forty years Hill. Ass.
; for the presumption from the antiquity of the deed is destroyed by 1701, in
opposite presumption, for no man shall be supposed to be guilty of so Kent,
nifest a fraud, and therefore here also the credit of the first deed must
restored, by proving a fair execution of it.

If a deed of feoffment be proved, and the possession have gone along Roll. Rep.
th the deed, there, the livery shall be presumed, though it be not prov- 192. 227.
; for when there has been possession in the manner that the deed sets Tri. per
th, it founds a very strong presumption, that the possession was deliver- Pais, 209.
in the manner that the deed sets forth; for that there should be a con- Cro. Jac.
ct, to transfer possession, and that possession should go according to that 463.
ntract, are such concurring circumstances as cannot be accounted for,
less the possession was transferred according to the contract, and, con-
quently, the livery and seisin must be supposed by the jury.

But if possession have not gone along with the deed, then the livery Pl. Com,
st be proved upon the feoffment; for since the livery is to give the pos- 6, 7.
ion on the deed, where no possession is, the presumption is, that there
s no livery, and, consequently, the livery must be proved to encounter
at presumption.

But if the jury find the deed of feoffment, and that the possession hath Roll. Rep.
ne along with the deed, yet the judges upon such finding, cannot ad- 132. Tri.
dge it a good conveyance, for the jury are judges of the fact, and what per Pais,
probable, and what is improbable; the court is only judge of what is 339.
w, and have nothing to do with any probabilities of fact; therefore it is
e jury only that are to make the conclusions and deductions as to the
uth of the fact; the court cannot make any conclusions or deductions of
e truth of facts, if they are not drawn by necessary consequence out of
e words of the verdict; for to the court the rule is *De non apparentibus*
un existentibus eadem est ratio, therefore they cannot conclude that there
s a lawful conveyance, unless the jury find the delivery of the deed.

A deed of feoffment may be given in evidence as a release, for where Tri. per
e party is in possession already, the deed only will be a sufficient contract Pais, 209.
transfer a right.

Secondly, A deed may be given in evidence, on a rule of court with- 2 Sid. 269.
proving such deed, for if the party consent, that shall be looked upon Tri. per
a good deed, and that rule is evidence of the validity of such deed, Pais, 547.
r the consent of parties concerned must be sufficient and concluding evi-
ence of the truth of such fact, for the jury are only to try the truth of
ch facts wherein the parties differ.

A deed which comes out of the hands of the opposite party after no- Rex v.
ce to produce it, must *primâ facie* be taken to be duly executed, and will Inhabitants
e received in evidence without proof of the execution; for the other of Middle-
rty not knowing who are the subscribing witnesses, cannot come pre- zoy, 2 Term
ed at the trial to prove the execution. Rep. 41. and the cases there cited.

As to Razure, Interlineation, and Addition.

Formerly if there were any razure or interlineation, the judges deter- 10 Co. 92.
ined upon the profert of the deed and view of it, whether the deed was
od or not; for the very contrivance of the solemn contracts, such as
eds are, and their preference to verbal contracts, was founded on this,
that

that the intent of the parties is there manifeſtly ſettled in expreſs wor and notoriouſly authenticated, and, there, ſuch contracts are totally ferred to the court, if the truth of the ſolemnities, *viz.* of the ſeal, of the delivery, be admitted, and therefore muſt be diſſolved by a cont of equal ſolemnity, becauſe how they are deſtroyed and avoided, m appear to the ſame judges that are by the law to determine of them: Fr hence alſo it came to paſs, that if a deed was razed or interlined, t adjudged it a void deed, becauſe it did not certainly appear to the co who were the judges of thoſe ſolemn contracts, whether the mind of party was not contained in ſuch a mangled contract or not.

Ibid. But as the manner of conveyancing ſwelled from the ſhort little de to large and voluminous ones, ſo vaſt room was left to the miſpriſions the clerks, that muſt be altered and amended, or with greater labour expence of time written over again; from thence the court though neceſſary not to diſcharge the deeds razed or interlined as void, upon demurrer; but they referred to the jury upon the iſſue of *non eſt fac* whether this deed, thus razed and interlined, was the individual con delivered by the parties.

11 Co. 27. 2 Str. 1160. If a deed be altered by a ſtranger without the conſent of the obl in a point not material, this doth not avoid the deed; but otherwiſe i if it be altered by a ſtranger in a point material, for the witneſſes ca prove it to be the act of the party that ſealed and delivered it when t is any material difference from the ſenſe of the contract; but if the tract contain the ſenſe of the parties, the witneſſes may well ſwear be their act, for an immaterial alteration doth not change the deed, conſequently, the witneſſes may atteſt that very deed without dange perjury.

11 Co. 27. But if the deed be altered by the party himſelf, though in a point material, yet it will avoid the deed; for when the party himſelf m any alteration in his own deed, it diſcharges the contract, for the tract hath the whole form from the words of the obligor: now when obligee undertakes to ſupply it with new words, and to alter thoſe the ty hath fixed upon, that is, according to the rules of law, which t every man's own act moſt ſtrongly againſt himſelf, a new making a new framing of the contract, and for a man to contract with himſe utterly void and ineffectual.

Another reaſon of this interpretation of law might be, to add a ſan to deeds, that perſons, who had them in their cuſtody, might not them for fear of deſtroying their own ſecurities.

11 Co. 28. b. If there be ſeveral covenants in the deed, and one of them be alt this deſtroys the whole deed, for the deed is but a complication of al covenants, ſo that the deed, which is the whole, cannot be the ſame, leſs every covenant of which it conſiſts be the ſame alſo.

2 Roll. Abr. 29. (*a*) *Quere*, whether that be not afterwards vacated by an interlineation? All intereſts that paſs without deed, would paſs, though the deed afterwards interlined or altered (*a*): yet the intereſt once veſted did thereby return back again, ſince the deed is not abſolutely neceſſary to paſſing of the intereſt, but is only evidence that it was paſſed. by the ſtatute, it is neceſſary to ſhew a writing under the hands of parties.

Roll. Rep. 39, 40. If there be blanks left in an obligation in places material, and fille afterwards by the aſſent of the parties, yet the obligation is void

e there is a material part of the contract added after the ſealing and ery, it is not the ſame contract that was ſealed and delivered: But ere be a blank left in an obligation, and filled up afterwards with thing immaterial, this doth not avoid the contract. 2 Roll. Abr. 29.

, if a bond was made to *C.* with a blank left for Chriſtian names and ion, which is afterwards filled up by the aſſent of the parties, yet a void bond. Roll. Rep. 39, 40.

if any immaterial part of the contract be added after ſealing and y, yet it is in effect the ſame contract, and therefore it ſhall not be ed by theſe additions. Ventr. 185.

if *A.* with a blank left after his name, be bound to *B.* and after *C.* ded as a joint obligor, yet this does not avoid the bond, becauſe this not alter the contract of *A.* for he was bound to pay the whole money ut ſuch addition. *Ibid.* 2 Lev. 35. 2 Keb. 872. 881. Moor, 547. 619. Cro. Eliz. 627.

ere a thing lies in livery, a deed formerly ſealed, may be given in nce relating to it, though the ſeal be afterwards torn off, for the in- paſſed by the act of livery that inveſts the party with the poſſeſſion, e poſſeſſion that was once transferred by the livery doth not return again, though the deed was cancelled, and the deed is only an evi- of transferring poſſeſſion, for by the act of livery the poſſeſſion paſ- nd the deed without the ſeal (the livery being indorſed) is an evi- of ſuch poſſeſſion: ſo, if the conveyance was made by leaſe and e, the uſes were once executed by the ſtatute, and do not return again by cancelling the deed. Palm. 403. Mod. 11. Vent. 14 2 Keb. 556. 2 Lev. 220. 2 Show. 28. But ſee now the ſtatute of frauds.

, if a man ſhews a title to a thing lying in grant, there he fails, if l be torn off from his deed; for a man cannot ſhew a title to a thing in ſolemn agreement, but by ſolemn agreement, and there can be no agreement without a ſeal; ſo that poſſeſſion alone is no good ſince the thing itſelf doth not lie in poſſeſſion but in agreement; ore a man cannot claim title to a water-courſe, but by deed and under 3 Bulſt. 79. Roll. Rep. 188.

ere a contract creates an obligation, it cannot be pleaded, if the ſeal en off, for the ſeal is the eſſential part of the deed, and without a it is no longer a deed, nor to be pleaded, nor given in evidence as a unleſs in the caſe above mentioned, where the intereſt veſts, though nd hath no continuance: but where the deed is neceſſary to be ſhewn, er to acquire the intereſt, there, it muſt have the eſſentials of a deed, it is ſhewn as ſuch. *Ibid.* 39, 40. 2 Bulſt. 246. 28, 29, 30.

an obligation were ſealed when pleaded, and after iſſue joined, the e torn off, yet ſhall the plaintiff recover his debt, becauſe the deed profered to the court was in the cuſtody of the law, and therefore ow ought to defend it: beſides, the truth of the plea, which is to be d, muſt have relation to the time when the iſſue was taken, and at the of the iſſue it had the eſſentials of a good deed, and therefore that icient to maintain the iſſue. Owen, 8. Cro. Eliz. 120. 5 Co. 119. b. 2 Bulſt 247. Dyer, 59. pl. 12, 13. Co. Lit. 283. a.

Doct. Placit. 262. Roll. Rep. 39, 40. 2 Roll. Abr. 29.

, if the ſeal of a deed be broken off in court, it ſhall there be d for the benefit of the parties, becauſe where any thing is impair- er the cuſtody of the law, it ſhall be reſtored by the benignity of the as far as poſſible. 2 Inſt. 676.

If

Noy 112. 2Roll. Rep. 30. 40. 5 Co. 23. a. Cro. Eliz. 546. Doct. Placit. 260. 262, 263. Poph. 161.

If there be a joint contract or obligation, and one of the obligor's ſeals be torn off, it deſtroys the obligation, becauſe they are both bound as perſon, and if one be diſcharged, the other cannot ſtand obliged, bec they both make up but one obligor.

5 Co. 23. a. Cro. Eliz. 546. Roll. Rep. 50. 2 Roll. Rep. 30. 149. Cro. Eliz. 408. 546. 576 11 Co. 28. b. Doct. Placit. 260. 262, 263.

But if two perſons be bound ſeverally, there, if the ſeal of one o obligors be broken off, yet the obligation continues in the other, bec there are ſeveral contractors, and ſeveral contracts, and therefore by troying the obligation of one of them, the obligation of the other is taken away.

March, 125. 2 Show. 29.

But if two men are bound jointly and ſeverally, and the ſeal of o them is torn off, this is a diſcharge of the other, for the manner o obligation is diſcharged by the act of the obligee, and therefore t (according to the rule of law, that conſtrues every man's own act ſtrongly againſt himſelf) a diſcharge of the obligation itſelf: bec ſince both are jointly bound as one perſon, the diſcharge of one of is a diſcharge of both; a ſatisfaction is ſuppoſed by the very cancelli it to be given for the whole debt, and no obligation can reſt upo other.

Potts v. Durant, Anſtr. 789. Atkyns v. Hellon, *Id.* 387.

Inſtruments of very ancient date which are incapable of being wiſe proved, derive their authenticity from being found in the repo which the law has allotted for them, or in which they ought prope be; and therefore cannot be received in evidence where they come the cuſtody of mere private hands. It is true, that where a conn can be eſtabliſhed, ſo as reaſonably to account for their being in ſuc tody, the courts have ſomewhat relaxed the rule, and admitted them read, though not coming from exactly the moſt proper repoſitory. where the cuſtody is merely private, and wholly unconnected with the ject-matter, the courts have never gone the length of admitting ſuch in evidence.

Dor v. Syburn, 7 Term Rep. 2.

A bill in Chancery is not admiſſible in evidence any further th ſhew, that ſuch a bill did exiſt, and that certain facts were in iſſ tween the parties, in order to let in the anſwer or depoſitions of th neſſes.

Taylor v. Cole, Weſtm. Sitt. after Hil. Term

But a bill in Chancery by an anceſtor under whom the party cl has been admitted in evidence to prove a family pedigree ſtated in, in the ſame manner as an inſcription on a tomb-ſtone, or in a bi 1789, *coram* Kenyon, C. J. cited *ibid.*

Sintzenick v. Lucas, Eſpin. Ca. 43.

A record is evidence only of what was in iſſue, and appears face of the record itſelf: it is not competent to a party to offe dence to ſhew that under that record any particular matter ca queſtion.

Barnes v. Trompowſkey, 7 Term Rep. 266. In debt on bond tried before Lord

Every inſtrument, whether under ſeal or not, the execution of wh witneſſed, muſt, generally ſpeaking, be proved by the witneſs h if living; if dead, by proving his hand-writing; if reſiding abro ſending out a commiſſion to examine him, or at leaſt by proving his writing, which laſt, indeed, is a relaxation of the old rule, and ted only of late years. The ſame medium of proof has alſo been ad

e the ſubſcribing witneſs has been ſought for, and could not be found, to furniſh a preſumption that he was dead. But the rule has never relaxed further than theſe inſtances. Kenyon, at the ſittings at Weſtmin-

13th Feb. 1790, it appeared, that the bond, which bore date in 1774, had been executed e defendant at New York in America. There were two witneſſes to it, and it was proved Evidence was given of the hand-writing of Rivington, one of the ſubſcribing witneſſes, was in America. Objection was taken, that this was not ſufficient, without proving alſo and-writing of the obligor; and Lord Kenyon being of that opinion, it was proved accord- It was then objected, that the hand-writing of W. Moreton the other ſubſcribing wit- ſhould alſo be proved, and that he alſo was abroad or dead; otherwiſe *non conſtat*, but he have been ſubpœnaed here. Lord Kenyon thought that ſome evidence of that ſort was ſary. Whereupon the plaintiff proved, that there had been a man of the name of Moreton, had lived as a clerk with Rivington, the other ſubſcribing witneſs: but it could not be prov- at his name was William, or that it was the hand-writing of that Moreton, or that that ton might not now be in England; all which was urged againſt the admiſſion of the proof. Lord Kenyon held it ſufficient; for this being the caſe of a foreign tranſaction, though per- the evidence was capable of being more perfect, yet it was ſufficient and reaſonable evidence to the jury, at leaſt, unleſs it were rebutted by ſome evidence on the other ſide. The e of ſending out a commiſſion would (he ſaid) in many inſtances be more than the value ſum in diſpute. Wallis v. Delancey, cited *ibid.*

party ſhall not be admitted to acknowledge a deed he has executed, it has been proved by the ſubſcribing witneſs. Johnſon v. Maſon, Eſpin. Ca. 89.

Whether Parol Evidence is to be admitted to explain what appears on the Face of a Deed or Will.

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(*to aſcertain*) Here, there is a *latent* ambiguity; the words themſelves *primâ facie* do not an ambiguity; but the ambiguity ariſeth from ſomething *debors*, ſome collateral matter the inſtrument itſelf. And as ſuch ambiguity is made to appear by parol evidence, parol ce muſt be admitted to explain it, as well as to raiſe it. See Bac. Max. Reg. 23. But there is an abſolute omiſſion of the deviſee, it cannot be ſupplied by parol ton v. Turner, 3 Atk. 257.

, where *J. S.* being ſeiſed in fee of a real eſtate as heir on the part his mother's mother, and being alſo ſeiſed in fee of a ſmall eſtate as to his own father, deviſed all theſe lands to truſtees and their heirs to pay ſeveral annuities and charities; after payment of which he ed the reſidue of the rents and profits of the premiſes to his own heirs of his mother's ſide for ever; and the queſtion was, whether eir of the mother's father, or the heir of the mother's mother was ed to the reſidue of the rents and profits? parol evidence was admit- ſhew, which heir of the mother's ſide was intended. Harris v. Biſhop of Lincoln, 2 P. Wms. 135.

gain, *R. H.* deviſed to the defendant ſeveral cloſes of the value of *per annum*, paying 100*l.* he owed to *J. S.* and 100*l.* he owed by bond *Shaw*; and deviſed ſome ſmall legacies, and gave all the reſt of perſonal eſtate to the plaintiffs, his nieces. It happened that the 100*l.* bond was not due to *Shaw*, but was the money of *Alice Beck*, then wife of one *F.* By reaſon of this miſtake, the deviſee of the land to pay the 100*l.* The plaintiff examined *Harvey* who drew the and depoſed that the teſtator declared, he meant the 100*l.* due to ſon who married Mrs. *Beck* of *Lincoln*; and another witneſs de- that he meant the bond for which *C.* was bound as his ſurety: ed for the plaintiff, firſt at the rolls, and afterwards on a bill of review Hodgſon v. Hodgſon, 2 Vern. 593. Pr. Ch. 229. S. C.

review before the Lord Chancellor, and heard on the merits, and a decreed on the merits; his lordſhip declaring he ſaw no hurt in admi collateral evidence to make certain the perſon or the thing deſcri

(*a*) Fonnereau v. Poyntz, 1 Br. Ch. Rep. 477. And Lord *Thurlowe* in a late caſe (*a*) ſaid it was a clear propoſition, every evidence as to the deſcription of the ſubject the teſtator ha ſcribed, muſt be admitted. As in the caſe of a ſpecifick legacy, you hear evidence concerning the ſubject to which the will applies, in to ſee whether the deſcription applies aptly or not.

Cuthbert v. Peacock, 2 Vern. 593. Debeze v. Man, 2 Br. Ch. Rep. So, parol proof hath been admitted as to the intention of a te where the queſtion hath been, whether a legacy ſhould go in ſatisfa of a debt due from the teſtator to the legatee, or whether a ſum adv on the marriage of a child ſhould go in ſatisfaction of a legacy?

165. In Fowler v. Fowler, 3 P. Wms. 354. Lord Talbot ſaid, his opinion was agai admiſſion of ſuch evidence.

Henkle v. Royal Exchange Aſſurance Company, 1 Vez. 317. It alſo hath been admitted in equity, to prove a variation betwe agreement executed and the agreement intended, upon a ſuggeſtion ſuch variance hath happened through miſtake, fraud, &c.

Baker v. Paine, *Id.* 456. South Sea Company v. D'Oliffe, 2 Ve Pitcairne v. Ogbourne, *Ibid.* Lady Shelburne v. Lord Inchiquin, 1 Br. Ch. Ca. 338. v. Harvey, 2 Ch. Ca. 180. *Per* Reynolds C. B. in Fitzgerald v. Lord Fauconberg, Fitz But in Hardwood v. Wallis, cited in 2 Vez. 195. parol evidence for this purpoſe was r In that caſe, an eſtate was agreed to be ſettled prior to marriage on the intended huſb life; remainder to wife for life; remainder to the firſt, &c. ſon in tail-male; remainde and every the daughters of that marriage. Inſtructions were given to an attorney to dr ſettlement, who drew it as far as the limitation to the ſons in tail-male; where he ſtopp wrote, *then go on as in Pippin* v. *Ekins*; which was a precedent he delivered to his clerk t from that limitation, and was a right ſettlement on the iſſue male and daughters by tha but the clerk drew the ſettlement to all the daughters of the huſband without reſtrain that marriage. It was executed with this miſtake. The plaintiff was the only daughter marriage: the huſband by a ſecond wife left a ſon and four daughters, the defendants. inſiſted, that letting in the daughters of the ſecond marriage would make the firſt wife chaſer for them, or the children of other ſucceſſive wives, to the deſtruction of the int her only child: the draft of the attorney was proved, and the ſettlement in Pippin v. But the Maſter of the Rolls, Sir Wm. Forteſcue, would not admit the parol evidence of torney to be read; and held, that the other evidence would not do: that nothing appe writing under the hands of the parties, the ſettlement could not be altered.—Evidence kind, it muſt be obſerved, ſeems to be more readily admitted to rebut an equity, than t a decree upon. Legal v. Miller, 2 Vez. 299. Jones v. Statham, 3 Atk. 388. Eden Bute, 7 Br. P. C. 204. 445.

Doe v. Burt, 1 Term Rep. 701. Rex v. Inhabitants of Sambourn, 3 Term Rep. 609. So, parol evidence is admiſſible to ſhew whether a thing be pa not of the eſtate demiſed by a deed. So, to ſhew that perſons ing themſelves in a certificate as officers of the pariſh at large, wh officers of the hamlet where the pauper was ſettled. In explan mercantile contracts it is every day's practice to reſort to it.

Per Lord Hardwicke in Baker v. Paine, 1 Vez. 459. and Blunt v. Cumpa 331.

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(*It has been*) Parol evidence offered to raiſe an equity, that a penſion granted by t to the defendant abſolutely and without any terms, was in truſt for the plaintiff, the d by his anſwer denying it, was rejected by Lord Thurlow, after much argument and d beration. Lady Margaret Fordyce v. Wilkis, 3 Br. Ch. Rep. 577.

Rex v. Inhabitants of Scammonden, 3 Term Rep. 474. So, it is competent to a party to aver other conſiderations th expreſſed in a deed. Thus, where the conſideration expreſſed deed was 28*l.*, parol evidence was admitted to prove, that the re deration was 30*l.* So, where the conſiderations mentioned in t

10,000*l.* *and natural love and affection*, the lords commiſſioners of great ſeal directed an iſſue to try whether natural love and affection ed any part of the conſideration, the eſtates which were conveyed he deed being worth 30,000*l.* On an appeal this was confirmed; and jury on the trial of this iſſue, finding that *natural love and affection* con- red no part of the conſideration, the deed was afterwards ſet aſide by Lord Chancellor.

Filmer v. Gott, 7 Br. P. C. 70. But in Clarkſon v. Hanway, 2 P. Wms. 203. it was holden that

grantee could not give parol evidence to prove blood and kindred to have been the conſide- of a conveyance, the conſideration expreſſed in the deed being an annuity to be paid to grantor. And in Peacock v. Monk, 1 Vez. 128. Lord Hardwicke ſaid, "where any con- ration is mentioned, as of love and affection only, if it is not ſaid alſo, *and for other conſidera-* you cannot enter into proof of any other: the reaſon is, becauſe it would be contrary to ded; for when the deed ſays, it is in conſideration of ſuch a particular thing, that imports whole conſideration, and is negative to any other. It is otherwiſe, where there is no con- ration at all in the deed.

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(to waſt) Batchelor and Searl, Eq. Ca. Abr. 246. S. C. Gilb. Eq. Rep. S. C. *Infra* vol. S. C. Duke of Rutland v. Ducheſs of Rutland, 2 P. Wms. 210. Petit v. Smith, 1 P. 7. Braſsbridge v. Woodroffe, 2 Atk. 68. Lake v. Lake, 1 Wilſ. 313. Ambl. 126. But in Blinkhorne v. Feaſt, 2 Vez. 28. Oct. 1750. Lord Hardwicke expreſſes himſelf very tender in admitting parol evidence in caſes of this kind; and it ſhould be reſtricted paſſed at the time of making the will. Nourſe v. Finch, 1 Vez. jun. 358. And Lake ake, Nov. 1751. is the laſt caſe (in print) which has been decided ſince that time on parol ence.

as parol evidence is admiſſible in favour of the executor to ſhew reſulting truſt for the next of kin, ſo it hath alſo been admitted in r of the next of kin, to take off the effect of the parol evidence ad- by the executor. And it ſeems from ſome caſes (*a*) that it may be by the next of kin originally and in the firſt inſtance.

Biſhop of Cloyne v. Young, 2 Vez. 95. Coote v. Bond, 2 Br. Ch. Rep.

526. (*a*) Fane v. Fane, 1 Vern. 30. Rackfield v. Careleſs, 2 P. Wms. 158.

here a teſtator gave legacies of the ſame amount in two different in- ents, parol evidence was admitted to ſhew that he intended them to cumulative.

Coote v. Boyd, 2 Br. Ch. Rep. 522.

here a fine is levied, if no uſes are declared, the reſulting uſes ſhall the conuſor, but parol evidence is admiſſible to rebut the preſump- of ſuch reſulting uſes.

Roe v. Popham, Dougl. 24.

teſtatrix bequeathed her real and perſonal eſtate to *E. T.* and *J. U.* between them for life, and upon the death of *E. T.* ſhe gave the eſtate to *J. U.* in tail general, and for want of ſuch iſſue to *R. U.* with a few pecuniary legacies; and charged the real eſtate with ment of theſe legacies, if her perſonal eſtate ſhould not be ſufficient; her will declared, ſhe gave all the reſt and reſidue of her perſonal to her uncle *L. C.*'s three daughters; and particularly gave to Mrs. 10*l.* and made her executrix. For the reſiduary legatees it was , that *reſt* and *reſidue* of her perſonal eſtate muſt mean the reſidue the particular legacies are paid off; and could not refer to the begin- the will, becauſe there is a fee deviſed, and, conſequently, the has diſpoſed of the whole: that parol evidence of the attorney ew the will, that he had expreſs directions to give the perſonal to the three daughters of *L. C.*, might be admitted in this caſe; be ſure) things which are quite contrary to the will ſhall not be by parol evidence, but that it may be allowed to explain words in a pecially in this caſe, where it appears to be a mere blunder of the drawer:

Ulrich v. Litchfield, 2 Atk. 372.

drawer: that this doth not intrench upon any of the rules with rega
parol evidence, but only clears up who was intended to have the per
eſtate, where the whole is deviſed to two different perſons; and t
ſeems clearly to be a blunder in the drawer of the will, becauſe the
in the firſt part of it is proper only in the diſpoſing of real eſtate.
Hardwicke—As to the queſtion, whether I ought to admit parol evi
to explain the intention of the teſtator, I am of opinion, that this is
caſe in which parol evidence can be read, and that it would be of d
rous conſequence. It is true, there are ſome things here which
make a judge wiſh to admit it; but I muſt not follow my inclina
only; for I do not know that upon the conſtruction of a will, cou
law or equity admit parol evidence, except in two caſes: firſt, to aſce
Dowſet v. Sweet, Ambl. 175. the perſon, where there are two of the ſame name, or there has b
miſtake in a chriſtian or ſurname, and this upon abſolute neceſſity;
Bradwin v. Harpur, *Id.* 374. if ſuch evidence were not let in, it would make the will void. The
caſe is, with regard to reſulting truſts relating to perſonal eſtate; wh
man makes a will, and appoints an executor with a ſmall legacy, a
next of kin claim the reſidue; in order to rebut the reſulting truſt f
next of kin, parol proof has been admitted to aſcertain the perſo
was to have the reſidue. It is very true, caſes may be cited, where
Cowper has admitted ſuch evidence; for he went upon this ground
it was by way of aſſiſting his judgment in caſes extremely dark and
ful. I have the greateſt deference for his judgment, but muſt o
was never ſatisfied with this rule of Lord *Cowper*'s of admitting par
2 Vern. 621. dence in doubtful wills: beſides, he went further in the great c
Strode and *Ruſſel*, in which there was an appeal to the Houſe of L
Mr. Juſtice *Tracy*, who aſſiſted Lord *Cowper* in that caſe, was at
the ſame opinion with him; but on conſidering it more, he diſavow
former opinion, and was clear that it could not be admitted, a
alteration in his judgment was mentioned in the Houſe of Lords.
caſe of *Selwin* and *Brown*, I was of opinion that it ought to hav
admitted; and even Lord *Talbot*, when he had heard the cauſe,
remorſe of judgment at the ſame time that he rejected the parol evi
but the Houſe of Lords refuſed it as of moſt miſchievous conſeq
and affirmed his decree.

Lowfield v. Stoneham, 2 Str. 1261. Upon *plenè adminiſtravit* pleaded, the queſtion was, whether
received by the defendant was due to her in her own right, or as e
to her huſband, and, conſequently, aſſets? It aroſe upon the fo
deviſe:—"I give to my loving brother *John Stoneham* 1000*l.*,
"caſe of his death, to his wife *Suſanna*," who was the defend
appeared that *John Stoneham* ſurvived the teſtator: the plaintiff t
inſiſted, that this legacy, which the defendant admitted that ſhe
ceived, veſted abſolutely in him, and was aſſets in her hands.
part of the defendant, it was offered to give in evidence, that the
in extremis declared, he meant to give his brother only the intereſ
1000*l.*, and that the defendant ſhould have the principal in caſe
vived him. The parol evidence was oppoſed by the plaintiff's
as being contradictory to the plain words of the will. And *Le*
Juſtice, ſaid, it could not be allowed, and that in the caſe of
and *Brown*, the Houſe of Lords had refuſed it, even where it
ſupport the legal interpretation of the will; and Lord *Hardwic*
two years ago held it in the ſame manner in the caſe of the Earl
quin and *O'Brien*.

A

Although parol evidence may be received to explain, yet it can never be admitted to annul or ſubſtantially to vary a written inſtrument. An action on the caſe was brought for the uſe and occupation of a houſe, of which, it was agreed in writing, that a leaſe ſhould be let by *Chriſtiana Preſton* to *Abraham Gamage* for twenty-one years, at 26*l.* *per ann.* to commence from *Michaelmas* then next. *Gamage* died and made *Merceau* his executor, who paid 26*l.* into court for one year's rent. On the trial, the plaintiff offered to ſhew by parol evidence, that beſides the 26*l.* *per ann.* the defendant had agreed to pay 2*l.* 12*s.* 6*d.* a year, being the ground-rent of the premiſes to the ground landlord; but no evidence was offered of the actual payment of ſuch ground-rent during the teſtator's life; without which *De Grey*, Chief Juſtice, thought ſuch parol evidence inadmiſſible, and nonſuited the plaintiff. On a motion to ſet aſide this nonſuit, it was alleged, that this was evidence not to alter or vary, but to explain the agreement. That this was not a ſolemn deed or will, but a mere executory act; and had a bill in Chancery been brought to carry it into execution, parol evidence would have been admitted to prove the agreement to pay the ground-rent. For in *Joynes* v. *Statham*, 3 *Atk.* 388. parol evidence was admitted to ſhew, that the agreement for a leaſe at 9*l.* a year was to *be clear of taxes*. But by *Blackſtone*, J. I am clearly of opinion that the lord chief juſtice did right in rejecting this evidence. Courts ſhould be very cautious in admitting any evidence to ſupply or explain written agreements; elſe the ſtatute of frauds would be eluded, and the ſame uncertainty introduced by ſuppletory or explanatory evidence, which that ſtatute has ſuppreſſed in reſpect to the principal object. It never ought to be ſuffered ſo as to contradict or explain away an explicit agreement, for that is in effect to vary it. Here is a poſitive agreement that the tenant ſhall pay 26*l* Shall we admit proof that this means 28*l.* 6*s.* 6*d.*? What is it to the tenant to whom the rent is to be paid, ſo as he is obliged to pay more than his contract expreſſes? we can neither vary the rent nor the term, the two things expreſſed in this agreement. With reſpect to collateral matters, it might be otherwiſe. He might ſhew that it is to put the houſe in repair, or the like, concerning which nothing is ſaid; but he cannot by parol evidence ſhorten the term to fourteen years, or extend it to twenty-five years, or make the rent other than 26*l.* per ann. The caſe in *Atkins* is of a mere executory act, in which the matter was to ſettle the proper covenants, and therefore had a right to ſettle who was to pay the taxes. Beſides, there were ſtrong ſuggeſtions of fraud in making the written agreement, as one party could neither read nor write.

Meres v. Anſell, 3 Wilſ. 275. Preſton v. Morceau, 2 Bl. Rep. 1249.

In a debt upon a bond payable at a certain day, the defendant pleaded, that by agreement between the defendant and the plaintiff's teſtator, the bond only ſtood as an indemnity. To this plea the plaintiff demurred, and the queſtion was, whether the agreement pleaded could be given in evidence, contrary to the expreſs tenor of the bond, purporting to be abſolute, for payment on the day? The plaintiff contended, that the office of parol evidence extended no farther than to explain a deed conſiſtently with its general purport, and by no means to change the nature of the ſpecial obligation; and that even on a will, the uncertainty to be removed by evidence muſt ariſe from ſomething extrinſick to the inſtrument. The court agreed the plea to be bad, and the objection deciſive againſt admitting collateral evidence to change the nature of the deed.

Meaſe v. Meaſe, Cowp. 47.

Haynes v. Hare, 1 H. Bl. 664.

In no caſe can parol evidence of a parol communication between the parties be received, to add a term not inſerted in the ſpecifick agreement which they have executed; for what has paſſed between them may have been altered and ſhifted in a variety of ways, but what they have ſigned and ſealed was fully ſettled. And my Lord *Thurlowe* laid it down as a rule of law, which it was impoſſible to break in upon, that nothing could be added to the written agreement, unleſs in caſes where there is a clear ſubſequent, independent agreement varying the former, not where it is a matter paſſing at the ſame time with the written agreement.

Lord Portmore v. Morris, 2 Br. Ch. Rep. 249.

Rich v. Jackſon, 4 Br. Ch. Rep. 519.

Gunnis v. Erhart, 1 H. Bl. 289.

The verbal declarations of an auctioneer cannot be admitted to contradict the printed conditions.

Thomas v. Thomas. 6 Term Rep. 671.

We have ſeen that a latent ambiguity in an inſtrument may be explained by parol evidence. It may, therefore, be admitted to ſhew that at the time of making a will, the deviſor gave inſtructions to inſert the name *A.* in the will, when the attorney inſerted that of *B.* by miſtake. But parol evidence of declarations made by the teſtator before the making the will cannot be received to contradict the will.

Beaumont v. Fell, 2 P. Wms. 141.

Lord Walpole v. Earl Cholmondeley, 7 Term Rep. 138.

Where the deviſor made one will in 1752, and another in 1756, without diſpoſing of his perſonalty, or appointing executors by either, and a codicil (reciting that *by his laſt will*, dated in 1752, he had made no diſpoſition of his perſonalty) diſpoſed of it, and appointed executors, it was holden, that there was no latent ambiguity ſo as to let in parol evidence to ſhew that the teſtator intended by the codicil to confirm the will of 1756, and not to republiſh that of 1752.

Per Buller, J. 2 H. Bl. 524.

(*a*) *Vide ſupra*, vol. ii. p. 652.

A doctrine did at one time prevail, that the court might receive evidence which they thought, according to the ſtrict rules of law, ought to be offered to a jury. But evidence which ought not to be received between the parties, to give a conſtruction to a written inſtrument brought in diſpute, ſeems to be no more admiſſible by a court than a jury. In the caſe in 2 *Vern.* 98. which is referred to in ſupport of the doctrine in a preceding part of this work (*a*), the court refuſed to receive ſuch evidence. And ſo they did in the two other paſſages of that book (2 *Vern.* 337 & 625.) referred to alſo in its ſupport.

Pym v. Blackburn, 3 Ves. jun. 34.

An agreement in writing between a landlord and a perſon who was then his tenant under a leaſe which had ſome time to run, was ſigned by the landlord for a new leaſe to be granted at any time after the completion of repairs which were to be made by the tenant with all convenient ſpeed, but blanks were left for the time of the commencement of ſuch new leaſe. Upon the completion of the repairs the landlord tendered a leaſe to commence from that time; and upon the tenant's refuſal to accept it, filed a bill for a ſpecifick performance. The tenant admitted, by his anſwer, that he accepted the agreement, but inſiſted, that the new leaſe was to commence before the old one was expired. The landlord offered evidence to ſhew, that it was the true meaning of the agreement that the new leaſe ſhould commence from the completion of the repairs; but the maſter of the Rolls rejected it.

(H

(H) Of Presumptive Proof.

A Presumption, as defined by the *civilians*, is *conjectura ex certo signo proveniens quæ alio adducto pro veritate habetur*. For when the fact itself cannot be proved, that which comes nearest to the proof of the fact is, the proof of the circumstances that necessarily and usually attend such facts, and these are called presumptions, and not proofs, for they stand instead of the proofs of the fact till the contrary be proved. Gilb. L. E. 303.

If a man gives a receipt for the last rent, the former is presumed to be paid, because a man is supposed first to receive and take in the debts of the longest standing; especially if the receipt be in full of all demands, then it is plain there were no debts standing out; and if this be under hand and seal, the presumption is so violent, that the law admits of no proof to the contrary; because that were to let a man invalidate his own deed, which our law doth not permit; for here, though the payment of the money is not proved, yet the acquittance is proved, which could not be without such payment.

Where a lease is proved, and it is also shewn, that the claimant hath received rent within twenty years, this infers a seisin in fee, and throws it upon the adverse party to shew that the lease is subsisting. And *Eyre*, Baron, held, that where rent is received without any proof of a lease, this also *primâ facie* is evidence for the plaintiff, and obliges the defendant to shew, that it is either a quit-rent, or that the term is unexpired. *Per Cur* in Harpur v. Brock, *Scac.* Tr. 14 G. 3. 3 Wooddes. 333.

Possession, and rent received, for twenty years, were holden to be admissible evidence of a fee, to be left to a jury; though the title, so far as it was developed, appeared to be a long term of years; for it might be a term attendant on the inheritance, and the lease one of the muniments of the estate. Denn v. Barnard, Cowp. 595.

The circumstance of twenty years having elapsed without any demand made, is of itself a presumption that a bond has been paid. And satisfaction of a bond may be presumed within a less period, if any evidence be given in aid of the presumption, as an account settled between the parties in the intermediate time without any notice being taken of such a demand. Oswald v. Legh, 1 Term Rep. 270.

If a person claiming a toll for passing over a highway, can shew that the liberty of passing over the soil, and the taking of a toll for such passage, are both immemorial, and that the soil and the tolls were before the time of legal memory in the same hands, though served since, it will be presumed, that the soil was originally granted to the publick in consideration of the tolls. Lord Pelham v. Pickersgill, 1 Term Rep. 660.

If a ship has been missing, and no intelligence received of her within a reasonable time after she sailed, it shall be presumed that she is lost. Green v. Brown, 2 Str. 1191.

Newby v. Read, Sittings after Mich. 3 Geo. 3, Page 312

(But now) In ejectment the case was as follows: John Gifford was seised in fee of the lands in question, and made a lease in reversion to Lewis Davells for 99 years, to commence after the deaths, or other sooner determination of the estates of John Davells the father, and John Davells the son, who had then a lease in possession for 99 years, if they or either of them so long lived. The plaintiff positively proved the death of John Davells the son; but as to the father, the proof was, that he had been reputed dead, and nobody had heard of him for 15 years last past. Upon an objection, that this last proof was insufficient, it was holden clearly by *Holt*, C. J. upon the perusal of the above statute, that this case was within it, because Lewis Davells, the father of the plaintiff, had a term in reversion in the lands, and so was a reversioner within the very letter of the statute; and he held, that a remainder man was within the equity of that law. Freeman v. Exton, Carth. 246.

By the 6 *Ann. c.* 18. reciting that divers perſons, as guardians and tru
tees for infants, huſbands in right of their wives, and other perſons ha
ing eſtates or intereſts determinable upon a life or lives, have continued
receive the rents and profits of ſuch lands after the determination of the
ſaid particular eſtates or intereſts, it is enacted, " That any perſon cha
" ing any eſtate in remainder, reverſion, or expectancy after the death
" any perſon within age, married woman, or any other perſon who
" ſoever, may, upon affidavit that he hath cauſe to believe that ſu
" perſon within age, *&c.* is dead, and that his or her death is conceal
" by ſuch guardian, truſtee, huſband, or any other perſon, once a ye
" have an order from the great ſeal for the production of ſuch per
" within age, *&c.*, and upon the guardian, truſtee, *&c.* refuſing or
" glecting to produce ſuch infant, *&c.* agreeably to ſuch order, the
" infant, *&c.* ſhall be taken to be dead, and the remainder-man or rev
" ſioner ſhall enter upon the eſtate in like manner as if ſuch infant,
" were actually dead."

(I) Where the Law requires the higheſt Proof t Nature of the Thing is capable of.

(*So if a witneſs*) But in ſuch caſe it is not neceſſary to produce the original record, for co
of records, the journals of the Houſe of Commons, the journals of parliament, pariſh regiſt
and the transfer-books of the Eaſt India Company, &c. are ſufficient. Wherever an origina
of a publick nature, and would be evidence if produced, an immediate ſworn copy thereof wil
evidence. Dougl. 171. 593. 3 Salk. 154. By 5 G. 2. c. 30. § 41, which directs proceedings
commiſſions of bankrupt to be entered on record, true copies ſigned and atteſted as therein
quired, may be given in evidence.

(K) Of Hearſay Evidence.

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(*So what a perſon*) The declarations of a priſoner cannot be given in evidence for him; th
fore a witneſs for this purpoſe cannot be called in his defence; but he may croſs-examine a
the witneſſes on the part of the proſecution as to any thing they may have heard him ſay rela
to the fact he is charged with. *Id. ibid.* 6 Ed.

Bull. Ni. Pri. 294. Where poſitive proof cannot be had, the declarations of perſons in
tereſted, and who are then dead, are admiſſible, as in queſtions conc
ing legitimacy, or in queſtions of pedigree.

Id. ibid. Hearſay is good evidence to prove the death of any perſon bey
ſea.

Rex v. Nutley, 3 Term Rep. 715. Hearſay is evidence in caſes of ſettlement of paupers. Rex v. Greenwich, *Id.* 716. Rex v. Holy Trinity in Wareham, Cald

Davis v. Pearce, 2 Term Rep. 53. It is evidence alſo, whether parcel or not parcel. See Garnons v. Barnard, Anſtr. 299.

Bull. Ni. Pri. 295. In queſtions of preſcription, hearſay is good evidence in order to p
a general reputation.

Biſhop of Meath v. Lord Belfield, Bull. In a *quare impedit*, the plaintiff derived his title from Lord *R.* in w
he laid a preſentation of one *Knight:* the biſhop ſet up a title in him
and traverſed the ſeiſin of Lord *R.*: the plaintiff gave in evidence

ntry in the regiſter of the dioceſe of the inſtitution of *Knight*, in which ere was a blank in the place where the patron's name is uſually inſert- d, and then offered parol evidence of the general reputation of the ountry, that *Knight* was in by the preſentation of Lord *R.*: upon a bill f exceptions, this came on in *K. B.* when the better opinion was, that e evidence was admiſſible, the regiſter, which was the proper evidence, ing ſilent; for a preſentation may be by parol, and what ſo commen- s may be tranſmitted to poſterity by parol, and that creates a general putation. Ni. Pri. 295. 1 Wilſ. 215. S. C.

It ſeems to be no objection to the admiſſion of hearſay evidence, that e party whoſe declarations are brought as hearſay evidence would not himſelf be an admiſſible witneſs, provided ſuch declarations at the time ere indifferent. Eſpin. Ni. Pri. 787.

(L) Of the Party's Confeſſion:

The confeſſion muſt be voluntary, not drawn from the accuſed by hope, extorted by fear. If the confeſſion be not reduced into writing, it cannot be uſed againſt the accuſed: and it is proper that he ſet his name or mark to it. 2 H. H. P. C. 284. Leach's Caſes, 286, 7. Burn's Juſt. tit. Examination.

His examination ought not to be upon oath. 1 H. H. 585.

Where the confeſſion is regularly taken, it is of itſelf, uncorroborated by any other evidence, ſufficient to convict the priſoner. Leach's Caſes, 287.

Excommunication.

WHERE a writ *de excommunicato capiendo* ſtated that the defendant was excommunicated in a cauſe of "defamation and ſcandal *merely ſpiritual*," it was allowed to be ſufficient. Page 314 Rex v. Payton, 7 Term Rep. 153.

It is no ground to call upon the temporal courts to quaſh the writ, that a greater, inſtead of the leſs, excommunication was pronounced; for this is merely matter of appeal. *Id. ibid.*

It is not neceſſary that the defendant ſhould be reſident in the dioceſe at the time of the excommunication; it is ſufficient if he were there at the time of the citation. *Id. ibid.* *Vide ſupra.* vol. ii. 673. S. P.

(A) In what Caſes the Spiritual Court may properly excommunicate.

(*If the excommunication*) *Secus*, if it had been the conjunctive *et*. 2 Atk. 499. Page 315 Rex v. Hunt, Ca. temp. Hardw. 314.

If the writ is in a ſuit *pro correctione morum*, it is too general. So, for appearing to anſwer *certis articulis animæ ſuæ ſalutem, morumque correctionem concernentibus*. Rex v. Thead, 1 Str. 43. Rex v. Munnery, *Id.* 76.

If

Rexv. Keat, 2 Str. 950. Rexv. Eyre, 2 Str. 1067.

If it is for *ſlander or defamation*, it is certain enough.

Two *ſignificavits* were quaſhed, being only ſaid to be in a cauſe which came by appeal in a matter merely ſpiritual. For by Lord *Talbot*, we are not to lend our aſſiſtance, but where it appears clearly they have juriſdiction, and are not to truſt them to determine what is a matter merely ſpiritual. In *Fowler*'s caſe, it was in cauſes of eccleſiaſtical rights, and held not ſufficient.

(B) In what Caſes a Perſon ſhall be ſaid to be *ipſo facto* excommunicated.

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(*And to this purpoſe*) By 27 G. 3. c. 44. no ſuit ſhall be commenced in any eccleſiaſtical court for ſtriking or brawling in any church or church-yard after the expiration of eight calendar months from the commiſſion of the offence.

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(*That notwithſtanding*) For this ſecond offence in the act, *ſmiting in a church-yard*, a precedent conviction at law is not neceſſary, though if there is one, the ordinary may uſe it as a proof of the fact. For with reſpect to this, and the firſt offence in the act, the ſtatute, though it provides a penalty, does not change the juriſdiction. As to the laſt offence, *maliciouſly ſtriking with any weapon*, &c. there muſt be a previous conviction, and a tranſmiſſion of the ſentence and a declaration. Wilſon v. Greaves, 1 Burr. 240. Wenmouth v. Collins, 2 Ld. Raym. 8

(C) By whom Excommunication is to be pronounced and certified.

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(*Excommunication*) By the ancient common law, as was ſaid by Hankford, 11 H. 4. 64. a commiſſary might certify excommunication; and that he was reſtrained by parliament.

F. N. B. 62. N.

And although the biſhop be in his dioceſe, yet the certificate of the car general, by his letters unto the Chancery, reciting that the biſho *in remotis agend.*, is good, and ſhall not be traverſed.

(*So, a parſon*) But in this caſe the rule in the regiſter is, that the excommunication be ſaid in the writ to be by the authority of the biſhop himſelf.

F. N. B. 64. C. 2 Buſſtr. 4. 2 Roll. Abr. 233. Lutw. 17.

The chancellor of the univerſity of *Oxford* may certify excommunication of perſons within his juriſdiction.

Whether the court of delegates have power to excommunicate, (though adopted in more modern practice,) hath formerly occaſioned a difference of opinion.

Co. Lit. 134.

But when the biſhop hath certified the excommunication under ſeal, death will not vacate the certificate.

(*c*) For within forty days it was competent to him to appeal to the court of Rome, and the appeal would operate as a *ſuperſedeas* to the proceſs, and berate the party. 20 H. 6. 25. a. b.

(*The certificate*) That is, the day on which the excommunication publiſhed in the church, for the writ *de excommunicato capiendo* cannot awarded till the party hath lain under the ſentence forty days (*c*), which are to be reckoned from that day.

F. N. B. 14 F.

The certificate muſt ſignify, that the perſon was excommunicated ſpecial name, and in a ſpecial ſuit againſt him *ex officio*, or by the p for otherwiſe he doth not incur the ſentence of the greater excommunication.

The defendant was excommunicated for not paying his proportion of a ...e made for repairing the church of *D.* in *Suffolk*. It was moved to ...erſede the writ, 1ſt, For that it was not ſhewn that the defendant was ...mmorant within the dioceſe at the time of the excommunication pro...nced, *Moor* 467. Sir *T. Jones* 89. 2dly, Becauſe there was no ad...ion of the defendant in the writ. On the other ſide it was anſwered, ...to the firſt objection) that the defendant in the libel was ſaid to be of ... in *Suffolk*, which was the ſame pariſh where the church was, and it ...uld not be intended that, after the libel, he removed from thence: but ...he did remove, his flying from the proceſs of the court ſhould not mend ...r caſe, for then the party, by his own act, and by turning his back upon ...ffice, might avoid ſuch proceedings. As to the want of addition, this ...as ſaid to be only neceſſary in the cauſes of excommunication mentioned ...the ſtatute of 5 *Eliz. c.* 23. for which reaſon it was true, that for ...ant of addition, there could be no proceeding againſt him by way of ...clamation with pains and penalties for not appearing; but ſtill as the ...atter was plainly of eccleſiaſtical cognizance, (*viz.*) the repairing of the ...urch, the excommunication was good, and ſo was *Cro. Car.* 190. ...ghts's caſe, *T. Jones* 89. The inhabitants of *Bermondſey*, 1 *Show.* 16. ...dnſon's caſe, 1 *Salk.* 293. The king v. *Fowler*. The chancellor diſ...lowed both the exceptions.

Rex v. Burrard, 1 P. Wms. 435.

Mr. *Keith*, miniſter of *May-fair* chapel, which was a chapel of eaſe to ... *George*'s pariſh, *Hanover-ſquare*, of which the plaintiff was rector, be... cited into the biſhop of *London*'s court for officiating as a clergyman ... the church of *England* without being licenſed by the biſhop, and hav... been denounced excommunicate forty days, for contumacy and con...mpt of the eccleſiaſtical laws, upon the biſhop's certificate into Chance..., the writ of *ſignificavit* iſſued, which it was moved to quaſh.—Lord ...rdwicke Chancellor.—This is a caſe of as great conſequence to the ...od government and diſcipline of the church as can poſſibly happen. I ...n take notice of nothing but what appears on the *ſignificavit* (*a*); and ...e queſtion before me is, whether there is ſufficient to warrant the court ...iſſue the writ of *excommunicato capiendo?* Now, if this gentleman is ...t of the juriſdiction, he is not without remedy, for he may go to a court ... common law after ſentence, as well as before. The firſt and material ...ception is, that the particular cauſe of the excommunication ought to be ...t forth. It is not neceſſary for the eccleſiaſtical court to ſhew they have ...ghtly proceeded; for if they have not, you have a remedy by appealing ... higher eccleſiaſtical juriſdiction. Here is certainly a deſcription of the ...incipal cauſe, and if ſome of the matters mentioned are within the juriſ...ction, it is ſufficient. It is not like the caſe of *The King* and *Fowler*, ...hich was held uncertain, as it was in the disjunctive, *tithes* OR *other ec...ſiaſtical dues*, ſo that it might be eccleſiaſtical dues only: if it had been *tithes* AND *other eccleſiaſtical dues*, it would have been well enough. As ... preaching, there is no pretence for his doing it without licence from ...e biſhop: the ſame as to the adminiſtration of the ſacrament, and cele...ration of marriage; for the canons of 1603, confirmed by act of parlia...ent, are expreſs as to that matter. Here, the ground of the contuma... is deſcribed ſpecially, which is more than is neceſſary; for where the ...uſe is ſufficient it may be ſet forth generally. The ſecond exception is, ...at it is not mentioned in what manner *Keith* officiated, or performed di...ine ſervice, and therefore it might be in his own houſe, or a private cha...pel. But the word *officiating* ought not to be ſo conſtrued; for reading prayers

Dr. Trebec v. Keith, 2 Atk. 498.

(*a*) The word *ſignificavit* is here uſed to denote the biſhop's certificate. It is ſometimes uſed to denote the writ *de excommunicato capiendo* itſelf. In this latter ſenſe it ſeemeth to be more properly applied; the writ having received its name from this ſame word in the beginning of it. *Significavit nobis venerabilis*

pater N. &c.

prayers or a ſermon in a private family, is not performing divine ſervic *Divine ſervice* is the expreſſion made uſe of in ſeveral acts of parliamen particularly in the act of uniformity, 13 & 14 *Car.* 2. *c.* 4. § 27. rela ing to the ſervice in *Welſh* · in ſeveral other acts of parliament that dire the reading of proclamations, the order is, that it be read after divine ſe vice. The word *officiate* relates to his office as a preſbyter, which mu mean his doing it in a publick manner. It is not indeed neceſſary for miniſter to have a licence from the biſhop of the dioceſe for every par cular caſe, but yet the biſhop may ſuſpend him wholly where he is irregula till he ſubmits to perform his duty properly: and it is not here a deſcri tion of the caſe, but of the contempt only, for which he has excomm nicated him. The fourth exception is, That it is not ſaid at the time the excommunication he officiated within the dioceſe of *London*, and ther fore has been cited out of the dioceſe contrary to the ſtatute of 23 *H.* *c.* 9. It is not averred, indeed, that he was reſident in the dioceſe at t time of the excommunication pronounced, but being ſaid in the libel to b in the dioceſe, I will not preſume he was not commorant when the moni on iſſued; and to this purpoſe the caſe of *The King* v. *Burrard*, 1 *Wms.* 435. was properly cited. There is another anſwer to this objectio that a man may be reſident in one dioceſe, and come into another a commit the offence charged upon him in the *ſignificavit*, and this, for t purpoſe of being cited, is a reſidence ſufficient, and he may be preſente in the dioceſe where he committed the offence; and unleſs he was conſidered, there would be no remedy. See Dr. *Blackmore*'s caſe *Hardr.* 421. The fifth exception is, That he, who pronounced the ſe tence of excommunication, is not ſaid to be a perſon in holy order The averment in the *ſignificavit* is ſufficient, for the words are, *a perſ lawfully authorized*, which take in the capacity of the perſon doing The ſixth exception is, That it doth not appear when the excommunic tion was pronounced. Now, the *ſignificavit* only avers, that he continue contumacious, but the *terminus a quo*, and the *terminus ad quem*, are nev ſet forth. The laſt exception was, That Mr. *Keith* is within the toler tion act, the 1ſt *W.* & *M. c.* 18. The act of toleration was made to pro tect perſons of tender conſciences, and to exempt them from penalties but to extend it to clergymen of the church of *England*, who a contrary to the rules and diſcipline of the church, would introduce the u moſt confuſion. All the exceptions therefore muſt be over-ruled.

The third exception was, that it is not ſaid he has performed divine ſervice ſince the monition. But to this his Lordſhip is not reported to have ſpoken.

(D) What Inconveniencies and Diſabilities i lays the Party excommunicated under: An herein of his Diſability to bring any Action.

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(*Excommunication*) But an excommunicated perſon may be appointed executor, and is c pable of a legacy: for the ſentence will not annul the executorſhip, or quite deſtroy the actio but only ſuſpend it till abſolution. God. O. L. 37, 38. Swinb. 367.

Rex v. Buckland, 1 Sti. 413.

A party in cuſtody on an *excommunicato capiendo* is entitled to the bene fit of the rules.

(E) O

(C) Of the Proceedings on the Writ of *Excommunicato capiendo*, both at Common Law and by virtue of the Statute 5 *Eliz. c.* 23.

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(a. *Wherefore*) It was formerly doubted, whether after the writ had been iſſued out of Chancery, and brought into the court of B. R., and there delivered to the ſheriff, but not actually returned into B. R., the court of Chancery, on a plain error appearing, could ſuperſede it. Rex v. Bernard, 1 P. Wms. 435 But it was determined by Lord Hardwicke, that after the return of the writ is out, the court of Chancery cannot, on a petition to quaſh the writ, do any thing in it, as they have no authority; for the court of B. R. have the cognizance of it, and they can compel the ſheriff to return it, and the application to quaſh it muſt be to them. If indeed the writ iſſue in the vacation, and be not yet returnable, (for it muſt be returned on one of the return days in the term,) the court of Chancery will give relief and diſcharge the party out of cuſtody. *Ex parte* Little, 3 Atk. 479. But if the writ iſſued from the court of Chancery be returned and enrolled in B. R., and on exceptions taken, a rule be made for the proſecutor to ſhew cauſe why the delivery of the writ to the ſheriff ſhould not be ſtaid, and before that can be done, the return be out, another writ may be ſued out from Chancery, but not from B. R. Ex parte Eyre, 2 Str. 1189. After a writ had been opened and entered of record, it was delivered out in order to take up the defendant; and before the return, the defendant moved and had the writ ſuperſeded; for the court ſaid, they could judge of it by the entry, and ſince it appeared the defendant could not be legally detained upon it, if he was taken, it was proper to ſuperſede it, to prevent him from being reſtrained of his liberty contrary to law: that the intent of this ſtatute in directing the writ to be delivered in open court, was to appriſe the court of the nature of the writ; that this was now to be conſidered as a writ that *improvide emanavit*, and they were not to ſtay till the return, till all the inconveniencies, which they ſhould have prevented by not iſſuing the writ, had happened. Rex v. Theed, 1 Str. 43. 10 Mod. 350. S. C. The words "*other officers*" in the ſtatute mean bailiffs of liberties or the coroner who is the proper officer to execute proceſs, where the ſheriff is incapacitated: therefore, if one who is a priſoner in the Fleet be excommunicated, the court of Chancery cannot order the curſitor to direct the writ of *excommunicato capiendo* to the warden of the Fleet, the ſame being a *viſcountiel* writ; but the writ muſt be directed to the ſheriff, who may return a *non eſt inventus* into the King's Bench, upon which return the court will grant a *habeas corpus* to bring up the priſoner, and there charge him with an *excommunicato capiendo*. Strudwicke's caſe, 3 P. Wms. 53.

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(f. *And be it further*) It is a commitment in execution, and therefore it ſeems the court can take no power to bail. 1 Show. 16.

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(g. *And that*) Before this ſtatute, it was not neceſſary to ſhew the cauſe in the writ, only the biſhop's certificate, but it was ſufficient to ſay the party was excommunicated for manifeſt contumacy. *Per* Holt, C. J. 1 Ld. Raym. 619.

EXECUTION.

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(A) Of the Prerogative Proceſs in Execution. (B) Whether a Court of Equity will aid an Execution at Law.

(C) Of the Judgment on which Execution is to be taken out; and herein of Recognizances and Statutes which are in the Nature of Judgments: And herein,

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(a. *Before facias*) But if the conuſee be ſatisfied by perception of the profits, though not to the extended value, the conuſor may be aided in equity. and may compel the conuſee to account according to the real value by him received. 2 Ventr. 338. Hardr. 136.

After

Oates v. Robinſon, 1 Str. 461. Fort. 373. S. C. 2 P. Wms. 91.

After an extent of a ſtatute in one county, and a *liberate* returned a filed, the conuſee may have an extent into another county, if the pra for the ſecond extent was entered at the time the firſt extent was tak out; otherwiſe not. Yet in this laſt caſe, a court of equity will reli him; for the attention and agreement of the conuſor is, that all lands (be they in never ſo many counties) ſhall be bound by the ſtatu and, conſequently, it would be moſt unreaſonable to confine the conuſee the lands of the conuſor in any one county; for this would be to de that ſecurity which the party himſelf had agreed to give, and had actu given.

(C) Of the ſeveral Kinds of judicial Writs whi lie after Judgment: And herein,

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(*Upon this writ*) But if there are no lands, the ſheriff need not take or return an inquiſi Stonehouſe v. Ewen, 2 Str. 874.

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(*When the*) (*c*) If he deliver more than a moiety, the execution is void. Patten v. Purb 2 Salk 563.

If the defendant be joint-tenant, or tenant in common, it ought to be ſpecially alleged in return. Hutt. 16.

Tidd's Pr. 754. 2 Eq. Ca. Abr. 381. 3 Term Rep. 295. (*e*) Gilb. Evid. by Loft. 10, 11. Runningt. Eject. 117.

But the ſheriff does not now, as formerly, deliver *actual*, but only poſſeſſion of a moiety of the lands; and in order to obtain actual po ſion, the plaintiff muſt proceed by ejectment (*e*); in which he muſt only prove the judgment, and, by the judgment roll, that an iſſued and was returned, but he muſt alſo prove the writ of *elegit* true copy thereof, and the inquiſition thereon; for it is the *elegit*, and quiſition upon it, which carve out the term, and give the right of e the judgment roll being no more than a *memorandum*, that the *elegit* i and was returned.

(*If the ſheriff*) And it hath been adjudged that the ſheriff is not bound to deliver a m of each particular tenement and farm, but only certain tenements, &c., making in va moiety of the whole. Denn v. Earl of Abingdon, Dougl. 473. 1 Burr. Pr Exch. 289.

Gilb. Execut. 56.

On lending money therefore, if the lender take two ſeveral bonds warrants of attorney, one for a part, and the other for the re of the money, and enter up two ſeveral judgments thereon, o ſame term, he may take the whole of the defendant's lands under t

Gilb. Exec. 35. 33.

If the term be extended, the plaintiff is accountable for all the p he receives out of the term, upon ſuch extent: and if he receive debt out of ſuch term, before it expires, the defendant ſhall be re to the term itſelf; but otherwiſe he ſhall keep the term, and not ac for the profits of it.

Gilb. Exec. 39. But qu. and ſee 3 P. Wms. 401.

An advowſon in groſs cannot be extended on an *elegit*, becauſe a ty cannot be ſet out by the ſheriff, nor can it be valued at any certai towards payment of the debt.

Id. 40. Jenk. 207. pl. 36. 3 Atk. 517. Ambl. 520.

Neither doth an *elegit* lie of the glebe belonging to a parſonag vicarage, or to the church-yard, for theſe are each *ſolum deo conſecrat*

A queſtion having ariſen in the court of Chancery, whether, up *elegit*, the plaintiff could be allowed intereſt beyond the penalty of a

, Lord *Hardwicke* was of opinion, that at law, upon a judgment en- up, the penalty is the *debitum recuperatum*, and the ſtated damages ween the parties; but if the creditor does not take out execution againſt perſon of the debtor, or his perſonal eſtate, but extends the lands *legit*, which the ſheriff does only at the annual value, and much be- the real, the creditor holds *quouſque debitum ſatisfactum fuerit*, and at , the debtor cannot upon a writ *ad computandum* inſiſt upon the credi- s doing more than account for the extended value; but if the debtor es into a court of equity for relief, this court will give it him by ob- g the creditor to account for the whole he has received, and as a o who comes for equity muſt do equity, will direct the debtor to intereſt to the creditor, even though it ſhould exceed the principal. d he ſaid, he remembered very well, upon Serjeant *Whitaker*'s inſiſting re Lord Chancellor *Cowper*, that this would be repealing the ſtatute *Weſtminſter*, his Lordſhip ſaid, he would not repeal the ſtatute, but would do complete juſtice, by letting the creditor carry on the intereſt n his debt, as he was to account for the whole he had received.

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This writ lay) It lay only in actions of treſpaſs *vi et armis*. Hob. 56.

If a *capias ad ſatisfaciendum* is made returnable wrong, as in vacation e, yet the writ is not therefore void, but only liable to be ſet aſide n motion for irregularity. Campbell Cumming, 2 Burr. 1187.

Not las) This muſt be underſtood of a *forcible* expulſion; for it hath been determined, that t *fieri facias*, the ſheriff may juſtify expelling the defendant *peaceably*, in other words, if defendant will conſent to go out, the ſheriff may put the vendee in poſſeſſion. Taylor v. , 2 Term Rep. 292.

So, where there have not been ſufficient effects of the defendant to ſa- y the judgment, the court has ordered the ſheriff to retain, for the uſe the plaintiff, money which he has levied in another action at the ſuit of defendant. Armſtead v. Philpot, Doug. 231.

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But the abſolute) 4 Term Rep 633. 641. 6 Term Rep. 88.

And as the ſheriff cannot take the goods of a third perſon, ſo, if the endant becomes bankrupt, before the delivery of the writ to the ſhe- , or, as it ſeems, before it is actually executed, the ſheriff cannot le- y take or diſpoſe of them, after notice of the act of bankruptcy, and a commiſſion ſued out or docket ſtruck: for by *Holt*, C. J. if a writ execution be delivered to the ſheriff againſt *A.*, who becomes bankrupt ore it is executed, the execution is ſuperſeded; conſequently, the pro- y of the goods is not abſolutely bound by the delivery of the writ to ſheriff. Tidd's Pr. 735. 1 Lev. 173 1 Ld. Raym. 252. and ſee 2 Eq. Ca. Abr. 381.

But if the ſheriff ſeize and ſell the goods, before he has notice of an of bankruptcy, he is excuſed (*e*), and if he ſell them after ſuch notice, ugh he may be ſued in *trover* (*f*), yet he is not liable to an action of ſumpſit (*g*). (*e*) 1 Bl. Rep. 205. 2 Bl. Rep. 829. (*f*) 1 Burr. 20. 1 Bl. Rep. 65. (*g*) 1 Term Rep. 475.

An execution taken out againſt the goods of a bankrupt after his cer- ate is ſigned, but before it is allowed, is good. 1 Term Rep. 361. and ſee 1 Bl. Rep. 400.

In

Cadogan v. Kennett, Cowp. 432. Jarman v. Wolloton, 3 Term Rep. 618. See Underwood v. Mordant, 2 Vern. 259.

In an action againſt the huſband, the ſheriff cannot take under *fieri facias* goods veſted in truſtees before marriage, for the benefit of wife.

Farr v. Newman, 4 Term Rep. 621.

In an action againſt an executor for his own debt, the goods the teſtator, in the hands of the defendant, cannot be taken in execution.

Heydon v. Heydon, 1 Salk. 392. See Jacky v. Butler, 2Ld. Raym. 871. Pope v Harman, Comb. 217. Marriot v. Shaw, Com. Rep. 277. Fox v. Hanbury, Cowp. Eddie v. Davidſon, Dougl. 650.

In an action againſt partners, the ſheriff muſt ſeize all their joint perty, becauſe the moieties are undivided; for if he ſeize but a moi and ſell that, the other will have a right to that moiety; but he ſeize the whole, and ſell a moiety thereof undivided, and the vendee be tenant in common with the other partner.

Lupton v. Barker, by diſtreſs. Bunb. 348.

It ſhould ſeem that a *levari facias* ought not to iſſue for a fee-farm but that the proper remedy is by diſtreſs.

Francis v. Naſh, Ca temp. Hardw 53.

Nothing can be taken in execution that cannot be ſold, as deeds, ings, &c. Neither can Bank notes be taken in execution, for tho they are aſſignable over, yet notwithſtanding they remain in ſome meaſ *choſes in action.*

Jeanes v. Wilkins, 1 Ves. 195.

Regularly, a *fieri facias* ought not to be taken out during the exiſte of a *capias ad ſatisfaciendum*, and the perſon in cuſtody under it: but i be ſo taken out, it is not void, though the court, it ſeems, would ſet aſide on motion, without putting the party to his *audita querela.* A riff, therefore, may juſtify the ſeizure of a leaſehold eſtate under it, may convey a good title to the eſtate to a purchaſer; and this, though make the ſale after the expiration of the return of the writ, and with any writ of *venditioni exponas.* For the property of the ſheriff contin till the execution is completed, which cannot be till ſale of the things t en in execution, and payment of the money to the plaintiff. This, deed, is ſhewn by the common courſe of proceeding; the ſheriff not ing bound to make a return of the writ of execution, unleſs the pa requires it. And as to the writ of *venditioni exponas*, that writ, tho a proper writ, yet is not of neceſſity, being rather to compel the ſher when guilty of laches, to do what he has authority to do, than to give h any new authority.

Bradley v. Wyndham, 1 Will. 144

If a *fieri facias* be executed inſufficiently and colluſively, a ſecond *facias* executed afterwards ſhall ſtand good, and be preferred, and the ſ riff may return *nulla bona* to the firſt.

(D) Where the Party ſhall be concluded by th Election of one of them, and what further R medy he has when he has not received enti Satisfaction on his firſt Writ, and this, eith againſt the Party or Sheriff.

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(*Therefore, if the*) And if the defendant has no lands, and the goods are not ſufficient to ſatisfy the plaintiff, he may have a *capias ad ſatisfaciendum* after an *elegit.* 1 Str. 226. 2 Raym. 1451.

If a plaintiff conſent to the defendant's being diſcharged out of execu- upon agreement, he cannot afterwards retake the defendant, although ſecurity given by the defendant on his diſcharge ſhould be afterwards aſide.

Withey, 1 Term Rep. 557. Thompſon v. Briſtow, Barnes, 205.

Vigers v. Aldrich, 4 Burr. 2482. Jaques v.

So, if the plaintiff conſent to diſcharge one of ſeveral defendants en on a joint *capias ad ſatisfaciendum*, he cannot afterwards retake ſuch fendant, or take any of the others.

Clark v. Clement, 6 Term Rep. 525.

But where two writs of *fieri facias* againſt the ſame defendant are deli- ed to the ſheriff on different days, and no ſale is actually made of the fendant's goods, the firſt execution muſt have the priority, even though ſeizure were firſt made under the ſubſequent execution. And if the ſon claiming under the ſecond execution pay the ſheriff the amount of debt under the firſt execution, the court will not, on motion, compel ſheriff to refund that money.

Hutchinſon v. Johnſton, 1 Term Rep. 729. But where the ſheriff had given a bill of ſale to the per-

claiming under the ſecond execution, that was holden to bind the ſheriff. Rybot v. Peckham, R. M. 19 G. 3. cited *Ibid*

If a *fieri facias* be executed fraudulently, a ſecond *fieri facias* at the of another perſon executed afterwards ſhall have the preference.

Bradley v. Wyndham, 1 Wilſ. 44.

Of the Authority and Juriſdiction of the Court out of which the Execution iſſues: And herein of the Manner of executing a Judgment where the Record has been removed from an inferior to a ſuperior Court.

N actions on a policy of aſſurance, where there is a verdict for the plaintiff againſt one of ſeveral under-writers, and the reſt have entered the conſolidation rule, and agreed to be bound by it; or where on reference to arbitration, it is agreed that a verdict ſhall be taken for the ntiff's ſecurity, and an award is afterwards made in his favour—in ch of theſe caſes, execution cannot be taken out without leave of the urt.

Tidd's Pr. 719. 1 Salk. 84. Barnes, 58.

So, where in ejectment, the landlord is admitted to defend on the te- 's non-appearance, and judgment is thereupon ſigned againſt the caſual ctor with a ſtay of execution till further order, the leſſor of the plain- having ſucceeded, muſt apply to the court for leave to take out exe- tion; and in ſuch caſe, if a writ of error be brought by the landlord, may be ſhewn for cauſe, and will be a ſufficient reaſon againſt taking execution. But if the landlord omit the opportunity of ſhewing it cauſe, the execution is regular, and cannot be ſet aſide (*a*).

Jones v. Edwards, 2 Str. 1241.

(*a*) George v. Wilſon, 2 Burr. 757.

It ſeems to be proper, where there has been already an execution an action of debt upon bond for the payment of an annuity, to ly to the court for leave to take out another execution for ſubſequent ears.

Howell v. Hanforth, 2 Bl. Rep. 843. Ogilvie v. Foley, *Id.* 1111.

Where a writ of error determines in the Exchequer-chamber by abate- nt or diſcontinuance, the judgment is not again in *B. R.* till there be a *mittitur* entered; for without a *remittitur* it cannot appear to that court, that the writ of error is ſtill pending in the exchequer-chamber (*a*): and

(*a*) 1 Salk. 261. 319.

1 Ld. Raym. 244. (b) 1 Salk. 265. 1 Cr. Pr. 369, 70.

and therefore in such case, it is usual for the plaintiff to move the c on an affidavit of the fact, for leave to enter a *remittitur*, and tak execution (b).

2 Term Rep. 737.

So, if the plaintiff recover a judgment against two defendants in B and one of them bring a writ of error in the Exchequer-chamber plaintiff cannot charge the other defendant in execution till the reco remitted, notwithstanding the writ of error might have been quashe mediately, because not brought by both the defendants.

(F) Who are entitled unto, and may sue Execution.

Cleeve v. Vere, Cro. Eliz. 450. 457. Sir W. Jon. 385.

BUT in case of an extent, and inquisition had, the execution complete till a *liberate* is awarded; and if the plaintiff in the e tion die before the *liberate* is awarded, the writ of *extendi facias* is by his death; and his representative cannot have any fruit thereo cause no right was vested by the extent.

(G) Of the Persons against whom Execution be sued out: And herein,

1. Of suing Execution where there are several Parties concerned.

Page 358 (*If a man*) That a separate *capias ad satisfaciendum* against one, on a joint judgment agai is bad, hath been lately adjudged. Clerk v. Clement, 6 Term Rep. 525.

Clark v. Clement, 6 Term Rep. 325.

There cannot be a separate *capias ad satisfaciendum* on a joint jud against two or more.

2. Of suing out Execution against the Heir and Executor.

1 Cr. Pr. 346. 3 Bl. Com. 414.

Neither an *elegit*, nor a *capias ad satisfaciendum*, will lie against e tors, unless a *devastavit* be returned.

3. Of suing out Execution against Infants.

2 Str. 1217.

But an infant seems to be liable to a *capias ad satisfaciendum*.

4. Of suing out Execution against a Feme Covert.

2 Str. 1167. 1237. 1 Wils. 149. Say. Rep. 149.

In an action against husband and wife, they may both be taken i cution; and the wife shall not be discharged, unless it appear, that is fraud and collusion betweeen the plaintiff and her husband, to ke in prison.

6. Of suing out Execution against a Clerk, or one in Holy Orde

Page 360 (*If a writ*) He may also be called upon by rule to return the writ; and if he make return, will be liable to an action. Gilb. Exec. 26. 1 Salk. 320. 1 Ld. Raym. 265.

Upon this writ, the biſhop or his officer makes out a ſequeſtration directed to the churchwardens, or, upon a proper ſecurity, to perſons of the plaintiff's own appointment, requiring them to ſequeſter the tithes, and other profits of the benefice; which ſequeſtration ſhould be forthwith duly publiſhed, by reading it in church during divine ſervice, and afterwards at the church door, and fixing a copy thereon: for where a ſequeſtration was made out, and not publiſhed whilſt the writ was in force, but was ſtayed in the regiſtrar's hands, by deſire of the plaintiff's attorney, the court held, that it had no priority, as againſt other ſequeſtrations, afterwards made out and duly publiſhed; but that if it had been publiſhed, the execution would have taken effect, and muſt have been firſt ſatisfied, notwithſtanding it was then returnable. 3 Burn's E. L. tit. Sequeſtration. Legaſſicke v. Biſhop of Exeter, E. 22 Geo. 3. K. B. Tidd's Pr. 745, 6.

It is ſaid, that the writ of ſequeſtration muſt be renewed every term (*a*); but it ſeems, that if the writ be laid and executed, before the day of the return, the meſne profits may be taken under it, after the writ is returnable, otherwiſe not (*b*). (*a*) 1 Cr. Pr. 345. (*b*) 3 Burn's E. L. tit. Sequeſtration. Tidd's Pr. 746.

Although a *levari facias de bonis eccleſiaſticis* is a continuing execution, and a levy under it may be made from time to time after it is *returnable*, until the ſum indorſed be ſatisfied, yet, if it be *actually returned*, the authority of the biſhop is at an end. Therefore, where ſuch a writ remained in the hands of the biſhop long after it was returnable, who ſequeſtered the profits of the living accruing as well before the return-day as after, and being ruled to return the writ, returned only the amount of the ſum levied up to the *return-day*, the court would not order the writ and return to be taken off the file, but would only permit the return to be amended by inſerting the ſum levied up to the time when the writ was *actually returned*. Marſh v. Fawcett, 2 H. Bl. 582. If the writ was not returned, adds the reporter, in a note upon this caſe, the execution would undoubtedly continue till the ſum indorſed was ſatisfied. But he queſtions, Whether the plaintiff could, after that ſum was levied, preſerve his priority with reſpect to the future arrears of the annuity over another judgment creditor, who might have delivered another writ to the biſhop, in the interval after the ſum indorſed on the former writ was levied, and before the time of the next periodical payment arrived? The equitable interpoſition of the court, he ſays, ſeems hitherto to have extended no further, in caſes of judgments entered on bonds to ſecure annuities, than to permit the judgment to ſtand as a ſecurity for the future payments, and freſh executions to be taken out as thoſe payments became due, without a ſuggeſtion or *ſcire facias* under the ſtatute of 8 and 9 W. 3. c. 11. Howell v. Hanforth, 2 Bl. Rep. 843. 1016. Ogilvie v. Foley, *Id.* 1111. Scott v. Whalley, 2 H. Bl. 297.

(I) To what Time the Execution ſhall have relation, ſo as to avoid any Alienation by the Party: And herein of the Statute of Frauds.

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(*By the* 14 *Par.*) This ſtatute, it hath been reſolved, is confined to purchaſers, and does not apply as between the parties to the ſuit. Therefore, if the defendant die in the vacation, judgment may be ſtill entered after his death, as of the preceding term, when he was living; and it will be a good judgment, at common law, as of that term, though execution cannot be ſued out upon it againſt the repreſentative of the defendant until it is revived by *ſcire facias*. 1 Salk. 87. 3 Salk. 116. 2 Ld Raym. 766. 7 Mod. 2. 93, S. C. 2 Salk 401. 7 Mod. 39 S. C. 3 Salk. 159. 3 P. Wms. 399. 2 Str. 882. Ca. temp. Hardw. 158. S. C. 6 Term Rep. 368. But then the roll ought to be brought in and filed, before the eſſoign day of the ſubſequent term. 1 Salk. 87. 2 Ld. Raym. 850. 6 Mod. 191. And it is ſaid, that if judgment be ſigned in term time, and in the ſubſequent vacation, the defendant ſell lands, and before the eſſoign day of the next term the plaintiff enter his judgment, it ſhall affect the lands in the hands of the purchaſer. 6 Mod. 191. *Tamen qu.* if the judgment be not docketted at the time of the ſale. Tidd's Pr. 706.

Alſo

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(*Alſo ſit the*) Before this ſtatute, the judgment bound the lands, and the docket was not more than an index to find it readily. Gilb. C. P. 165. But now it is deemed neceſſary, the judgment ſhould be docketted in order to bind the lands: and if it be not docketted Str. 639. Barnes, 261, 2. or if there be a falſe docket, which is as none, Gilb. C. P. 1 Wilſ. 61. 2 Str. 1209. S. C. though a right judgment, the purchaſer or mortgagee will be and in the latter caſe, the party muſt take his remedy againſt the attorney or officer for not ketting it truly. But *qu.* whether equity would not relieve againſt a purchaſer with notice, withſtanding the judgment be not docketted? See 7 Vin. Abr. 53. 2 Eq. Ca. Abr. 68 Vin. Abr. 54. If the judgment againſt a teſtator or inteſtate be not docketted, the debt is on a level with ſimple contract debts, and the executor or adminiſtrator may, under the pl *plenè adminiſtravit* to an action of debt upon ſuch a judgment, give in evidence the payme bond and other ſpecialty debts. Hickey v. Hayter, 6 Term Rep. 384.

To give effect to a judgment, as againſt purchaſers and mortgagee lands in *Middleſex* and *Yorkſhire*, it is required that it ſhould be *regiſter* for by 5 *Ann. c.* 18. § 4. and ſeveral ſubſequent ſtatutes, "No judgm
6 Ann. c. 35. § 19. 7 Ann. c. 20. § 18. 8 Geo. 2. c. 6. § 1 & 18.
" ſtatute, or recognizance, (other than ſuch as ſhall be entered into in
" name and upon the proper account of his Majeſty,) ſhall affect or b
" any manors, lands, tenements, or hereditaments, in thoſe coun
" but only from the time that a memorandum of ſuch judgment, ſta
" or recognizance, ſhall be entered at the regiſter-office, in ſuch ma
" as therein is directed."

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(*By the* 29 *Car.* 2) But neither before this ſtatute, nor ſince, is the property of goods a ed, but continues in the defendant, till the execution executed. The meaning of the w *that no writ of execution ſhall bind the property but from the delivery of the writ to the ſheriff*, is, after the writ is ſo delivered, if the defendant make an aſſignment of his goods, unleſs in ma overt, the ſheriff may take them in execution. 2 Eq. Ca. Abr. 381.

Comb. 145. This ſtatute protects only goods in the hands of *purchaſers* where goods are ſold *bonâ fide*; for if the party die after the *teſte*, but before delivery of the writ to the ſheriff, the goods are bound in the hand his executors; for this is not a change of property by ſale, or for a va ble conſideration.

1 Ld. Raym. 252. But in ſuch caſe, the ſheriff ſhall not be made a treſpaſſer by relation for any ſubſequent diſpoſal of them; though he would be liable in trover. Smith Milles, 1 Term Rep. 475.
So, if a writ of execution be delivered to the ſheriff, and the de dant become bankrupt before it is executed, the execution is thereby perſeded, and the goods are not bound by the delivery, for the prop ceaſes to be in the bankrupt from the time of the act of bankruptcy c mitted.

Cro. Car. 459. 1 Sid. 29. 2 Ld. Raym. 1073. 1 Salk. 322. (*a*) Noy, 73. 2 Ld. Raym. 1073.
The ſheriff deriving his authority from the writ, it hath been hold that if the plaintiff die after a *fieri facias* ſued out, it may be executed withſtanding; and his executor or adminiſtrator ſhall have the mo And if the plaintiff (*a*) has made no executor, or adminiſtration is yet committed, the money muſt be brought into court, and there depo ed until, &c.

(K) Of the King's precedency in Executions.

(*As to the king's*) Rex v. Cotton, Parker 112. 2 Vez 288. But the above ſtatute of 33 8. extends to executions againſt perſonal property as well as againſt land, and reſtrains the rogative within the limitation there preſcribed. Parker, 261, 2.

This ſtatute of 33 *H.* 8. it hath been reſolved, is not confined to 7 Co. 18. b.
ſimple debts only, but extends to all debts and executions at the ſuit of the king. But it is reſtrictive upon the old prerogative, and introductive of a new law, for *ita quod, ſo always that the king's ſuit*, &c. makes a condition precedent and a limitation. Hence, therefore, a judgment and execution, executed by *elegit*, ſhall be preferred to the extent of the king, being on a bond debt, bearing date before the ſubject's judgment, and ſigned to the king before the ſubject's execution. And, in the caſe of an execution againſt perſonal property, if the king's extent be ſued out anterior to a judgment recovered by the ſubject, and writ of execution thereon delivered to the ſheriff, though not executed, the king ſhall be poſtponed. Beſides, in this caſe, the property of the goods is changed by the ſubject's execution, and no longer remains in the king's debtor. It will indeed be otherwiſe, if an extent come after a diſtreſs, or before a proviſional aſſignment under a commiſſion of bankrupt, for in neither of thoſe caſes is the property of the goods diveſted out of the owner.

Attorney General v. Andrews, Hard. 23. Lechmerev. Thoroughgood, 3 Mod. 236. Comb. 123. Uppom v. Sumner, 2 Bl. Rep. 1251. 1294. Rorke v. Dayrell, 4 Term Rep. 402.

(N) Of the Sheriff's Authority in doing Execution: And herein of breaking Doors, &c.

A SEIZURE of part of the goods in a houſe by virtue of a *fieri facias*, in the name of the whole, is a good ſeizure of all. 1 Ld. Raym. 725.

(P) Of the Party's Remedy when there hath been an irregular Execution, and how the ſame is to be ſet aſide.

IF the writ of *fieri facias*, &c. be irregular, the defendant may move the court to ſet it aſide, and that the goods or money levied may be reſtored to him. A third perſon, whoſe goods are taken under it, may alſo move the court to have them reſtored: But if the right be not clear, the court will leave him to his action againſt the ſheriff; or they will ſometimes direct an iſſue for trying it, and retain the money in court, to abide the event of the trial. Tidd's Pr. 748.

If a *fieri facias* be teſted, or returnable, out of term, or, in an action by bill, if it be returnable on a general return-day, it is void, or at leaſt erroneous, and may be quaſhed or ſet aſide on motion, together with the proceedings that have been had under it. But a *fieri facias* may be amended (g), by adding or altering the teſte. 2 Salk. 700. Davey v. Hollingſworth, Tr. 24 Geo. 3. B R. Tidd's Pr. 727.

(g) 1 Wilſ. 155. Say. Rep. 12.

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(*a*) *where*) But if the ſheriff or officer incautiouſly join in the ſame plea with the party, he forfeits his defence. 1 Str. 509.

(R) Of the Prerogative Proceſs in Executions.

WE have already taken notice of executions where the crown is concerned: ſome points, however, ſtill remain untouched.

The uſual proceſs for the king's debt is an *extendi facias*, which is given by the ſtatute of 33 *H.* 8. *c.* 39. Of ſuch extents there are two kinds, the one *immediate*, the other *in aid*: the former iſſuing immediately at the proſecution of the crown for the proper debt of the crown againſt its immediate debtor: the latter, the extent *in aid*, properly ſo called, iſſuing not againſt the immediate debtor, but againſt the ſurety. It is uſual, however, to give the name of an extent *in aid* to that extent which iſſues at the ſuit and *in aid* of the king's debtor, for the purpoſe of ſecuring a debt found by inquiſition upon an extent iſſued againſt ſuch debtor to be due to him. For, in an extent there are three kinds of property that are liable, *viz.* the real eſtate, the perſonal eſtate in poſſeſſion, and *choſes in action*; and it is for the purpoſe of ſecuring this laſt that an extent, generally though improperly called an extent *in aid*, is given. This extent is deduced from the prerogative of the king to take an aſſignment of the debts of his debtors; for if the debts can be aſſigned to the king, it ſeems to follow, that he may take them as part of the perſonal eſtate.

The extent *in aid*, we mean that improperly ſo called, is in its nature and effect an immediate extent. It iſſues againſt the debt as part of the effects of the principal debtor, and when executed, gives the debt the like priority over other debts as a proper immediate extent would give. Though ultimately intended for the ſecurity of the crown, yet it is in truth given in eaſe of its debtor; who is entitled to the benefit of it though he be in a ſtate of perfect ſolvency, and the crown be not in the ſlighteſt danger; and even, it ſhould ſeem, though the crown debt ſhould be ſatisfied.

Rex v. Blatchford, Anſtr. 164. Rex v. Clarke, Bunb. 222.

As this is a ſtrong prerogative remedy imparted to a ſubject, the courts of Exchequer have thought it proper to reſtrict it within certain rules. It is therefore provided, that no ſuch extent ſhall iſſue, without affidavit that the debtor to the crown is the original creditor. It is alſo provided that for debts *in aid*, no proceeding ſhall be had any further than to an inquiry and ſeizure, and not to ſale of the goods, without *ſpecial* order of the court. Indeed it ſeems, that in this caſe no proceſs ſhould be ſuffered to go againſt the debt of the king's debtor without a *ſcire facias*, unleſs there be immediate danger that the king will loſe his debt, and that be made out, either to the court, or before a baron of the Exchequer.

Gilb Excheq. 174. Anſtr. 164. R. 15 Car. 1.

The *ſcire facias* on ſuch extents *in aid* ſets forth the original debt, and then ſets forth the inquiſition taken of the debt due to the king's debtor or by virtue of ſuch extent *in aid*. And extents may likewiſe be had againſt the debtor of ſuch debtor, and ſo on as far as any effects can be traced (*a*). There are inſtances of this in *Freeman*'s Entries, 575 to 616. And the reaſon is, becauſe the ſecond debtor, when the debt is ſeized, is a debtor to the king, ſince the king, for the reaſons above given, can ſeize a *choſe in action*; and the ſecond debtor, being become a debtor to the king, he likewiſe can have an extent, to ſeize the *choſe in action* that is due to him. For in relation to the king, not only the money which the debtor has in his actual poſſeſſion, but that which be

Gilb Excheq. 177.

(*a*) But debts cannot be ſeized beyond the third degree. To that extent debts either by ſpecialty or ſimple con-

e has out in other people's hands, ſhall belong to the king. For common perſons, if their debtors made away with their eſtates, were ſuppoſed to be able to look after them, and to watch the goods in the actual poſſeſſion of them: but the king, being engaged in publick affairs, could not watch an actual poſſeſſion of his debtors; and therefore, ſince there was no danger of maintenance, he might proceed to get in their debts, as far as he could diſcover them. Parker, 259. See alſo Parker, 19. tract may be found and ſeized into the king's hands, upon affidavits and motion. Evin's caſe, Hard. 403.

Another reſtriction which the court have laid upon theſe extents *in aid* is, that no debts without ſpecialty ſhall be found by inquiſition for debts in aid, unleſs it be by order, upon motion in open court, and except it be for debts due to the king's farmers. Gilb. Exchequ 176. Rex v. Packington, Bunb. 42.

An immediate extent ſhall be preférrred to an extent *in aid*, though prior to it; and though the ſheriff have ſold the goods taken under the extent *in aid*, yet the king will be entitled to the money, if he hath not paid it over. *Immediate extents in general ſhall be preferred according to the teſte of the writ.* Rex v. Boudage, Parker, 282. Reg. v. Quaſh, *Id.* 281.

But a ſecond immediate extent, upon which evidence was offered, to find the goods ſeized upon an extent *in aid*, ſhall be preferred to a prior immediate extent, not offering ſuch evidence.

Upon the execution of an extent a perſon muſt anſwer all queſtions though affecting his intereſt, if they do not ſubject him to penalties or forfeiture; elſe the court will grant an attachment againſt him. Reg. v. Newel, Parker, 269.

A debt due to a man *jure uxoris* is conſidered as a debt originally due to him within the meaning of the above rules, and the ſtatute of 7 *Ja.* c. 15., which prohibits any debts from being aſſigned to the king by his debtor, but what were due originally to ſuch debtor *bonâ fide*. Reg. v. Thornton, Parker, 271.

Where an extent has long been dormant, though an inquiſition has been taken upon it, yet proceſs ſhall not iſſue without motion. Reg. v. Robinſon, Bunb. 62.

Debts are not bound by the *teſte* of the extent, but only from the day of the caption of the inquiſition. Rex v. Green, Bunb. 265.

It is laid down as a rule, that wherever an extent might have iſſued againſt a man in his lifetime, a *diem clauſit extremum* may iſſue againſt his eſtate after his death. And debts to the third degree may equally be found upon a *diem clauſit extremum* as upon an extent. Bunb. 119. Parker, 19.

If a perſon be indebted to the king by ſimple contract in his lifetime, and that debt be found upon record after his death, the goods which he had at his death are bound to the king's debt, and the officer may ſeize them under a *diem clauſit extremum*. But, if he owe nothing to the king at his death, the goods will go to his perſonal repreſentatives, and the *diem clauſit extremum*, if any have iſſued, will be ſuperſeded. Parker, 16. 95.

(S) Whether a Court of Equity will aid an Execution at Law.

WHERE property is ſo circumſtanced as to be out of the reach of a legal execution, as, where it is veſted in the funds, or is in the hands of a truſtee, a court of equity will not extend its arm in aid of the legal proceſs. Horn v. Horn, Ambl. 79. Caillaud v. Eſtwick, Ambl. 381.

Page 371 # Executors and Administrators.

(L. 2) Where the Personal Estate only shall be applied in Discharge of Debts, &c. And therein of marshalling the Assets.

(A) What Persons may be Executors: And herein

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(*It seems by*) (*b*) There is an instance of a mayor and commonalty suing as executors, and objection taken. Roll. Abr. 919. And it seems now, that any corporation aggregate may executors, Swinb. p. 5. § 1.; they may appoint certain individuals to be syndics, and to rece administration with the will annexed. 1 Bl. Comm. 28. n.

By the 9 & 10 *W.* 3. *c.* 32. Persons denying the Trinity, or asserti that there are more Gods than one, or denying the christian religion to true, or the holy scriptures to be of divine authority, shall, for the seco offence, be disabled to be executors.

And by the acts for the qualifications for offices, persons not hav taken the oaths, and performed the other requisites for qualifying, w shall execute their respective offices after the time limited for their qu fications shall be expired, shall be disabled to be executors.

6. Who, in respect of their Fortune and Circumstances, may be Exe tors; and therein of obliging an Executor to give Security.

Utterson v. Mair, 4 Br. Ch Ca. 270. 2 Vez. jun. 95.

The court of Chancery too will restrain an insolvent executor, and point a receiver, who may bring actions in the name of the executor the recovery of the testator's effects. In like manner, it will restrain assignees of a bankrupt executor from paying over the fund to him, this, upon petition in the bankruptcy, from the peculiar authority it over them.

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(*But if an infant*) The court of Chancery will not direct money to be paid to an infant cutor, though above the age of seventeen; but will refer it to a master to inquire whether t are any debts or legacies, and to consider of a maintenance. Campart v. Campart, 3 Br. Rep. 195.

(*But by our law*) If, therefore, the husband be abroad, the court of Chancery will re the executrix from getting in the assets of her testator, and appoint a receiver for that pur with power to commence suits for the recovery of debts due to the testator's estate. Tay Allen, 2 Atk. 213.

(*A debtor*) Sir William Blackstone founds the executor's right of retaining upon this; th cannot, without an apparent absurdity, commence a suit against himself as representati the deceased, to recover that which is due to him in his own private capacity. 3 Bl. Com But one executor shall not be allowed to retain his own debt, in prejudice to that of hi executor in equal degree; but both debts shall be discharged in proportion. Vin. Abr *Executors* (D. 2).

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(*So if administration*) 2 Bl. Comm. 511. Yet if he afterwards takes out administration may shew it, and then retain, 2 Ventr. 180; though the administration be granted *pendente* Stil. 337. Andr. 328.

The bare appointment of a creditor to be executor, if he refuse to act, will not extinguish his legal remedy for the recovery of his debt. Rawlinson v. Shaw, 3 Term Rep. 557.

10. Of making Debtors Executors.

A teſtator gave legacies to his brother and nephew, who were indebted to him in different ſums, and made no diſpoſition of the reſidue. Lord Thurlow ſaid, he thought it had been a ſettled point in the court of Chancery, that the appointment of the debtor executor, was no more than ſtanding with the action; and declared it a truſt for the next of kin. Carey v. Goodinge, 3 Br. Ch. Rep. 110.

(B) Of the different Kinds of Executors and Adminiſtrators: And herein,

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(*If one makes*) Freke v. Thomas, 1 Salk. 39. 1 Ld. Raym 667. S. C. *Id.* 338. Com. Rep. 110. S. C. *Id.* 159 S. P. S. C. cited.

In ſuits *by* executors, ſome of whom are under age, they muſt all join, and may ſue by attorney; but in ſuits *againſt* them, the infants cannot appear by attorney. Smith v. Smith, Yelv. 130. Foxwith v. Tremain, 2 Saund. 212. 1 Mod. 47. 72. 296. S. C. 1 Sid. 449. S. C. 1 Lev. 299. S. C. 2 Ventr. 102. S. C. Raym. 198. S. C. Freſcobaldi v. Kinaſton, 2 Str. 783.

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(*An executor*) What acts make a perſon ſo liable, is a queſtion of law; whether proved or not, is for the conſideration of the jury. 2 Term Rep. 97.

So, if the ſervant of *B.* ſell the goods of *C.*, an inteſtate, as well after his death as before, though originally by the orders of *C.*, and pay the money ariſing therefrom to *B.*, *B.* may be ſued as an executor *de ſon tort.* Paget v. Prieſt, 2 Term Rep. 97. *Id. ibid.*

So, if a perſon having intermeddled in the inteſtate's affairs, has money belonging to him in his hands at the time when an action is brought againſt him for a debt due from the inteſtate, he is liable as an executor *de ſon tort.*

So, if a creditor take an abſolute bill of ſale of the goods of his debtor, but agree to leave them in his poſſeſſion for a limited time, and in the meanwhile the debtor die, whereupon the creditor takes and ſells the goods, he will be liable to be ſued for the debts of the deceaſed as executor *de ſon tort*; for the debtor's continuing in poſſeſſion is inconſiſtent with the deed, and fraudulent againſt creditors. Edwards v. Harben, 2 Term Rep. 587.

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(*But if an action*) And if they amount to the full value, the plaintiff ſhall be nonſuited. Bull. *Ni. Pri.* 48. He may, perhaps, of ſuch goods as he hath ſold. Bull. *Ni. Pri. ibid.* If the action be treſpaſs inſtead of trover, payment of debts to the value will go only in mitigation of damages. *Id. ibid.*

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(*But this it is ſaid*) A perſon entitled to adminiſtration, is oppoſed in the eccleſiaſtical court, and *pendente lite*, being ſued as executor, he pleads a retainer for a debt due to himſelf; to which the plaintiff replies, that the defendant is executor *de ſon tort*; the defendant rejoins, that letters of adminiſtration were granted to him *puis darrein continuance*; this plea was holden good on demurrer, and judgment for the defendant. Vaughan v. Browne, 2 Str. 1106. Andr. 328. S. C. 1 Term Rep. 588. S. C. cited. If *H.* get the goods of an inteſtate into his hands, and adminiſtration be granted afterwards, he ſtill remains chargeable as a wrongful executor, *unleſs he deliver over the goods to the adminiſtrator before the action is brought*, and then he may plead *plene adminiſtravit.* Per Holt, C. J. 1 Salk. 313. And he cannot avail himſelf of a delivery over of the effects to the

the rightful adminiſtrator *after the action brought*, though in fact no adminiſtration was granted at the time of its commencement; nor of the aſſent of the adminiſtrator to his retainer, ſo as to defeat the action of the creditor. Curtis v. Vernon, K. B. 3 Term Rep. 587. Affirmed in the Exchequer-chamber, 2 H. Bl. 18.—But, an executor *de ſon tort* is not liable, it ſeems, *de bonis propriis*, but only ſo far as he hath wrongfully adminiſtered the effects of the deceaſed. Harris's Juſtin. 87. n. cites 1 Mod. 213-4. Swinb. 337. ed. 1743.

(C) Of the Manner of appointing an Executor: And herein,

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(*But although*) A teſtator deſired certain perſons to act *as his executors*, and gave one of them a legacy; the Maſter of the Rolls held, that the legatee, ſo appointed executor, could not claim his legacy without acting, or at leaſt proving the will. Read v. Devaynes, 3 Br. Ch. Rep. 95.

Pickering v. Towers, Ambl. 364. So, if after giving ſeveral legacies, the teſtator appoint *A.* and *B.* *receive and pay the contents.*

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(*The teſtator*) Yet *quoad* creditors, they are all executors, and as one executor, and may be ſued as one executor. 19 H. 8. 8. Dy. 3. 32 H. 8. Br. Exec. 155. Cro. Car. 293.

(D) Of appointing Co-Executors: And herein,

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(*If a man*) The law is otherwiſe, it hath been ſaid, with reſpect to adminiſtrators. Lord Bacon's Tracts, 162. Hudſon v. Hudſon. But ſee *contr.* Jacomb v. Harwood, 2 Ves. 265. Sed qu. Toothe, Touchſt. 484-5.

(*Alſo it hath been adjudged*) *Qu.* As to the determination, for the obligation was only evidence of the debt; and as the debt was not aſſignable, being a *choſe in action*, and only a mere *delivery*, what intereſt could paſs?

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(*Alſo it hath been held*) 1 P. Wms. 241 S. C. This diſtinction is not made by the decree, nor hath it been adopted in later caſes. *Vide* Sadler v. Hobbs, 2 Br. Ch. Rep. 117., and the decree in 1 Cox's P. Wms. 243. But in the caſe of Gibbs v. Herring, Pr. Ch. 49., it is ſtated to have been taken and allowed; but the editor of the laſt edition of that work hath not been able to diſcover any ſuch caſe in the Regiſter-book. The diſtinction, therefore, is, in truth, without authority.———Taking it without the diſtinction, the rule laid down in the text, as to executors joining in receipts, hath been generally admitted as eſtabliſhed law. Fellows v. Mitchel, 1 P. Wms. 81. Aplyn v. Brewer, Pr Ch. 173. Leigh v. Barry, 3 Atk. 584. *Ex parte* Belchier, Ambl. 219. Sadler v. Hobbs, 2 Br. Ch. Ca. 116. But it hath been broken in upon by Lord Harcourt in the caſe of Churchill v. Hobſon, *ubi ſupra*, and by Lord Northington in Weſtley v. Clarke, 25th June 1759, reported in 1 Cox's P. Wms. 83., and Finch's edition of Pr. Ch. 17[illegible] and the Maſter of the Rolls (Sir R. P. Arden) hath expreſsly entered his diſſent from it in the fulleſt extent, *viz.* that an executor, by joining in a receipt, ſhall *in all caſes be liable*. Scurfield v. Howes, 3 Br. Ch. Rep. 94. This, however, is clear from all the caſes, that where, by *any act done* by one executor, any part of the eſtate comes to the hands of another executor, the former will be anſwerable for his companion in the ſame manner as if he had enabled a ſtranger to receive it. Sadler v. Hobbs, Scurfield v. Howes, *ubi ſupra*, 1 Cox's P. Wms. 241. note, Gilb. Attorney General, Hardr. 314.

(E) Of the Probate of Wills, and granting Administration: And herein,

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(*But however*) 1 Str. 481. Hence alſo, payment of money to an executor who hath obtained probate of a forged will, is a diſcharge to the debtor of the inteſtate, notwithſtanding the probate be afterwards declared null, and adminiſtration regranted to the next of kin. Allen v. Dundas,

Dundas, 3 Term Rep. 125. As a priſoner cannot be convicted of forging a will during the exiſtence of the probate, R. v. Vincent, 1 Str. 481., it is the practice to poſtpone the trial till the ſpiritual court hath determined upon its validity. R. v. Goodrich, O. B. 1784, cited in 3 Term Rep. 126. R. v. Rhodes, 1 Str. 703.

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(*But it is ſaid*) If the effects of an inteſtate veſt in the king by a forfeiture for felony, and the ordinary grant letters of adminiſtration to *A.* in conſequence of a warrant from the king, and they run in the uſual form, *viz.* "to pay debts, &c." though with this additional clauſe, "to the uſe of his majeſty," *A.* may be ſued by the creditors, and ſhall not be permitted to impeach the letters of adminiſtration. Megit v. Johnſon, Dougl. 542.

(*If a perſon dies*) But where the deceaſed has goods within the dioceſe of *York*, and alſo within a peculiar in that dioceſe, two adminiſtrations ſhall be granted; for the archbiſhop ſhall not have his prerogative in ſuch caſe, the peculiar being derived out of his juriſdiction. Cro. El. 8.

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(*Yet it is ſaid*) *Sed Vide* 1 Mod. 213. that the adminiſtration in ſuch caſe is void.

(*But if there*) So, Robinſon v. Pett, 3 P. Wms. 251. Arnold v. Blencowe, at the Rolls, Jan. 1788. *Et vide* R. v. Simpſon, 3 Burr. 1463. and 1 Bl. Rep. 456.

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(*It hath been*) If there are two executors, and one adminiſters, he alone will be charged with the receipts in equity, though he afterwards renounce, and pay over the money to the other executor, who proved the will. Read v. Truelove, Ambl. 417.

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(*By the* 22 & 23 *Car.*) The next of kin, or a creditor, have a right *ex debito juſtitiæ* to put this bond in ſuit in the name of the ordinary, Archbiſhop of *Canterbury* v. Houſe, Cowp. 140. and, therefore, the ordinary, or his perſonal repreſentative, may be compelled by *mandamus* to deliver up the bond for this purpoſe. Rex v. Johnſon, Executrix of the Biſhop of *Worceſter*, and others Mich. 29 Geo. 3.

(*The inventory*) And if the inventory does not diſtinguiſh between the *ſperate* and *deſperate* debts, it will charge the executor with the whole as aſſets, and put him to prove if any of them were deſperate. Bull. N P. 140 2. Upon the iſſue of *plenè adminiſtravit*, the plaintiff cannot put in evidence a copy of the inventory delivered by the defendant to the ſpiritual court, *unleſs it be proved by him*, though it be ſigned by the appraiſers: but if he can give an inventory in evidence, he may ſhew that the goods were under-valued. *Id. ibid.*

If the executor enter to the teſtator's goods, and will make no inventory thereof, than may every legatory recover his whole legacy at his hands; for, in this caſe, the law preſumeth, that there are ſufficient goods to pay all the legacies, and that the executor doth ſecretly and fraudulently abſtract the ſame; whereas otherwiſe, the executor is preſumed not to have any more goods which were the teſtator's, than are deſcribed in the inventory (*a*) the ſame being lawfully made. Swin. 228.

(*a*) Nor ſhall the inventory be concluſive on him, if there ſhould be afterwards an unexpected deficiency of the aſſets, 2 Vez. 194.

If the executor make no inventory, but pay intereſt on a legacy, or pay the legacies but one, this ſhall be received as evidence of aſſets. Corporation of Clergymen's Sons v. Swainſon, 1 Vez. 75. Ort. v. Kaines, 2 Vez. 194.

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(*If the teſtator*) Comyns, 150. But ſee 3 Term Rep. 125. *contra*—where the authority of the caſes, both in Rolle and Comyns, is denied.

So, it hath been holden, that an executor may file a bill in equity before probate, and that the ſubſequent probate makes the bill a good one. And it was ſaid in a late caſe (*b*) in the Exchequer *arguendo*, that it had been determined by that court about three years ago, that Humphreys v. Humphreys, 3 P. Wms. 351.

(*b*) Patten, Executrix, v. Panton, 1793. In this case of Patten v. Panton, that it was sufficient if the probate were obtained at any time before hearing. to a bill by the plaintiff as executrix, for an account of money which the defendant was charged with having embezzled; and that certain annuities purchased by the plaintiff in the 5 *per cents.* might be transferred to the plaintiff; the defendant pleaded that no probate had been granted, and that a suit was depending between the plaintiff and defendant, touching the right of the plaintiff to probate. The court gave no judgment upon the argument, and the case was never afterwards moved.

(F) What Persons are entitled to Administration

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(*And accordingly*) For a feme covert may make a will with the consent of her husband, and in such case, he cannot be entitled to administration. R. v. Betteſworth, 2 Str. 1112. He may, indeed, adminiſter to her notwithſtanding a will, if ſhe have power to diſpoſe only of part of her property. R. v. Betteſworth, 2 Str. 891.——In caſe of the huſband's death *after* the wife, adminiſtration muſt be granted to his next of kin. Squib v. Wynn, P. Wms. 378. Bac. Bryant, 11 Vin. Abr. tit. *Executors.* K. pl. 25, Humphrey v. Bullen, *ia.* pl. 26. Elliſ. Collier, 3 Atk. 326. 1 Vez. 15. 1 Wilſ. 168. Bouchier v. Taylor, Hargr. Law Tracts, 7 Br. P. C. 414.

(*If there be*) For the proximity of degree is reckoned according to the civilians. Pr. Ch. 2 Vez. 215.

e. Blackborough v. Davis, 1 P. Wms. 40. Woodroffe v. Wickworth, Pr. Ch. 527. If there be neither father nor ſon of the inteſtate, the next in ſucceſſion are (*c*) brothers and grandfathers: theſe are followed by (*d*) uncles, nephews, and the females of each claſs reſpectively, who muſt, as equally near, take *per capita*, and not *per ſtirpis*; and laſtly, couſins.

(*d*) Durant v. Preſtwood, 1 Atk. 454. Loyd v. Tench, 2 Vez. 215.

Croke v. Watt, 2 Vern. 124. Show. P.C. 108. A brother of the half blood ſhall exclude an uncle of the whole blood, for the half blood are of the kindred of the inteſtate; and the ordinary may grant adminiſtration to the ſiſter of the half, or brother of the whole blood at his diſcretion.

Bac. Elm. 80. 1 Salk. 38. If none of the kindred will take the adminiſtration, it may be granted to a creditor

Pierce v. Parks, 1 Sid. 281. Thomas v. Butler, 1 Ventr. 219. If the executor refuſe, or die inteſtate, the adminiſtration is to be granted to the reſiduary legatee, in excluſion of the next of kin.

Plowd. 278. a. In defect of all theſe, the ordinary may commit adminiſtration, as he might have done before the ſtatute of *Edw.* 3., to ſuch diſcreet perſon as he approves of, or may grant letters *ad colligendum bona defuncti*.

Manning v. Napp. 1 Salk. 37. Jones v. Goodchild, 3 P. Wms. 33. See Dougl. 542. If a baſtard, (who hath no kindred, being *nullius filius*,) or any elſe that hath no kindred, die inteſtate, and without wife or child, as hath been formerly holden, that the ordinary could ſeize his goods, and diſpoſe of them to pious uſes: but the uſual courſe now is, for ſome one to procure letters patent, or other authority from the king, and then the ordinary of courſe grants adminiſtration to ſuch appointee of the crown.

(G) In what Manner the Ordinary may grant Adminiſtration; and herein of granting it to one or more, or for a particular Thing.

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(*But this*) But *lis pendens* about the will is a good return to a mandamus to grant a probate, Andr. 366. or adminiſtration. 4 Burr. 2295. 1 Bl. Rep. 640.

(H) What ſhall be deemed the Teſtator's Perſonal Eſtate, or Aſſets in the hands of the Executor: And herein,

1. What ſhall be ſuch an Intereſt veſted in the Teſtator, as ſhall go to his Executors.

IF an executor hath a leaſe for years of land, of the value of 20*l.* a year, rendering rent of 10*l.* a year; it is aſſets in his hands only for 10*l.* over and above the rent. Cro. Eliz. 712.

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(*And as the law*) An eſtate in the plantations is teſtamentary, and aſſets to pay debts. Noell v. Robinſon, 2 Ventr. 358.

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(*But the abſolute property*) And as to creditors, ſee ſtat. 13 Eliz. c. 5. and *ante*.

If an executor renew, he ſhall account for the new leaſe, as well as the old, for the benefit of the creditors. Anon. 2 Ch. Ca. 208.

If a man deviſe land to be ſold, neither the money thereof coming, nor the profits thereof for any time to be taken, ſhall be accounted as any of the goods and chattels of ſuch perſon deceaſed. St. 21 H. 8. c. 5. § 5.

But if a man deviſe lands to be ſold by one for payment of his debts and legacies, and make the ſame perſon his executor; the money made by ſuch perſon upon the ſale of the land ſhall be aſſets in his hands. 1 Roll. Abr. 920.

But otherwiſe it is, where the land is deviſed to be ſold by the executor and *others*; for there the money ſhall not be aſſets; for they are not truſted with it as executors. *Id. ibid.*

But it ſhall be aſſets in equity, tho' not at law. 1 Eq. Caſ. Abr. 141. Such aſſets as are liable to debts and legacies by the courſe of law, are called *legal* aſſets; ſuch as are only liable by the help of a court of equity, are called *equitable* aſſets. 4 Burn. E. L. 288. Yet legal aſſets, although they cannot be come at without the aſſiſtance of equity, ſhall be applied in a courſe of adminiſtration. Therefore, if a mere truſt eſtate deſcend on the heir at law, though it may be neceſſary to go into equity, to reduce it into poſſeſſion, yet it will be conſidered as legal, and not as equitable aſſets. a truſt eſtate being made aſſets by ſtatute. But an equity of redemption of a mortgage in fee, being merely an equitable intereſt, and not made aſſets by any legiſlative proviſion, will, therefore, be conſidered as equitable aſſets. Plunkett v. Penſon, 2 Atk. 294. So, it hath been ſaid, that if a termor for years mortgage his term, the equity of redemption will be equitable aſſets. Caſe of Sir Charles Cox's Creditors, 3 P. Wms. 342. Hartwell v. Chitters, Ambl. 308. But this laſt point was not in fact determined in the caſe of Sir Charles Cox's Creditors; and yet the caſe of Hartwell v. Chitters reſts entirely on the ſuppoſed authority of that caſe. And it hath been adjudged in ſeveral preceding caſes, that chattels, whether real or perſonal, mortgaged or pledged by the teſtator, and redeemed by the executor, ſhall be aſſets *at law* in the hands of the executor for ſo much as they are worth beyond the ſum paid for redemption, though recoverable only in equity. Hawkins v. Lewes, 1 Leon. 155. Harcourt v. Wrenham, or Harwood v. Wrayman, Moore, 858. 1 Roll. Rep. 156. 1 Brownl. 76. 1 Roll. Abr. 920. Alexander v. Lady Graham, 1 Leon. 325. Formerly it was holden, that whatever comes to the executor's hands, or he is entruſted with

with, as executor, is assets at law: therefore money arising from the sale of lands devised to executor to sell, or which he is empowered to sell for the payment of debts and legacies, considered as legal assets, and administrable as such. Girling v. Lea, 1 Vern. 63. Greave Powell, 2 Vern. 248. Anon. *id.* 405. Cutterback v. Smith, Pre. Ch. 127. Bickham v. F man, *id.* 136. Dethwicke v. Caravan, 1 Lev. 224 Burwell v. Corrant, Hardr. 405. L Masham v. Harding, Bunb. 339. Blatch v. Wilder, 1 Atk. 420. But modern resolutions h taken a different turn; and courts of equity have considered the real estate in such case as mer a trust fund, and distributable among the creditors *pari passu*; Anon. 2 Vern. 133. Challi Casborn, Pr. Ch. 408. Chambers v. Harvest, Mosel. 123. Hall v. Kendall, *id.* 328. Lewi Oakley, 2 Atk. 50. Batson v. Lindegreen, 2 Br. Ch. Rep. 94. And that, though the devise not to the executor expressly upon trust, or in trust, or as a trustee, provided there be enough the will to convert the executor into a trustee, as if the devise be to him and his heirs, Silk Prime, 1 Br. Ch. Rep. 138 n. Newton v Bennett, *id.* 135. Barker v. Boucher, *id.* 140. if the executor has merely a naked power to sell *quâ executor*, *quære*, whether the assets are legal equitable? Silk v. Prime; Newton v. Bennet, *ubi supra*. It hath, however, been determin that if an estate descend to the heir, charged with debts, it will be legal assets. Freemoul Dedire, 1 P. Wms. 430. Plunkett v. Penson, 2 Atk. 290. It seems then, from the above ca that assets are considered as equitable, either in respect of the intent of the testator, or of nature of the testator's interest in the property. In the first case, the charge upon the real est must be for the payment of debts generally, and the descent must also be broken: in the la case, the interest of the party in the property must be purely an equitable interest, and not m legal assets by any statute. 2 Fonbl. Eq. Tr. 404. n. f.

2. How far Debts due to the Testator are Assets.

3 Ch. Ca. 89. So, a debt due from an executor to his testator, is assets in equity to p legacies.

(*But though debts*) So, if he neglects to bring an action on a bond, he shall be charged w the amount of it. Lawson v. Copeland, 2 Br. Ch. Rep. 156.

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(*So if the*) As to this, see tit. *Arbitrament and Award*, C.

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(*And though pictures*) But this doctrine, as to annexation to the freehold, hath been gradua relaxing for a long time; and if things of the kind above-mentioned can be taken away witho prejudice to the fabrick of the house, the executor, it seemeth, shall have them. This relax tion hath been made upon reasons of publick benefit and convenience. Lawton v. Lawto 3 Atk. 14. Lord Dudley v. Lord Warde, Ambl. 113. Harvey v. Harvey, 2 Str. 1141.

(*As to the*) This must be understood of tenant in fee-simple; for such a sale by tenant in t would not be effectual without docking the entail, unless they were actually felled in the lifeti of such tenant, for otherwise they descend with the land to the issue in tail. Hob. 173. 11 C 50. a.

(*But corn*) If lessee for life of a hop-ground dies in August before severance of the hops, t executor may maintain trover for them against the remainder-man, though growing on ancie roots. Latham v. Atwood, Cro. Car. 515. Hargr. Co. Lit. 55. b. n. 1. Hal. MSS.

Knevit v. Poole, Gouldf. 143. If disseisor sow the land of tenant for life, and tenant for life die befor severance, his executors, and not the disseisor, or the reversioner, sha have the corn.

(*As to charters*) If the writings of an estate are pawned or pledged for money lent, suc charters in the hands of the *creditor* are to be considered as chattels; and in case of his decea they would go to his executor or administrator, because such personal representative would b entitled to the benefit accruing from the loan. Noy, Max. 50.

Pusey v. Pusey, 1 Vern. 273. A bill was brought in Chancery, suggesting, that an antique horn wit an old inscription had immemorially gone with the plaintiff's estate, an was delivered to his ancestors to hold their land by, and praying that might be restored: the Lord Keeper was of opinion, that if the land was

1 Inst. 107. a. of the tenure called *cornage*, the heir was entitled to this monument o antiquity *at law*.

(Bu

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(But though) As, if he expreſsly declare that the executor ſhall be only a truſtee. Pring v. 3 Vern. 99. Graydon v. Hicks, 2 Atk. 18. Dean v. Dalſon, 2 Br. Ch. Rep. 634. Ben- Bachelor, 3 Br. Ch Rep. 28. 1 Vez. jun. 63. Or, if the will contains a reſiduary clauſe, the name of the reſiduary legatee is not inſerted. Biſhop of *Cloyne* v. Young, 2 Vez. 91. North v. Purdon, 2 Vez. 495. Hornſby v. Finch, 2 Vez. jun. 78. Or, if the reſiduary ee has died in the lifetime of the teſtator. Nicholls v. Criſp. Ambl. 769. Bennett v. ker, 3 Br. Ch. Rep 28.

(And this) See *acc.* 2 Vern. 248. 2 P. Wms. 157. 2 Atk. 46. 2 Vez. 97.

(Since this there) It is now a ſettled rule in equity, that if a *ſole* executor has a legacy *generally* *abſolutely* given to him, he ſhall be excluded from the reſidue; Joſlin v. Brewett, Bunb. 112. es v. Dewes, 3 P. Wms. 40. Farringdon v. Knightly, 1 P. Wms. 544. Vachel v. Jefferies, Ch. 170. Petit v. Smith, 1 P. Wms. 7., and this, though the legacy be ſpecifick; Randall v. ley, 2 Vern. 425. Southcot v. Watſon, 3 Atk. 226. Martin v. Rebow, 1 Br. Ch. Rep. 154., gacies be given to the next of kin; Bayley v. Powell, 2 Vern. 361. Wheeler v Sheers, 288. Andrew v. Clark, 2 Vez. 161. Kennedy v. Stainſby, ſtated in a note, 1 Vez. jun. for the rule is founded rather on a preſumption of intent to exclude the executor, than to a truſt for the next of kin; and therefore, if there be no next of kin, a truſt ſhall reſult the crown. Middleton v. Spicer, 1 Br. Ch. Rep. 201. The above rule is founded upon the ction, that the executor cannot take part and *all* But if there be two or more executors, a y to one is not within ſuch objection, for the teſtator might intend a preference to him *pro* . Coleſworth v. Brangwin, Pr. Ch. 313. Johnſon v. Twiſt, cited 2 Vez. 166. Buffar v. ford, 2 Atk. 220. So, where there are unequal legacies, whether pecuniary or ſpecifick, to eral executors, they ſhall not be excluded. Braſbridge v. Woodroffe, 2 Atk. 68. Bowker v. ter, 1 Br. Ch. Rep. 328. Blinkhorn v. Feaſt, 2 Vez. 27. *Secus*, where equal pecuniary ies are given them. Petit v. Smith, 1 P. Wms. 7. Carey v. Goodinge, 3 Br. Ch. Rep. 110. ſee Heron v. Newton, 9 Mod. 11.

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(But as this) Newſtead v. Johnſtone, 2 Atk. 45. Southcot v. Watſon, 3 Atk. 229.

(Likewiſe where A. was executrix) This caſe hath been over-ruled, and it is now ſettled, that a wife, minated executrix, is, asto the reſidue, preciſely in the ſituation of any other executor; Lake Lake, Ambl. 126. Godſall v. Sounden, 2 Eq. Caſ. Abr. 444. pl. 58. Martin v. Rebow, 1 Ch. Rep. 154; unleſs the legacy to her, being ſpecifick, conſiſt of property, which was her's e marriage; for this may vary the rule. Lawſon v. Lawſon, 7 Br. P. C. 511.

(Likewiſe where A., poſſeſſed) Pr. Ch. 316. S. C.
See *acc.* Lady Granville v. Ducheſs of Rutland, 1 P. Wms. 114. Nourſe v. Finch, 1 Vez. 356. Hoſkins v. Hoſkins, Pr. Ch. 263.

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(And as this) Lady Granville v. Ducheſs of Beaufort, 1 P Wms. 114. S. C. Petit v. Smith, P. Wms. 7. 5 Mod. 247. S. C. Com. Rep. 3. S. C. Bachelor v. Searle, 2 Vern. 736. Duke Rutland v. Ducheſs of Rutland, 2 P. Wms. 210. Mallabar v. Mallabar, Ca. Temp. Talb. Lake v. Lake, 1 Wilſ. 313. Ambl. 126. Brown v. Selwin, Ca. Temp. Talb. 140. But parol idence, it is ſaid, ought in this caſe to be admitted with great caution; Rackfield v. Careleſs, P. Wms. 160. Duke of Rutland v. Ducheſs of Rutland, *id.* 215. Blinkhorn v. Feaſt, 2 Vez. Nourſe v. Finch, 1 Vez. jun. 358., and reſtricted to what paſſed at the time of making the ll. See the two laſt cited caſes.

(I) How

(I) How the Perſonal Eſtate, after Debts paid, to be diſtributed when the Party dies Inteſta And herein, of the Share the Huſband or W are entitled to; and of the aſcending, deſce ing, and collateral Line, and Admiſſion of Half-Blood; and where the Diſtribution ſh be *per Stirpes*, and not *per Capita*.

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(1. *That the clauſe*) Caldicot v. Smith. 2 Show. 286. Beeton v. Darking, 2 Vern. 168. v. Pett, Salk, 250. pl. 1 Ld. Raym. 571. S. C. Comyns Rep. 87. pl. 56. S. C. 1 P. W 25. S. C. Bowers v. Littlewood, *id.* 595.

(*a*) Burnet v. Man, 1 Vez. 156.

(2. *On that clauſe*) And (*a*) this ſhall extend to a poſthumous bro of the half-blood.

(3. *That where*) Bowers v. Littlewood, 1 P. Wms. 595. Davers v. Dewes, 3 P. Wms Lloyd v. Tench, 2 Vez. 213. Durant v. Preſtwood, 1 Atk. 454. Stanley v. Stanley, *id.* Janſon v. Bury. Bunb. 159.

(*A man died*) Barnard. 290. S. C. 2 Atk. 115. S. C. Ball v. Smith, 2 Freem. 230. S. P.

Keilway v. Keilway, 2 P. Wms. 344. 1 Str. 710. Gilb. Rep. 189. Stanley v. Stanley, 1 Atk. 455.

It hath been reſolved on the ſtatute of *Ja.*, that if a man die inte and without iſſue, leaving *a wife*, and ſeveral brothers and ſiſters, his mother living, the mother ſhall have no more than an equal ſhare moiety of the eſtate with the brothers and ſiſters. And though ſhould be no brother or ſiſter, yet if there are the children of a dece brother or ſiſter, they ſhall take the ſame ſhare with the mother w their parent would be entitled to.

Moor and Barham, 1 P. Wms. 53.

If a perſon dying inteſtate, leave a grandfather by the father's ſide, a grandmother by the mother's ſide, his next of kin; theſe (grandf and grandmother) ſhall take in equal moieties by the ſtatute of diſtributi as being in equal degree: for though the grandfather on the father's may, in ſome reſpects, be more worthy of blood, yet here digni blood is not material; in regard the brother of the half-blood ſhall equally with the brother of the whole blood.

Evelyn v. Evelyn, 4 Burn's E. L. 363. Ambl. 191. S. C.

If a perſon dying inteſtate leave a grandfather and a brother, the gr father ſhall not ſhare the perſonal eſtate with the brother, but the ſhall take the whole: for the brother is nearer than the grandfather, being by our law but one degree between brother and brother, wh there are two degrees between grandfather and grandſon.

Bruce v. Bruce, Dom. Proc. 15 April 1790. Hog v. Laſhley, Dom. Proc. 7 Mar. 1792.

Where a perſon dies inteſtate, having perſonal property in diff places and ſubject to different laws, it is now ſettled, that the *lex dom* not the *lex rei ſitæ*, ſhall attach upon the property, and direct the ſucce to it. What ſhall be conſidered as the *domicil* of the party is rather a tion of fact than of law.

Balfour v. Scott, Dom Proc. 11 Mar. 1793. Ommaney v. Douglas, Dom. 18 Mar. 1796. Bempde v. Johnſtone, 3 Vez. jun. 200.

Ambl. 415.

Upon this principle it was determined by the privy council in the ca *Burn* v. *Cole*, 7th *April* 1762, that where a teſtator domiciled in En

, the judge of the probate in the plantations was bound by the probate ed in *England*. The *lex domicilii* regulates teſtate as well as inteſtate ſion.

) Of Advancement, and bringing into *Hotchpot*. Page 430

f a father) 2 P. Wms. 446. Neither ſhall what a child receives out of the mother's eſtate. v. Frederick, *id.* 356.

If a child, who hath received any advancement from his father, die in father's life-time, leaving children, thoſe children ſhall not be ad- ed to their father's diſtributive ſhare, without bringing their father's ncement into hotchpot. And the reaſon is, becauſe they do not take heir own right, but as repreſenting their father. Proud v. Turner, 2 P. Wms. 560.

A child, partly advanced, ſhall bring in its advancement only among the r children; for the wife ſhall have no advantage of it. Ward v. Lant, Pr. Ch. 182-4.

) What ſhall be a *Devaſtavit*, either in Executors or Adminiſtrators: And herein of the Order of paying Debts and Legacies.

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It is holden) Ca. Temp. Hardw. 226. and ſee 4 Ann. c. 16. § 13.

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Debts by) This is not quite correct: funeral and teſtamentary charges are in the firſt place to paid. Off. of Exec. 137. 2 Bl. Comm. 511.

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Next to the) That is, judgment obtained againſt, or confeſſed by the teſtator; not the exe- r; for to theſe, this priority doth not extend; Off. of Exec. 137.; nor will it prevail againſt ain debts by particular ſtatutes, as the forfeitures for not burying in woollen, 30 Car. 2. c. 3.; ney due from the overſeers of the poor, 17 Geo. 2. c. 38. § 3.; for letters to the poſt-office, 9 n. c. 10. § 30., &c.

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It has been) Pr. Ch. 179. 188. Bunb. 48. Ca. temp. Talb. 217. 2 Atk. 385 That is, in the courſe of adminiſtration of aſſets, but not ſo as to affect the lands of the tor. 1 Vez. 496. 2 P. Wms. 621. However, there have been caſes, where even decrees e been holden to bind lands, and where decrees are to hold and enjoy over. Ca. temp. lb. 222.

Alſo it hath) But this will cover aſſets no further than the amount of the ſum payable by condition. Ca. temp. Hardw. 228.

The grantor's covenant in a marriage-ſettlement for him and his heirs, the premiſes were free from incumbrances, ſhall rank equally with s on bond. Parker v. Harvey, Vin. Abr. tit. *Executors*, (Q. a.) pl. 39.

If two men are partners in trade, and one of them gives a bond to e his wife 1000*l*., and dies; and the other partner adminiſters; if the e would be paid out of the ſeparate eſtate of the huſband, on there be- effects, ſhe ſhall have a preference before other creditors; but if there o ſeparate eſtate, and the wife would have ſatisfaction out of the rtnerſhip effects, then all the partnerſhip debts muſt be firſt paid. Croft v. Pye, 3 P. Wms. 182.

In where debt) Willett v. Earle. Gage v. Acton, Com. Rep. 67. Stonehouſe v. Ilford, *id.* 8. P.

(*But*

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(*But though*) In the case of Harman v. Harman, as reported in Shower, and 3 Mod. court agreed, that a judgment upon a simple contract debt may be pleaded in bar to an acti debt upon bond, and that it is no *devastavit* in an executor to pay a debt upon such a contra fore a bond debt of which he had no notice; and they relied on the cases of Edgecumbe v. and Brooking v. Jennings, 1 Mod. 174., but it was adjourned; and afterwards, according to berbach, judgment was given for the plaintiff. But from a later case of Davis v. Monk Fitzg. 76., Bull. *N. P.* 178., it seems to be settled, that an executor may plead a *judgment ren ed* on a simple contract to an action of debt on bond, unless he has notice of such bond, and for the reason given in the text. But where an executor to an action of debt upon bond ple a judgment *confessed* on the preceding day in a simple contract debt, the plea was disallowed cause it did not aver that it was without notice of the plaintiff's demand, for in such case o an executor excused in confessing a judgment. Sawyer v. Mercer, 1 Term Rep. 690.

Or bill in equity. 2 Vern. 37. 88. 3 P. Wms. 402. note. 2 Bl. Comm. 512. but qu.

(*Also* (*d*) *where*) As this power may be an inlet to fraud, the Chancery will sometimes i pose. 10 Mod. 496.

Plumer v. Marchant, 3 Burr. 1380.

If a man has covenanted with *B.* and *C.* to leave by his will, or his executors within six months after his death shall pay 700*l.* to t in trust to pay the interest to his wife for life, then to be div among his children, and in default of children, as he shall appoint; binds himself, his heirs, *&c.* in a penalty for performance, and dies out issue, and intestate; if *B.* administers, he may retain assets agai bond creditor who sues him before the six months are elapsed.

2 Ch. Ca. 201. 2 Vern. 62.

But with respect to debts in equal degree, if a suit hath been comm ed for any one, such debt shall be first paid; for after a suit begun, a ecutor (it hath been holden) may not excuse himself by any volu

Br. Executors, pl. 43. Went. 146.

payments. Yet, it is said, that the executor, before notice of such may pay any other creditor in equal degree, and then plead that he fully administered before notice.

Mason v. Williams, 2 Salk. 507. (*c*) See the case of Dorston v. Earl of *Orford*, 3 P. Wms. 401. n.

And it was holden by Lord *Cowper*, that pending a bill in equit against an executor, or after a decree *quod computet*, an executor may any other debt of an higher nature, or of as high a nature, if there *legal* assets; but if he hath only *equitable* assets, then the court of Cha ry will not indemnify him, and suffer him to prejudice and disapp the first suitor. But he cannot do so, his lordship added, after a decree.

where a voluntary payment made by an executor of a debt in equal degree, pending in a s equity, was allowed.—See too the case of Waring v. Danvers, 1 P. Wms. 295., where, aft action at law brought by one creditor, an executor confessed judgments to other creditors equity would not interpose.

Barker v. Dumeres, Barnard, Ch. Ca. 277.

Where a creditor sues an executor at law and in equity at the time for the same demand, equity will not compel him to make his e on in which of the courts he will proceed, in case the executor is atte ing to prefer other creditors before him, by confessing judgments to t but will merely restrain him from taking out execution upon the judg without leave of the court.

For the distinction between *legal* and equitable assets *vide supr.* H Ca. temp. Talb. 220. 2 Vern. 435.

Where there are only *equitable* assets, the court of Chancery will d the application of them according to that course which is most namely, to pay every creditor his share in proportion. So, where the sets are partly *legal* and partly *equitable*, although the court cannot away the legal preference on legal assets, yet where one creditor been partly paid out of such legal assets, when satisfaction comes t made out of equitable assets it will postpone him till there is an equality satisfaction to all the other creditors out of the equitable assets, pro tion

…le to ſo much as the legal creditor hath been ſatisfied out of the le-
…ſets.

…gacies) But where lands are deviſed for payment of debts and legacies, and the debts are …land is not liable to ſatisfy, as debts by ſimple contract; there, it is ſaid, the debts ſhall …no preference of the legacies; but if there be not ſufficient to pay all, they ſhall be paid in …rtion. 2 Freem. 270. So, if a man bind himſelf in an obligation to perform a certain …, and deviſe divers legacies, and die leaving only ſufficient to ſatisfy the obligation if this …come to be forfeited; yet this obligation ſhall not be any bar of the legacies, becauſe it is …ain whether it will ever be forfeited; but the executor ſhall make a conditional delivery of …gacy, (to wit,) that if the obligation ſhould be recovered againſt him, the legatee ſhall re- …the legacy. 1 Roll. Abr. 928.

…ence it hath) See further tit. *Legacies*, (L.)

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…d in ſtrictneſs) In Comb. 342, Holt Ch. J. is repreſented to ſay, that 10*l.* is enough to be …t for the funeral of one in debt. And where a man dies inſolvent, no more than 40*s.* ſhall …wed. 3 Atk. 249.

…) Where the Perſonal Eſtate ſhall be firſt ap- …lied in Diſcharge of Debts, &c. And herein of …arſhalling the Aſſets.

…HE general rule is, that the perſonal eſtate of a teſtator ſhall in all caſes be primarily applied in the diſcharge of his *perſonal* debt, (or …al legacy,) unleſs he by expreſs words or *manifeſt* intention exempt …

1 Cox's P. Wms. 291. Haſlewood v. Pope, 3 P. Wms. 324.

…v. Chicheſter, 1 Br. P. C. 192. Fereyes v. Robinſon, Bunb. 302. Walker v. Jackſon, …624. Bridgeman v. Dove, 3 Atk. 202. Earl of Inchiquin v. French, Ambl. 33. and …33. Samwell v. Wake, 1 Br. Ch. Rep. 144. Duke of Ancaſter v. Mayer, *id.* 454. …w it may be ſo exempted, ſee Bampfield v. Wyndham, Pr. Ch. 101. Wainwright v. …s, 2 Vern. 718. and Ambl. 581. Stapleton v. Colville, Ca. temp. Talb. 202. Walker …on, 2 Atk. 624. Anderton v. Cooke, and Kynaſton v. Kynaſton, cited in 1 Br. Ch. …6-7. Holiday v. Bowman, cited in 1 Br. Ch. Rep. 145. Webb v. Jones, 2 Br. Ch. Rep.

…it ſhall be, although ſuch perſonal debt be alſo ſecured by mort- …and this, whether there be a bond, or covenant for payment or …

Cope v. Cope, 2 Salk. 449. Howel v.

…1 P. Wms. 291. Pockley v. Pockley, 1 Vern. 36. King v. King, 3 P. Wms 360. …v. Hancock, 2 Atk. 436 Robinſon v. Gee, 1 Vez. 251. Earl of Belvidere v. Rochfort, …C. 510. Philips v. Philips, 2 Br. Ch. Rep. 273.

…lands ſubject to, or deviſed for payment of debts, ſhall be liable to …ge ſuch mortgaged lands either deſcended or deviſed; (*a*) even …the mortgaged lands be deviſed expreſsly *ſubject to the incum-* …(*b*).

(*a*) Bartholomew v. May, 1 Atk. 487, Marchioneſs of …

…ſdale v. Earl of Coventry, 1 Br. Ch. Rep. 240. (*b*) Serle v. St. Eloy, 2 P. Wms. 386

…lands deſcended ſhall exonerate mortgaged lands deviſed.

Galton v. Hancock, 2 Atk. 424.

…*incumbered* lands and *mortgaged* lands both being ſpecifically …d, (but expreſsly "after payment of all debts,") ſhall contribute in …ge of the mortgage.

Carter v. Barnardiſton, 1 P. Wms. 505. and 2 Br. P. C. 1.

But

But in all theſe caſes, the debt being conſidered as the *perſonal* de the teſtator himſelf, the charge on the real eſtate is merely colla The rule therefore is otherwiſe, where the charge is on the *real* principally, although there be a collateral perſonal ſecurity (*c*); or the debt (although perſonal in its creation) was contracted originall another (*d*).

(*c*) Counteſs of Coventry v. Earl of Coventry, 2 P. Wms. 222. Edwards v. Freeman, *id.* 437. Wilſon v. Earl of Darlington, 2 Cox's P. Wms. 664. note. Ward v. Lord Dud Br. Ch. Rep. 316. (*d*) Cope v. Cope, 2 Salk. 449. Bagot v. Oughton, 1 P. Wms. 347. man v. Newnham, 1 Vez. 51. Robinſon v. Gee. *id.* 251. Parſons v. Freeman, Ambl Lecam v. Mertins, 1 Vez 312. Perkyns v. Baynham. 2 Cox's P. Wms. 664. note. Sti Shafto, *ibid.* Baſſett v. Percival, *ibid.* Lawſon v. Hudſon, 1 Br. Ch. Rep. 58. Earl of kerville v. Fawcett, 2 Br. Ch. Rep. 57. Tweddell v. Tweddell, *id.* 101. 152. Billingh Walker, *id.* 604.

Lanoy v. Duke of *Athol*, 2 Atk. 446 Lacam v. Martins, 1 Vez. 312. Mogg v. Hodges, 2 Vez. 53.

It is a rule in equity, that where one claimant has more than one to reſort to, and another claimant only one, the firſt claimant ſhall to that fund, on which the ſecond has no lien. If therefore a ſpe creditor, whoſe debt is a lien on the real aſſets, receive ſatisfaction the perſonal aſſets, a ſimple contract creditor ſhall ſtand in the pla the ſpecialty creditor againſt the real aſſets, *ſo far* as the latter ſha exhauſted the perſonal aſſets in payment of his debt; and legatee ſhall have the ſame equity as againſt aſſets deſcended.

(*e*) Anon. 2 Ch. Ca. 4. Sagittary v. Hyde, 1 Vern. 455. Neave v. Alderton, 1 Eq. Ca. Abr. 144. ſon v. Fielding, 2 Vern. 763. Galton v. Hancock, 2 Atk. 436. (*f*) Culpepper v. Aſton Ca. 117. Bowdman v. Reeve, Pre. Ch. 578. Tipping v. Tipping, 1 P. Wms. 730. Gardiner, Bunb. 137. Lutkins v. Leigh, Ca temp. Talb. 54.

Haſlewood, v. Pope, 3 P. Wms. 323.

So where lands are ſubjected to the payment of *all* debts, a ſhall ſtand in the place of a ſimple contract creditor, who has bee fied out of perſonal aſſets.

Hyde v. Hyde, 3 Ch. Rep 83. Maſters v. Maſters, 1 P. Wms. 422.

So, where legacies by will are charged on the real eſtate, but legacies by codicil, the former ſhall reſort to the real aſſets upon a de cy of the perſonal aſſets to pay the whole.

Bligh v. Earl of Darnley, 2 P. Wms. 620.

Clifton v. Burr, 1 P. Wms. 678. Haſlewood v. Pope, 3 P. Wms. 324. Scott v. Scott, Ambl. 383. (*a*) Lutkins v. Leigh, Ca. temp. Talb. 53. v. Tipping, *id.* 730.

But from the principles of theſe rules it is clear that they can applied in aid of one claimant ſo as to defeat the claim of anothe therefore a pecuniary legatee ſhall not ſtand in the place of a *ſpecial ditor*, as againſt land deviſed, (though he ſhall as againſt land deſce but ſuch legatee (*a*) ſhall ſtand in the place of a mortgagee who h hauſted the perſonal aſſets, to be ſatisfied out of the mortgaged pr though ſpecifically deviſed; for the application (*b*) of the perſonal in caſe of the real eſtate mortgaged, does not take place to the de of any legacy.

Forreſter v. Lord Leigh. Ambl. 171. (*b*) Oneal v. Mead, 1 P. Wms. 693. Davis v. Gardiner, 2 P. Wms. 190. Rider v. Wager, *id.* 335.

2 Atk. 438. 1 Vez. 312. Robinſon v. Tonge, 2 Cox's P. Wms. 680. note.

But none of the rules deducible from theſe caſes ſubject any fu claim to which it was not before ſubject, but only take care that th *on* of one claimant ſhall not prejudice the claims of the others.

Mogg v. Hodges, 2 Vez. 52. Attorney General v. Tyndal, Ambl. 614. Foſter v. Blagden, *id.* 704, Hillyard v. Taylor, *id.* 7

A court of equity will not marſhal aſſets in favour of a charita queſt, ſo as to give it effect out of the perſonal chattels, it being far as it touches any intereſt in lands.

Where a legacy is given out of a mixt fund of real and perſonal eſtate payable at a future day, and the legatee dies before the day of payment; *quære*, Whether the court will marſhal the aſſets ſo as to turn ſuch legacy upon the perſonal eſtate, in which caſe it would be veſted and tranſmiſſible; whereas as againſt the real eſtate it would ſink by the death of the legatee? Prowſe v. Abingdon, 1 Atk. 482. Pearce v. Taylor, Tr. Vac. 1790. before Ld. Thurlow.

As againſt real aſſets *deſcended*, it ſeems, that the wife ſhall ſtand in the place of creditors for the amount of her *paraphernalia*. But as againſt real aſſets deviſed, (*c*) *quære*. Tipping v. Tipping, 1 P. Wms. 730.

...lſon v. Corbet, 3 Atk. 369. Graham v. Londonderry, *id.* 393. (*c*) Probert v. Clifford, 2 ...k's P. Wms. 544. note. and Ambl. 6. Incledon v. Northcote, 3 Atk. 438.

(I) In what Caſes an Executor may make himſelf liable *de bonis propriis*: And herein,

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(*Executors*) Rock v. Leighton, 1 Salk. 310. 1 Ld. Raym. 589. S. C. Com. Rep. 87 S. C. ...rm Rep. 690. S. C. Skelton v. Howling, 1 Wilſ. 258. S. P. So, if he pleads only the ...eral iſſue, and has a verdict againſt him. Ramſden v. Jackſon, 1 Atk. 292. Erving v. Pe..., 3 Term Rep 685. For he can never avail himſelf of matters in a ſubſequent ſtage of the ...ceedings, which he might have pleaded in an earlier ſtage. Earle v. Hinton, 2 Str. 732. and ...ſ *ſupr.*—In *aſſumpſit* againſt an executor, he pleaded *non aſſumpſit* and *plene adminiſtravit*; it ...s inſiſted, that if the plaintiff could prove aſſets unadminiſtered, to any amount, he muſt have ...gment for the whole. But Lord Mansfield ſaid, the law had been underſtood to be ſo, and ...y caſes decided to that effect; but that he thought it abſurd and wrong, that the plaintiff ...ld recover of the executor *more than the aſſets in his hands*; and the judgment was given ac...ingly. Harriſon v. Beecles, Guildh. Tr. 1769, cited by Lord Kenyon, 3 Term Rep. 688. Thus, where to three ſeveral actions an executor pleaded that he had no aſſets *ultra* 100*l.*, and ...gment was had upon each action for 100*l.*, equity refuſed an injunction. Anon. 1 Vern. 119. ...here he had pleaded a falſe plea, by the miſtake of his attorney, as alleged, and a verdict ...paſſed againſt him, equity would not relieve him, though the merits had never been tried. ...phenſon v. Wilſon, 2 Vern 325. However, in the caſe of Robinſon v. Bell, 2 Vern. 146., ...ere the attorney had, by miſtake, pleaded a different plea from that which he was directed to ...d, and the executor had confeſſed a mortgage to the teſtator, which afterwards turned out ...e worth nothing, upon which confeſſion a verdict had been given againſt him, the court ...ought fit to relieve. And in that caſe Lord Commiſſioner Hutchins mentioned two inſtances ...ere the court had interpoſed in behalf of executors after verdicts on *ne unques executor*.—Under ...e circumſtances of the anonymous caſe above cited from 1 Vern. 119., the executor may now ...end himſelf at law, without reſorting to equity, by pleading to one action *plenè adminiſtravit* ...ter a certain ſum, and afterwards to the others, though brought in the ſame term, the like ...a of *plenè adminiſtravit præter* the ſame ſum, and as to that ſum that he had confeſſed it in the ...er action. Waters v. Ogden, Dougl. 452.

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(*But if an*) If an executor pleads a former judgment had againſt him by another perſon, and aſſets *ultra*, and the plaintiff reply *per fraudem*, and it be ſo found, yet ſhall the judgment ...y be *de bonis teſtatoris*. Bull. N. P. 144.

(*But in the caſe*) But after the plaintiff hath taken ſuch judgment, he ſhall not in a ſubſequent ...on againſt the executor, ſuggeſting a *devaſtavit*, be allowed to go into evidence of aſſets having ...n in the defendant's hands before that judgment; for by ſo taking his judgment, he admits ...t the defendant hath fully adminiſtered to that time. Bull. N. P. 169. In a *ſcire facias* ...refore on the judgment, he muſt not pray execution of aſſets generally, but of thoſe only ...ich have come to the executor's hands, ſince the former judgment. Mara v. Quin, 6 Term ...p. 1. But if the executor receive aſſets between the time of the plaintiff's ſuing out the writ ...the firſt action and the judgment, the judgment will be amended by being made a judgment as

of that term when the plaintiff could, at the ſooneſt, have entered it up, unleſs the defendant can ſhew that in point of fact ſome injuſtice will be done by it in the particular caſe. *Ibid.*

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(*So if A.*) Forbearance ſeems a good conſideration for a promiſe by an executor to pay a debt of his teſtator. Keech v. Kennegal, 1 Vez. 125.

(N) What Actions Executors or Adminiſtrators may bring in Right of thoſe they repreſent.

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(*So if a lord*) Evelyn v. Chicheſter, 3 Burr. 1717. *acc.*

Doe v. Porter, 3 Term Rep. 13. The perſonal repreſentative of a tenant from year to year as long as both parties pleaſe, may maintain an ejectment, for it is a chattel intereſt which veſts in him.

(O) How ſuch Actions muſt be laid: And therein of joining a Matter in Right of the Teſtator and in their own Right, in the ſame Action.

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(*An executor*) 2 Str. 1271. 4 Term Rep. 480. But it is the conſtant practice to join in the ſame declaration ſeveral counts for money had and received by the defendant to the uſe of the teſtator, and to the *uſe of the executor as ſuch*. Petrie v. Hannay, 3 Term Rep. 660.

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(*Alſo executors*) So, in an action on a judgment obtained by them. Crawford v. Whittal, Dougl. 4. note. Bonafous v. Walker, 2 Term Rep 128. But where the goods of the teſtator never were in the poſſeſſion of the executors, they muſt declare in that character. And if the goods when recovered will be aſſets in their hands, they muſt ſue for them in that character, whether the converſion happen before or after the teſtator's death. 4 Term Rep. 281.

Munt v. Stokes, 4 Term Rep. 565. So, where executors pay money which they were not obliged to pay, and afterwards bring an action to recover it back, they muſt declare in their own, and not as executors.

King v. Thom, 1 Term Rep. 487. If a bill of exchange be indorſed to *A.* and *B.* as executors, they may declare as ſuch in an action on the bill againſt the acceptor.

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(*But where*) It is ſufficient to ſtate that the defendant is adminiſtrator. Holiday v. Fletcher, 2 Ld. Raym. 1510. 2 Str. 781. S. C. 1 Barnard. 29. S. C. Wade v. Wadman, 1 Barn. 167.

If a plaintiff declare as adminiſtrator, where he needs not, the want of profert is no objection, even on a ſpecial demurrer. (*But this is*) Which ſtatute, by 4 *Ann. c.* 16., is extended to judgment by confeſſion, *nihil dicit*, or *non ſum informatus*. And it is further enacted by this laſt ſtatute, that this omiſſion of a *profert* ſhall not impede the judgment, except the ſame ſhall be ſpecially and particularly ſet down and ſhewn for cauſe of demurrer. Crawford v. Whittal, Dougl. 4. n.

. Term Rep. 565. If there are ſeveral executors named, one cannot ſue alone, until the others have releaſed.

(P)

(P) Of Actions and Remedies againſt Executors and Adminiſtrators: And herein,

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(*Trover lies*) Trover will not lie againſt executors upon a converſion by the teſtator, in reſpect of the form of the plea. Hambly v. Trott, Cowp. 375.

Actions ſurvive againſt an executor, or die with the perſon, either on account *of the cauſe of action*, or on account *of the form of action*. As to the former, where the cauſe of action is money due, or a contract to be performed, gain or acquiſition of the teſtator, by the work and labour, or property of another, or a promiſe of the teſtator, expreſs or implied; where theſe are the cauſes of action, the action ſurvives againſt the executor. But where the cauſe of action is a tort, or ariſeth *ex delicto*, ſuppoſed to be by force and againſt the king's peace, there the action dies; as battery, falſe impriſonment, treſpaſs, words, nuiſance, obſtructing lights, diverting a water courſe, eſcape againſt the ſheriff, and many other cauſes of the like kind.—As to the latter—in ſome actions the defendant could have waged his law; and therefore, no action in that form lies againſt an executor. But now, other actions are ſubſtituted in their room upon the very ſame cauſe, which do ſurvive and lie againſt the executor. No action where in form the declaration muſt be *quare vi et armis, et contra pacem*, or where the plea muſt be that *the teſtator* was *not guilty*, can lie againſt the executor. Upon the face of the record the action ariſeth *ex delicto*; and all private criminal injuries or wrongs, as well as all publick crimes, are buried with the offender. Cowp. 375. *per* Lord Mansfield.

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(*Therefore by the*) But in the caſe of Hammond v. Gatliffe, Andr. 252., the court ſtrongly inclined to think, that an executor *de ſon tort* is not liable for a *devaſtavit* committed by the firſt executor *de ſon tort*, either at the common law, or by theſe ſtatutes.

4. Where Executors and Adminiſtrators ſhall be excuſed from Coſts.

In an action by an executor or adminiſtrator, the plaintiff not being liable to coſts, the defendant was not allowed formerly to bring money into court; but now it is otherwiſe, and the effect of the rule will be not to make the plaintiff pay, but only loſe his coſts. 2 Salk. 596. 2 Str. 796.

Executors and adminiſtrators are holden liable to pay the coſts of a non-pros, but not of a nonſuit: the former is imputable to themſelves; the latter may be the effect of their ignorance of the nature and extent of the teſtator's or inteſtate's demand. But, where the cauſe of action accrues ſubſequent to the death of their teſtator or inteſtate, there, this ground of action fails them, and if they are nonſuited, they muſt pay the coſts: they are not entitled to the protection of the character they have aſſumed, or they ought not to have ſued in it; they ſtand therefore merely in the ſituation of common plaintiffs, Higgs v. Warry, 6 Term Rep. 654. Bollard v. Spencer, B. R. Tr. 37 G. 3.

5. Executors and Adminiſtrators excuſed from putting in Special Bail.

Where an executor hath perſonally promiſed to pay a debt or legacy, it ſeems, that he may be holden to bail on ſuch promiſe. Mackenzie v. Mackenzie, 1 Term Rep. 716.

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Extinguiſhment.

Wilſon v. Kennedy, Eſpin. Caſ. 245.

IF money is due for goods ſold, or upon any ſuch like account, and a promiſſory note is given for the account of the debt, which note, afterwards, upon action brought, appears not to have the proper ſtamp upon it, ſo that it cannot be given in evidence, the party may reſort to evidence on the goods ſold, or the demand upon account of which the note was given: for a promiſſory note is not like a bond, which merges the demand.

Page 452 (*Alſo the*)

(D) Of the Extinguiſhment of Debts.

1 Ld. Raym. 680. 1 Burr. 9.

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Fairs and Markets.

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(A) Of the Right to a Fair or Market: And herein,

(*The firſt*) The reaſon why a fair or market cannot be otherwiſe claimed, is not merely for the ſake of promoting traffick and commerce; but alſo, for the like reaſon as in the *Roman* law; for the preſervation of order, and prevention of irregular behaviour. "*Jus Nundinarum oritur a principe, quia ubi eſt multitudo, ibi debet eſſe rector.*" *Per* Wilmot, J. 3 Burr. 1812. 1 Bl. Rep. 580. *Vide l.* 1. *ff. de nund. l.* 1. *C. de nund. et mercat.*

(D) Of Toll and other Duties which Owners of Fairs and Markets are entitled to; And herein,

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(*b*) (*Toll payable*) But piccage and ſtallage ſeem rather improperly called *tolls*. Toll can only be due by grant, cuſtom, or preſcription: it is not incident of common right to a fair; it will not paſs under general words in a grant of a new fair, nor will cuſtom ſupport it in ſuch a fair. 2 Str. 1171. It is certain, and payable only on a ſale, unleſs by ſpecial cuſtom, by the buyer; but piccage and ſtallage are uncertain, payable whether the goods are ſold or not, and the owner of the ſoil is entitled to them of common right. Theſe are paid as a ſatisfaction for the uſe of the ſoil: Toll, properly ſo called, goes only, though not neceſſarily, with the right of market; but the right of market and the right of ſoil are things totally diſtinct. Stallage and piccage go with the ſoil to the youngeſt ſon where it is borough engliſh; whilſt the market deſcends to the heir at common law. Moor, 474. 1 Wilſ. 115. 2 Str. 1238 2 Inſt. 220. Treſpaſs, therefore, will lie at the ſuit of the owner of the ſoil againſt any one who who erects a ſtall without his licence, 1 Wilſ. 107. 2 Str. 1238. 2 Bl. Rep. 1116; but he cannot, in ſuch caſe, diſtrain the goods, as damage feaſant. 2 Ld. Raym. 1589. 1 Wilſ. 115.

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A claim of toll in ſpecie *for goods ſold*

(*But where*) And this is the proper remedy where goods are fraudulently ſold out of the market to avoid the tolls; for in ſuch caſe there can be no diſtreſs.

a market is supported, it seems, by evidence of a right to toll *for goods brought into the market*, and there sold; without shewing any right to toll for goods sold in the market, but not brought there. Moseley v. Pierson, 4 Term Rep. 104.

(E) How far a Sale in a Fair or Market-overt changes the Property of a Thing sold therein.

(*For the*) And in *London* every shop, in which goods are exposed publickly to sale, is market-overt for such things as the owner professeth to trade in, but in the country, the market-overt is confined to the particular place or spot of ground set apart by custom for the sale of particular goods. See cases *supr.* 2 Bl. Comm. 449. However, where the transaction is perfectly fair on the part of the vendee, though the dealing is out of the precincts of *London*, great allowances shall be made in analogy to the above-mentioned customs. Therefore, it seems, the property of goods may be changed, and effectually transferred to the buyer, by a *bonâ fide* sale, in a shop out of *London*, and that whether the shop-keeper is the vendor or vendee, if the goods are of the kind in which he trades. Harris v. Shaw, Ca. temp. Hardw. 349.—But the custom of *London* doth not extend to the case of a pawn. Hartop v. Hoare, 3 Atk. 44. 1 Wils. 8. S. C. 2 Str. 1187. S. C.

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(*By the* 21 *H.* 8. *cap.* 11.) There hath been no writ of restitution sued out these 200 years.

(*Since this statute*) If the goods are produced at the trial, and not restored, the owner may recover them by action of trover. Loft. 88. And though they should not be the very *identical* goods stolen, yet if they are the produce of those goods, the prosecutor is entitled to them. *Ibid.* Noy, 128. Cro. El. 661. But if stolen goods, before conviction of the felon, be sold *bonâ fide* in market-overt, the property is thereby changed; and though conviction revests the original ownership, and the owner has a right to restitution if he can find the possessor, and ascertain the specifick articles, yet he cannot maintain trover against one who was not in possession of them at the time of the conviction. Harwood v. Smith, 2 Term Rep. 750.

FEES.

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(A) In what Cases a Fee shall be said to be due.

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(*Also it is holden*) But an ancient fee may attach on a modern act of parliament; such, for instance, as a fee on an oath taken before a justice of the peace, or a judge at chambers; *per* Heath J. 2 H. Bl. 223.

(*All fees*) If an act of parliament recognizes a right to a fee, the *quantum* may be ascertained by usage, though not of ancient date. Fleetwood v. Finch, 2 H. Bl. 226.

(B) How much shall be said to be due.

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(*And for this purpose*) By 7 Geo. 3. c. 29., it is provided, "That this act shall not extend to "allow any sheriff, &c. any poundage, for taking the body of any person in execution upon any "process at the suit of any sheriff, or other officer or minister of the crown, upon any bail-bond "entered into for the appearance of any person prosecuted, either for any duties due or payable "to his majesty, or for any penalty inflicted by any act for the preventing of the clandestine "running or receiving any customable or prohibited goods; or in any case where the sheriff, &c. "would not be entitled to poundage if the proceedings were or had been carried on directly in "the name of the crown."

1. That

Woodgate v. Knatchbull, 2 Term Rep. 148.

1. That under this ſtatute, the ſheriff cannot take any other charge b that for the poundage.

Ibid.

2. That an action lies againſt the ſheriff for the penalty though the ex tortion were by the bailiff.

Alchin v. Wells, 5 Term Rep. 470.

3. That if the ſheriff levy under a *fi. fa.*, he is entitled to pou dage, though the parties ſhould compromiſe before he ſells any of th goods.

(1. *That though*) But the action muſt be in the name of the ſheri and not of the bailiff.

(8. *It ſeems*) By ſt. 3 Geo. 1. c. 15. § 17. the ſheriff ſhall not take poundage for executi any *ca ſa.*, where part of the debt hath been paid, for any greater ſum than what remains due t the plaintiff, who is to mark the ſame on the back of the writ, and the ſheriff, &c. is guilty extortion, and ſhall forfeit to the party grieved treble damages, and double the ſum ſo extorte and alſo 200*l.*

By ſtat. 3 Geo. 1. c. 15. § 16., no ſheriff, under-ſheriff, deputy-ſheriff, or their bailiffs, or th bailiff of any franchiſe or liberty, by reaſon of any writ of *habere facias poſſeſſionem aut ſeiſinam*, ſha take above 1*s.* per pound of the yearly value of any manor, &c. where the whole exceeds n 100*l.* per annum, and 6*d.* only for every 20*s.* above ſuch yearly value. And by 8 Geo. 1. c. 1 §5. no more is to be taken on an *extent* and *liberate*.

By ſt. 3 *Geo.* 1. *c.* 15. § 3. Sheriffs levying debts, *&c.* (except po fines) due to the crown, by proceſs of the pipe, or *levari facias*, ſha have 12*d. per* pound for any ſum not exceeding 100*l.* levied, and 6*d.* fo every 20*s.* above that ſum; and on proceſs by *fi. fa.* and *extent*, ſhall hav 1*s.* 6*d. per* pound for any ſum not exceeding 100*l.* levied; and 1*s.* p pound above that ſum; provided they anſwer the ſame on their account by a day to be fixed by warrant of the barons.

By § 13. No ſheriff or other perſon employed in levying, *&c.* debt to the crown, ſhall take any fee except 4*d.* only for an acquittance; an if a ſheriff, *&c.* demand or take any money for executing, or forbearin to execute ſuch proceſs, he forfeits treble damages and coſts to the part aggrieved, and double the ſum ſo extorted; which damages and penalti ſhall be given by the barons of the Exchequer in ſuch ſummary way they ſhall deem proper; provided the conviction be within two years afte the offence committed. Nevertheleſs, by § 14., the ſheriff may take ſuc poundage and allowance as are given by this act, and ſuch allowance a may be made by the Treaſury or Exchequer for any extraordinary ſervic to the crown.

R. v. Burrell, Bunb. 305.

The ſheriff may retain poundage, without waiting for an allowance of i in his account, and this upon an extent in aid. And his right to pou

R. v. Thomas Jetherell, Parker, 177.

dage may be determined upon motion.

R. v. Wade, Skin. 12. Sir Thomas Jones, 185.

The ſheriff hath been allowed poundage out of a fine (impoſed after con viction upon an indictment of battery in K. B.,) levied upon a *fi. fa.* for the barons of the Exchequer always make ſuch allowance after monie paid there by the clerk of the crown.

Rex v. Caldwell, Anſtr. 279. Rex v. Fry, *Id.* 358. Rex v. Jetherell, Parker, 177.

Where two extents iſſue into two different counties, the ſheriff wh completes his levy is entitled to his full poundage, nor can the ſheriff o the other county call for an apportionment. And the ſheriff may be fai to complete his levy, as well where the money is paid by the debtor b the compulſion of the levy, and to relieve himſelf from it, as where is raiſed upon a *venditioni exponas*. The poundage by the 9th ſection o th

the ſtatute of 3 *G.* 1. *c.* 15. is to be proportioned only where the ſeizure is by one ſheriff, and the goods are ſold by another. But a ſheriff is not entitled to any allowance for coſts and charges beyond his poundage. Rex v. Crackenthorpe, Anſtr. 412.

FELONY.

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(*Whoever becomes*) Sir Wm. Blackſtone defines felony to be an offence which occaſions a total forfeiture of either lands, or goods, or both, at the common law; and to which capital or other puniſhment may be ſuperadded, according to the degree of guilt. 4 Bl. Comm. 95. He therefore derives the word felony, from the *Saxon* ꝼeo, or ꝼeoh, fee, or feud; and the *German* ıoıı, price, as being a crime puniſhable with the loſs of the feud or benefice. *Ibid.* But as in petit larceny, the lands are not liable to eſcheat; and petit larceny hath always been ranked among felonies; a later writer ſeems inclined to derive it from ꝼælen, in the ſenſe of offending. 2 Wood. 510. It is to be obſerved, that the *Saxon* ꝼeo, or ꝼeoh, in its primitive ſenſe, ſignified money or goods; that it is, in a tranſlated ſenſe, an inheritance or feud. Lye's Sax. Dict. voc. Feo. Spelm. Gloſſ. *ubi ſupr.*

(A) Of What Nature the Things taken muſt be, to conſtitute the Offence Felony.

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(*Hence we have*) By 21 Geo. 3. c. 68, "Whoever ſhall rip, cut, break, or remove, with intent to ſteal any copper, braſs, bell-metal, utenſil, or fixture being fixed to any dwelling-houſe, out-houſe, coach-houſe, ſtable, or other building uſed or occupied with ſuch dwelling-houſe, or thereunto belonging, or to any other building whatſoever, or fixed in any garden, orchard, court-yard, fence, or outlet belonging to any dwelling-houſe or other building, or any iron rails or fencing ſet up, or fixed in any ſquare, court, or other place, (ſuch perſon having no title, or claim of title thereto); or whoever ſhall be aiding, abetting, or aſſiſting therein, or ſhall knowingly buy or receive the ſame, although the principal felon hath not been convicted of ſtealing the ſame, ſhall be guilty of felony, &c."

And by 5 *Geo.* 3. *c.* 25. § 17. and 7 *Geo.* 3. *c.* 50. § 2. "Whoever ſhall rob any mail in which letters are ſent or conveyed by the poſt, of any letter, packet, or bag of letters, or ſhall ſteal and take from any ſuch mail, or from any bag of letters ſent or conveyed by the poſt, or from or out of any poſt-office, or houſe or place for the receipt or delivery of letters or packets ſent, or to be ſent by the poſt, any letter or packet, although ſuch robbery, ſtealing, or taking ſhall not appear or be proved to be a taking from the perſon, or upon the king's highway, or to be a robbery committed in any dwelling-houſe, or any coach-houſe, ſtable, barn, or any out-houſe belonging to a dwelling-houſe; and although it ſhould not appear that any perſons were put in fear by ſuch robbery, ſtealing, or taking, yet ſuch offenders ſhall be deemed guilty of felony, and ſuffer death without the benefit of clergy."

(C) What ſhall be ſaid to be a felonious and fraudulent Taking.

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(*But though*) Where *A.* intending to go a diſtant journey, hires a horſe, fairly and *bonâ fide*, for that purpoſe, and evidences the truth of ſuch intention by actually proceeding on his way, and afterwards rides off with the horſe, it is no theft; becauſe the felonious deſign was hatched ſubſequent to the delivery, and the delivery being obtained without fraud or deſign, the owner parted with his poſſeſſion as well as his property; *O. B.* 1784, p. 1294, and thereby gave to *A.* dominion over the horſe, upon truſt, that he would return him when the journey was performed *O. B.* 1786, p. 333-4. But if the delivery of property be obtained with a pre-concerted deſign, to

to steal the thing delivered, although the owner, in this case, parts with the thing itself, he still retains, in law, the constructive possession of it. And where the delivery of property is made for a certain, special, and particular purpose, the possession, except for such purpose, is still supposed to reside, unparted with, in the first proprietor. See several instances, 1 Hawk. P. C. c. 33. § 5. note 6th edition.

(*It was formerly*) The offender must be a lodger at the time the larceny is committed. O. B. 1785. No. 74. The indictment also must set forth the name of the person by whom the lodgings were let. O. B. 1784. No. 747. And the property stolen must be such as may reasonably be construed the furniture of the sort of lodging taken. 1 Hawk. P. C. c. 33. § note.

To the foregoing larcenies by breach of trust by lodgers and men servants, the legislature has added two others, *viz.* by officers or servants employed to transact the business of the bank of *England* stat. 15 G. 2. *c.* 13. § 12.; and by officers or servants employed in the post office stat. 5 *Geo.* 3. *c.* 25. § 17. and 7 *Geo.* 3. *c.* 50.

(D) What shall be said to be a carrying away.

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(*Also where a person*) A man was detected in taking a bale of goods in a waggon. It appeared that the bale lay horizontal and that he had set it on its end. As it had not been removed from the *spot*, it was holden, on a case reserved, that it was not a sufficient carrying away. But where a man, with a felonious intention, had removed goods from the head to the tail of a waggon, was adjudged to be a sufficient removal to constitute a carrying away. O. B. 1784. So, a diamond ear-ring snatched from a lady's ear, but lodging in the curls of her hair, and not taken by the thief, was holden to be a sufficient asportation. O. B. 1784. 1 Hawk. P. C. c. 33. § 18. note 6th edition.

(F) Of what Value the Things must be; And herein of the Difference between Grand and Petit Larceny.

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(*Also if one*) But it is now settled, that the stealing must be to that amount at one and the same particular time.

(H) Where the Offender is to be transported.

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(*It is enacted*) Though transportation was not established by legislative authority before 4 G. 1., yet long before that time, (probably from the original planting of colonies in the *West Indies*) transportation was frequent, as appears from the introduction to Kelynge's Reports. *Per* Cur. J. 2 H. Bl. Rep. 223.

It is provided by the 8 *Geo.* 3. *c.* 15. that where any offender shall be convicted without benefit of clergy, and the judge shall grant a reprieve if the king shall afterwards pardon such offender on condition of transportation, and such intention shall be signified by a secretary of state, the judge recommending mercy, such judge may make an order for the immediate transportation of the offender, in like manner as if such intention had been signified during the continuance of the assizes at which the offender was convicted.

In consequence of the defection of the *American* colonies, the law upon this subject have undergone considerable alterations, for which

ſtatutes of 19 *Geo.* 3. *c.* 74. 24 *Geo.* 3. *ſeſſ.* 2. *c.* 56. 25 *Geo.* 3. 6. 27 *Geo.* 3. *c.* 2. 28 *Geo.* 3. *c.* 24. 30 *Geo.* 3. *c.* 4. and 34 3. *c.* 60.

Feoffment.

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) Of the Charter of Feoffment: And herein, what Things are neceſſary to the making of a perfect Charter, and how far the Charter governs the Livery which is relative to it.

T is now of very little uſe, being only inſerted by cuſtom: it was formerly uſed to ſignify the tenure by which the eſtate granted was to holden, *viz. tenendum per ſervitium militare, in burgagio, in libero ſocca- &c.*; but all theſe being reduced by ſtatute 12 *Car.* 2. *c.* 24. into free common ſocage, the tenure is now never ſpecified.

4. Next follows the *reddendum*, which is that by which the grantor create or reſerve ſome *new* thing to himſelf out of what he had before granted See tit. *Rent.*

5. The clauſe of warranty. A warranty is a covenant real, annexed to lands or tenements, whereby a man and his heirs are bound to warrant the ſame lands, and to render in value, if they are evicted by a former title. See tit. *Warranty.*

6. Of the *cujus rei teſtimonium*, comprehending the ſealing. This clauſe is not neceſſary, though ſealing be of the eſſence of a deed, for if a thing be not ſealed, it is not a deed. Co. Lit. 6. a. 7. a. 2 Co. 5. a.

The practice of ſealing came into this country with the *Normans*; ſome indeed, among whom is Sir *Edward Coke*, have ſuppoſed that it obtained ſome degree in the time of the *Saxons*, a miſtake which hath proceeded from not knowing that the croſſes (with which both principals and witneſſes then ſigned) were indifferently called *ſigna* and *ſigilla*. This mode of authenticating inſtruments ſoon became of general uſe; though it is certain that there were ſeveral conveyances, which, down as low as the reign of *Edw.* the 3d, were admitted as good and legal, when otherwiſe well atteſted, although they never had any ſeals affixed to them; theſe being the grants of thoſe who ſtill adhered to the old *Saxon* mode, and retained the ſubſcription of names and croſſes. And mankind might, perhaps, ſafely rely upon the authority of ſeals, whilſt ſigners were carefully preſerved, and the arms or impreſſions were appropriated: but as population increaſed, and the ſame arms were indiſcriminately uſed by numbers, the evidence of ſeals only muſt neceſſarily become uncertain and unſatisfactory: the ſtatute of 29 *Car.* 2. *c.* 3. revives, therefore, the old *Saxon* cuſtom, and expreſsly directs the ſigning, in all grants of lands, and many other ſpecies of deeds. It hath indeed been formerly holden, that ſealing is a ſigning within the ſtatute, a doctrine which would have diſappointed the intent of the legiſlature, and which the better judgment of later times hath exploded. 1 Leon. 25. Spelm. Gloſſar. voc. Sigillum et ſignum. Co. Lit. 70. a. Nicholſ. *Engliſh* Hiſtor. Libr. 242. 3 Lev. 2 Str. 764.

7. Of

Co. Lit. 6. a. 2. Co. 5. a. 3 Leon. 100. 2 Roll. Abr. 27. Yelv. 194.

7. Of the date.—The date is not essential to a deed; for if it ha date, or a false or impossible date, the deed shall be good, and shall effect from the time of the delivery.

So, if it hath the day of the month, but no year is mentioned, fo is a void date: and in such case it may be pleaded to have been deli at some other day than that mentioned in it.

1 Burr. 60.

If two deeds bear date the same day, and are evidently but one a ment, that shall be presumed to be executed first, which will suppor clear intent of the parties.

2 Inst. 77-8. 2 Bl. Com. 307.

8. Lastly, the *his testibus*. The attestation or execution of a dee the presence of witnesses is necessary, rather for preserving the evid than for constituting the essence of the deed. This clause of *his te* was formerly introduced as well in the king's grants as in the d of subjects; in the former however it hath been long discontin the king attesting his patent himself; and it was entirely disus the latter in the reign of *Henry* 8., since which time the witnesses subscribed their attestation either at the bottom, or on the back o deed.

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Fines and Amercements.

(C) In what Actions or Proceedings there ou to be a Fine or an Amercement: And herein.

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(*In an action*) Such an abatement is now prevented by 8 & 9 W. 3. c. 11. § 7.

(G) Of the Reasonableness of an Amercem and the Assessment thereof: And herein,

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(*Before the statutes*) Fitzgib. and 1 Wilf. 248. *acc.*

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Fines and Recoveries.

(*A fine is an*) But this was not on account of the acknowledgment thereof in a court record, for no such acknowledgment is made in any of the ancient fines; but because land quired in this manner were supposed to be recovered by sentence of a court of justice, and possession was delivered by the sheriff, in pursuance of a writ delivered to him for that purp Cruise on *Fines*, 6.

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(*From an*) Mr. Cruise thinks, that the idea of a fine was originally taken from the tra of the civilians; and therefore dates their antiquity no higher than the reign of *Stephen*, or immediate successor, *Henry* II. Cruise on Fines, 7., &c.

(A)

of the ſeveral Parts of a Fine, and when they begin to operate.

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e next) Formerly the poſt-fine, or king's ſilver, was paid at the king's ſilver-office; but ow paid at the alienation office, by the ſtat. 32 Geo. 2. c. 14. *quod vide.*

on the entry) When a year and a day has elapſed from the date of the caption, or acknowledgment of a fine, without entering the king's ſilver, an affidavit muſt be made, that all who depart with any intereſt by the fine are ſtill living, otherwiſe the king's ſilver will not ceived. And now that the king's ſilver is paid at the alienation-office, if a year elapſes e the fine is carried to the king's ſilver-office, an affidavit muſt be made, that the parties alive when the king's ſilver was paid. Barnes, 215. Cruiſe on Fines, 25.

he king's ſilver, it muſt be remembered, is not payable until the re- day of the writ of covenant: if therefore any of the parties die be- that time, the fine will be void. Wright v. Mayor of Wickham, Cro. Eliz.

ckell v. Hodgkinſon, 3 Mod. 99. Clements v. Langharne, 2 Ld. Raym. 872. Cookman nar, Sir T. Raym 461. Price v. Davis, Comb. 57. 71. Watts v. Birkett, Barnes, 220. 115. S. C.

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he note) A fine may be engroſſed at any time after it is levied. 4 Leon. 96. Dy. 254. a.

he chirograph of a fine is evidence to all perſons, and in all courts of fine; becauſe the chirographer being an officer appointed by the law he purpoſe of tranſcribing fines from the record, his copies muſt be ed to be authentick. Bull. N. P 229.

(B) The ſeveral Sorts of Fines.

ſt part) This fine is executed as to the firſt part, and executory as to the ſecond; for if the art was not executed, it would be void, as the cognizee can have nothing to render to the ee till he is in poſſeſſion. Cruiſe on Fines, 73. If the party to whom the eſtate was d by a fine executory was in poſſeſſion at the time when ſuch a fine was levied, he need not a writ of *habere facias ſeiſinam*; for in that caſe the fine would enure by way of extinguiſh- Touchſt. 4. So, if a fine executory was levied of a reverſion depending on an eſtate for years, or of a ſeignory, or any thing which lay in grant, they would paſs immediately, e it would be impoſſible to give actual poſſeſſion of them. 1 Co. 97. a.

his fine) This ſpecies of fine hath been called a feoffment of record; but this expreſſion is means accurate; for there are caſes in which a feoffment hath a more extenſive operation fine, Co. Lit. 50. 1 Salk. 339. 3 Atk. 141.; and therefore, Sir W. Blackſtone hath ſaid, might, with more accuracy, be called an acknowledgment of a feoffment or record. 2 Bl. . 348. But this perhaps is not making a very ſubſtantial diſtinction. 2 Wooddeſ. 309.

(C) Who may levy Fines.

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s to ſome) And the ſtatutes 11 H. 7. c. 20. & 32 H. 8 c. 28. & c. 36.

o perſon can levy a fine of lands that will affect ſtrangers, unleſs he leaſt an eſtate of freehold in them, either by right or by wrong; herwiſe it might be in the power of any two ſtrangers to deprive a perſon of his eſtate, by levying a fine of it, ſo that in every caſe e a fine is levied, and none of the parties to ſuch fine have any eſtate Touchſt. 14. Weſt. Symb p. 2. § 13.

of

of freehold in the lands whereof the fine is levied, it will only bi parties themſelves, and their heirs, but may at any time be ſet aſide real owners by pleading that neither of the parties had an eſtate of hold in the lands at the time when the fine was levied.

3 Co. 77. b. Hence, therefore, if a perſon who is only poſſeſſed of lands for of years, or who holds them by a ſtatute merchant, ſtatute ſtaple, o of *elegit*, or is tenant at will, levies a fine, it will have no effect wh as to ſtrangers.

Ld. Townſend v. Aſh, 3 Atk. 336. (a) Co Cop. § 55. Upon the ſame principle, a fine levied before entry or receipt will be void. So, if a fine be levied by a copyholder of his copyhol becauſe the freehold is in the lord.

Carter v. Barnardiſton, 1 P. Wms. 505. But a perſon having a defeaſible right only to lands, may, notwith ing, levy a fine of them, which cannot be ſet aſide by the plea that of the parties had an eſtate of freehold in the lands.

1 Ch. Ca. 213. Ca. temp. Talb. 43. So a *ceſtuy que truſt* may levy a fine of his truſt eſtate, although only tenant at will to his truſtees; for it is now ſettled in equity, th legal conveyance or aſſurance by the *ceſtuy que truſt*, ſhall have the effect on the truſt eſtate, as it would have had on the legal eſtate, truſtees had conveyed it to the *ceſtuy que truſt*. If it were not ſo, tr by refuſing, or by not being capable of executing their truſt, might p a *ceſtuy que truſt* tenant in tail from exerciſing the power given him law over his eſtate, which would tend to the introduction of pe ties.

3 Co. 29. b. So, a fine levied by a vouchee to the demandant, or a fine from t mandant to the vouchee, will be good; becauſe in law the vouc ſuppoſed to be tenant of the land, though in fact he never is ſo a ſent.

13 Vin. Abr. 228. An alien, not being capable of holding lands, ought not to be p ted to levy a fine: but if he does levy a fine, it will not conclude th after office found.

Co. Read. 7. Corporations aggregate cannot levy fines; becauſe, as they are in they can only appear by attorney; whereas the ſtatute *de modo levand* requires that the parties to a fine ſhall appear perſonally before the j But Sir *Edward Coke* ſaith, that a ſole corporation may acknow fine.

By the ſtatutes 11 *H.* 7. *c.* 20. and 32 *H.* 8. *c.* 28. women ſe jointures or eſtates tail of the gift of their huſbands, and huſbands *jure uxoris* are prohibited from levying fines of ſuch eſtates. And th bling ſtatutes, which prevent eccleſiaſticks from alienating their c lands for any longer time than three lives, or twenty-one years, by ſary implication prohibit them from levying fines.

Weſt Symb. p. 2. § 13. Perſons outlawed, or waved in perſonal actions, may alien by fin their eſtates ſtill remain in them, although they have forfeited the rent profits.

Stevens v. Winning, 2 Will. 219. A perſon who hath committed murder may, it ſeems, before conv levy a fine, if the deed to lead the uſes be prior to the time of comm the offence.

(D)

(D) Of the *Dedimus Poteſtatem.*

ſtatute) This ſtatute, as it is called, is not properly a legiſlative act, but is merely a writ to the juſtices of the bench, for their government in taking the acknowledgment of 2 Reeves, 304.

by cuſtom, the judges of aſſize may, in their circuits, take the acknowledgment of fines without any writ of *dedimus poteſtatem*, on account great confidence which the law placeth in their judgment and integrity: in ſuch caſes, however, a writ of *dedimus poteſtatem* ought to be ſued bearing date before the acknowledgment of the fine; although, if the *dedimus poteſtatem* is teſted after the date of the acknowledgment, the fine will be ſupported. Jenk 227. Dy. 224. b. Cro. El. 275.

commiſſioners) They are required by ſtat. 23 El. c. 23. § 5. to certify the acknowledgment of the fine within twelve months after it is taken, and alſo to certify the year and day when it was acknowledged. Page 528

the writ of *dedimus poteſtatem* recites, that a writ of covenant is depending between the parties, it ſhould bear date after the writ of covenant; will be error. But (*u*) if it be teſted on the ſame day with it, the will be valid. Touch. 5. Co. Read. 9. 1 Roll. Rep. 223. Cro. Eliz. 740.

1 Roll. Abr. 794. (*a*) Cro. Eliz. 677. Cro. Ja. 11. 5 Co. 47. b.

a rule of the court of Common Pleas made in *Hil.* 13 *Geo.* 1. it was diſ, that no fine acknowledged before commiſſioners ſhould be allowed to unleſs ſome perſon, who was preſent when the fine was acknowledged, appear perſonally before the lord chief juſtice of the court, and be ed upon oath touching the execution thereof. Wilſon, 82. *Vide* Deanv. Tidmarſh, Barnes, 143

is rule having been found by experience to be attended with inconcies, and not having anſwered the good purpoſes for which it was ed, the court made the following rules:

ry 17 *Geo.* 2. "It is ordered, That inſtead of an oath made *viva* of the due acknowledgment of fines, an affidavit in writing on chment ſhall be made and annexed to every fine, in which the perſon ing the ſame ſhall ſwear that he knew the parties acknowledging ſuch ; that the ſame was duly ſigned and acknowledged, that the party parties acknowledging, and alſo the commiſſioners taking the ſame, e of full age and competent underſtanding; that the feme coverts any) were ſolely and ſeparately examined apart from their huſbands, freely and voluntarily conſented to acknowledge the ſame; and that cognizor or cognizors, and every of them, knew the ſame to be a to paſs his or their eſtate or eſtates, which fine, together with ſuch davit annexed, ſhall be tranſmitted to the lord chief juſtice, or ſome er juſtice of this court, for his *allocatur* thereon, and ſuch affidavit ll remain annexed to ſuch fine, and be left with the ſame in the prooffice: and it is ordered, That every ſuch affidavit, except where perſons, at the time of their acknowledging the fine, are in *Ireland*, in ſome other parts beyond the ſeas, ſhall be made by ſome attorney the courts of *Weſtminſter-hall*." Wilſon, 85.

ry 26, 27 *Geo.* 2. "It is ordered, That in the affidavits made in rſuance of the preceding rule, the perſon or perſons ſo making the Wilſon, 89.

"ſame

" ſame ſhall ſwear, that the fine was duly ſigned and acknowledged
" the day and year mentioned in the caption; and if there be any
" or interlineation in the body or caption of ſuch fine, that ſuch ra
" interlineation was made before the party or parties ſigned the ſa
" and before the caption was ſigned by the commiſſioners."

Say v. Smith, Barnes, 217.

Theſe rules have in ſome inſtances been diſpenſed with, and (a) ticularly where fines have been acknowledged out of the kingdom.

(a) Fleetwood v. Calenda, *id.* 219. Heathcock v. Hanbury, *id.* 217. Seton v. Sinclair, 2 Bl. Re

By the ſtatute 34, 35 *Hen* 8. *c.* 26. § 40. it is enacted, That fine and may be taken before the juſtices of *Wales*, of lands, tenement hereditaments, ſituated within their juriſdiction, by force of their commiſſion, without any writ of *dedimus poteſtatem*, to be ſued for the in like manner and form as is uſed to be taken before the king's chief of his Common Pleas in *England*.

(F) Of the Operation of a Fine in barring Strangers, or thoſe who have but an uncertain Intereſt, as a Term for Years, or barely an equit Intereſt.

Plowd. 366.

IF an infant be in his mother's womb when a fine is levied, he allowed five years from the time he attains his full age to make his for although he is not comprehended within the letter of the act, only mentions infants under the age of twenty-one years, and therefo not extend to thoſe who are unborn, yet they are within the inten the act, and will be aided by the exception.

Idem, 375.

If a perſon labours under ſeveral diſabilities at the ſame time, woman is covert, under age, of inſane mind, and in priſon, at a time the fine is levied, or when a right accrues to her, and one or more o diſabilities are removed, ſtill the five years given by the ſtatute w commence until all her diſabilities are entirely removed.

Doe v. Jones, 4 Term Rep. 301.

It is now ſettled, notwithſtanding ſome old opinions to the contrar when once the five years allowed to perſons labouring under diſabiliti avoid a fine, begin, the time continues to run notwithſtanding any quent diſability.

See Cruiſe on Fines, 258., &c.

But if a perſon to whom a right accrues to lands whereof a fin been levied, labours under any of the diſabilities, ſpecified and ex in the ſtatute 4 *Hen* 7., and dies before his diſabilities are remo ſeems to be a doubtful point, whether the heir of ſuch perſon be obli make his claim within five years after the death of his anceſtor, or lowed an indefinite time for the purpoſe.

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(*It is a rule*) This poſition, that no fine will bar any intereſt which is not *deveſted and right* is too general, if the words *deveſted and put to a right*, are underſtood in their ſtrict ſenſe. See Cruiſe on Fines, 289., where the learned author ſhews the general rule to be, eſtate or intereſt can be barred by a fine unleſs it is deveſted out of the real owner, either the fine is levied, or by the operation of the fine itſelf, that is, unleſs the real owner is out of poſſeſſion of ſuch eſtate or intereſt, and that while he continues in poſſeſſion, a fi not affect him.

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here he) And in the case of Deighton v Grenville, 2 Ventr. 333. 1 Show. 36. Skin. all the judges agreed, that although the cognizees of statutes-merchant did not enter, yet ey had possession in law, in consequence of their extents and *liberates*, which gave them a entry, and therefore they might be barred by a fine. However, they cannot be barred ey have extended the lands, or pursued their rights in some other manner, for until then ve no right to enter on the lands, and, therefore, cannot be put out of possession, 1 17.

e estate of a devisee may be barred by a fine and non-claim if the has not entered:

s where *John Metcalf* devised lands to *John Gallant*, an infant of e of three years, in fee; the son and heir of *John Metcalf* entered lands, and levied a fine of them; and *John Gallant* the infant died be attained his full age, leaving a sister, who was then married; the were of opinion, that the sister must make her claim within five years e death of her husband, otherwise the fine would bar her. Hulm v. Heylock, Cro. Car. 200.

tle of entry for a condition broken may be barred by a fine levied by ntee or devisee of the conditional estate.

s, where lands were devised to trustees and their heirs, upon con- that they should pay a certain sum of money every year for the sup- a schoolmaster, *&c.*; and, on non-performance of the trusts, the were devised over to other persons; the trustees neglected to per- e trusts, and levied a fine of the lands; it was determined that the a good bar to the persons who had a title to enter on breach of the on. Mayor of *London* v. Alsford, Cro. Car. 575. 1 W. Jones 452.

tle of entry for a condition broken may also be barred by a fine levied grantor of the conditional estate: as if a person makes a feoffment dition, and before the condition is broken, the feoffor levies a fine same lands, either to the feoffee, or to any other person, the con- will be thereby discharged for ever. But if the fine was levied for pose of corroborating the conveyance by which the condition was , it will not destroy the condition; for in that case the fine and con- e will be construed together, and will operate as one assurance. Shep. Tou, 154. Cromwell's case. 2 Rep. 69.

ems, that a right or title of entry on any other account may also be y a fine. Thus where *Humphrey Mackworth* was seized to him heirs, provided that if a hundred pounds was not paid within three after the birth of a child, the trustees should enter; the money paid; so that the estate of *Humphrey* being with a *quousque* ceased, trustees did not enter: *Humphrey* conveyed away the lands by lease ease, and levied a fine; after which five years passed: Lord Chief *Bridgeman* delivered the opinion of the court, that the entry of the was barred by the fine. Thomasin v. Mackworth, Carter, 75.

ower appendant, or in gross, may be barred by a fine levied of the which the power relates, by the person to whom such power is ; because, by the fine, the person acknowledges all his right and in the lands to be vested in another; and therefore it would be re- to that acknowledgment that he should ever afterwards claim any ver those lands. Besides, a power appendant, or in gross, being the old dominion, is considered as an interest, which may be re- 1 Inst. 237. a. 3 Rep. 83. a.

Thus where *Christopher Digges*, being seised in fee, covenanted to sed to the use of himself for life, remainder over, reserving to him- ower of revocation, by deed indented and enrolled; and *Christopher* revoked the uses; but, before the deed of revocation was enrolled, Digges's case, 1 Rep. 173.

he

he levied a fine; it was resolved that the fine being levied before the rolment of the deed of revocation, until which time the revocation imperfect, had destroyed the power.

1 Inst. 215. a. Tou. 501. A power of revocation may also be destroyed in part, by levying a of part of the land, and yet the power will continue good as to the due.

Herring v. Brown, 2 Show. 185. 1 Ventr. 368. Carth. 22. Comb. 11. Skin. 184. If a person who has a power appendant, or in gross, levies a fine o lands to which the power relates, and afterwards by deed declares that fine shall enure as an execution of his power, the fine and declaratio uses will in that case be considered as one assurance, and will not de the power.

1 Freem. S. C. Doe v. Whitehead, Dougl. 45. S. P.

A power collateral to the land, which is not joined with an int cannot be destroyed by a fine, levied by the person to whom such a p is reserved; because it is considered as a bare and naked authority, cannot be released or devested. Thus it is said by Lord Chief J

1 Inst. 237. a. 1 Rep. 174. a. *Popham*, in *Digges*'s case, that if a feoffment was made to *A.* in f divers uses, with a proviso that it should be lawful for *B.* to revoke uses, *B.* could not in that case release his power, nor extinguish or de it by a fine, because it was a collateral power; for the land did not from him, nor would the party have been in by him, if he had exec the power.

Willis v. Shorrall, 1 Atk. 474. It follows from the same principles that a collateral power cann barred by the fine of a stranger. Thus where a person by a proviso i marriage-settlement gave his wife a power to dispose of one hundred po to such persons as she should appoint, to be paid within one year after decease; and in default of payment one *John Moreton* was empower make a lease of certain lands to raise that sum; the wife, in a year the death of her husband, made an appointment of this sum, but it not paid; the heir of the husband levied a fine of the land, and five passed, and afterwards the appointees of the one hundred pounds bro their bill to be paid that sum; Lord *Hardwicke* observed, that althoug the several statutes relating to fines, all right, claim, and interest w strangers had, were barred by a fine, yet that such a stranger as *Moreton*, who had no interest, but only a bare naked power, and could not have made an entry, was not affected by it.

Bartholomew v. Bellfield, Cro. Jac. 332. A fine and non-claim is a good bar to a writ of error, in consequ of the word, actions, in the second saving of the statute, 4 *Hen.* 7. fine is also a good bar to a writ of error to reverse a common recovery.

Deighton v. Grenville, 2 Ventr. 333. 1 Show. 36. Skin. 260. S. C. Lords Journals, vol. 16. p. 454. 26th *April* 1699. If lands are extended on two statutes, and the person who is seis the land levies a fine; though the cognizee of the first statute must his claim within five years after the fine has been levied, otherwise he be for ever barred; yet the cognizee of the other statute need not his claim until satisfaction has been entered upon record on the first st because that is the only proper determination of an extent, so that he have five years allowed him from that time to avoid the fine by the se saving in the statute, 4 *Hen.* 7.; because until then his right did not crue.

Cruise on Fines, 242, &c.

Alth

Although the ſtatute 4 *Hen.* 7. does not extend to the poſſeſſions of the church, yet in caſe a biſhop, dean, vicar, or prebendary, ſhould neglect to make his claim within five years after a fine levied of an eſtate to which he was entitled in right of his biſhoprick, *&c.*, he will be barred during his life, but his ſucceſſor will be allowed five years to avoid the fine, from the time of his becoming entitled to the lands. Plowd. 538.

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(t. *Where the*) So, where a perſon to whom lands were deviſed chargeable with legacies, levied a fine, on which there was a five-years non-claim, and afterwards granted a rent-charge, and mortgaged the lands; it was decreed, that the fine and non-claim were no bar to the legatees, becauſe the deviſee having no title but under the will, muſt have had notice of them. Drapers' Company v. Yardley, 2 Vern. 662.

And a fine levied by a truſtee will not be allowed to affect the intereſt of the *ceſtui que truſt*.

Thus in the above caſe of *Bovey* v. *Smith*, the Lord Keeper put this caſe to Serjeant *Maynard*,—"*A.* ſeiſed in fee in truſt for *B.* " for full conſideration conveys to *C.*, the purchaſer having notice of the truſt; and afterwards *B.*, to ſtrengthen his own eſtate, levies a fine. Whether *B.* the *ceſtui que truſt* be not in that caſe bound to enter within five years? and the counſel were all of opinion, that he was not; for *C.*, having purchaſed with notice, notwithſtanding any conſideration paid by him, was but a truſtee for *B.*, and ſo the eſtate not being diſplaced, the fine cannot bar." 1 Vern. 149.

So in the caſe of *Shields* v. *Atkins*, Lord *Hardwicke* ſays, it would be dangerous, where a perſon enters on the foot of a truſt, and never makes any declaration of his having performed the truſt, to conſtrue this ſuch an entry, as that a fine and non-claim afterwards would be a bar. And in the caſe of Lord *Pomfret* v. Lord *Windſor*, his lordſhip obſerved, that a court of equity would not ſuffer a fine levied by a truſtee to bar an equitable right: and that if a practice of this kind was allowed to prevail, a court of equity might as well be aboliſhed by act of parliament. 3 Atk. 563. 2 Vezey, 481. 2 Atk. 631. S. P.

But if the title is merely a legal one, and a man has purchaſed an eſtate which he ſees himſelf has a defect on the face of the deeds, yet the fine will be a bar, and will not affect the purchaſer with notice, ſo as to make him a truſtee for the perſon who had the right, becauſe, as Lord *Hardwicke* obſerves, this would be carrying it much too far, for the defect upon the face of the deeds is often the occaſion of the fine being levied. 2 Atk. 631.

Before the ſtatute of uſes, if a *ceſtui que uſe* had levied a fine it might have been avoided at any time by the plea *quod partes finis nihil habuerunt*; becauſe the *ceſtui que uſe* had no eſtate in the land, but was barely tenant at will to his feoffees. But modern chancellors have very much altered the law in this reſpect, having laid it down as a general rule, that any legal conveyance or aſſurance by the *ceſtui que truſt*, ſhall have the ſame effect and operation on the truſt eſtate, as it would have had on the legal eſtate, if the truſtees had conveyed it to the *ceſtui que truſt*. So that now a *ceſtui que truſt* in tail may by a fine duly levied, bar his iſſue as fully, as if he had the legal eſtate; for otherwiſe truſtees by refuſing, or by not being capable of executing their truſt, might prevent the tenant in tail from exerciſing the power given him by the law over his eſtate, which would be extremely inconvenient, and would tend to the introduction of perpetuities. Year Book, 27 Hen. 8. 20. Bro. Ab. tit. *Fines*, pl. 4. 1 Chan. Ca. 213. Caſes Temp Talbot, 43.

A *ceſtui que truſt* in tail may not only bar his own iſſue by a fine, but alſo the perſons in remainder or reverſion, unleſs they make their claim within the time ſpecified by the ſtatute. Baſket v. Pierce, 1 Vern. 226.

Goodrick v. Brown, 1 Chan Ca. 49 2 Vern. 56. Where a fine is levied pursuant to a decree of the court of chancery, a particular purpose, that court will not permit it to operate farther than decree directs.

Trevor v. Trevor, 1 P. Wms. 622. 2 Br. P. C. 122. The intention of marriage articles is so far considered in equity, that a fine be levied of the lands comprehended in such articles to different u a court of equity will compel a conveyance of the lands to the uses of marriage articles, notwithstanding the fine.

Holt v. Lowe, 4 Br. P. C. 253. The plea of a fine and long possession under it, is not a good bar t bill brought for a discovery of the deeds, declaring the uses of fine.

Loyd v. Carew, Show. P. C. 137. A springing or shifting use cannot be barred by a fine, levied of estate out of which such springing or shifting use is to arise.

Dillon v. Leman, 2 H. Bl. 584. *A.* seised in fee of lands dies leaving *B.*, a feme covert, his h Upon his death, a stranger makes a tortious entry on the lands, contin in possession, and levies a fine *sur cognisance de droit come ceo*, &c. with p clamations. *B.* afterwards dies under coverture, no entry having b made on her behalf to avoid the fine, leaving *C.* her heir of the age twenty-one, of sound mind, out of prison, and within the realm. claim is made by *C.* at any time within five years after the death of His right is therefore barred by the fine. For the exception in the f branch of the statute of the 4th of *Hen.* 7. and the proviso at the end o are to be taken together; and being so taken, they do not amount so mu to an exception as a saving, the true meaning of which is, that the rig of those persons who are under disabilities, and of their heirs, are sa as long as the disabilities continue, and five years after; the heir there not being himself disabled is barred, unless he prosecutes his right wit five years after it accrues by the death of his ancestor dying under a di bility: consequently, *C.* in this case is prevented by the fine from recov ing the lands in question.

(G) Of the Remedies given to Strangers by Clai and Entry for the preservation of their Right

Page 536 (*If a man*) As where a fine operates as a discontinuance of the estate, in which case a r action must be brought. 1 Vern. 212.

3 Burr. 1897. Dougl. 468. 2 Str. 1086. 4 Br. P. C. 353. Nor does the delivery of a declaration in ejectment amount to such entry as will avoid a fine, even though the defendant appears to it, a confesses lease, entry and ouster; for there must be an actual entry ma *animo clamandi*, whereas in an ejectment, there is only a fictitious or s posed entry, for the purpose of making a demise: and the entry must made before the time when the demise is laid.

2 Leon. 221. The suing out by a writ, and delivering it to the sheriff does not amou to a pursuing a claim or title by way of action, unless the writ be return by the sheriff

2 Bl. Rep. 994. Dal. 116. If the claim be made by action, it must be a real action; so that ejectment will not suffice, nor is a bill in chancery such a claim under t statute 4 *Hen.* 7. as will avoid a fine.

1 Ch. Ca. 268. 278. 2 Bl. Rep. 994. There is however an exception to this rule, in the case where a fine h been levied of a trust estate, because no entry by the *cestui que trust*, claim

…im, or other legal act, will be ſufficient to avoid the fine, or ſuſpend the … ariſing from the non-claim; it can only be done by bill in chancery, …e claim to avoid a fine ought to be of a nature which correſponds …h the eſtate.

And even where the ſubject matter of the ſuit is of legal juriſdiction, 2 Atk. 389. Pincke v. Thorny-croſte, 1 Br. Ch. Rep. 289. Printed caſes Dom. Proc. 1784.
…e filing of a bill in a court of equity will, in ſome inſtances, prevent the … ariſing from a fine and non-claim: and in caſes of this kind, the court …ll direct a trial at law, with an order that the defendants ſhall not ſet up …e fine in bar of the plaintiff's claim, upon the ſame principle that it …metimes directs that the defendants in a ſuit at law ſhall not plead the …tute of limitations.

The entry of one joint tenant, coparcener, or tenant in common, will …ſufficient to avoid the effect of a fine, as to the other joint-tenant, co-…rcener, or tenant in common.

No entry is neceſſary where the fine is levied without proclamations, for 2 Wilſ. 45. …e ſtatute 4 *Hen.* 7. doth not extend to ſuch a fine; and it may be avoid-…at any time within twenty years.

(H) Of erroneous Fines, and the Manner of reverſing them.

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(*And here*) So, if one who is ſeiſed *ex parte materná* levies a fine in which there is error, the …*ex parte materná* will be entitled to the writ of error. 1 Leon. 201. So, the younger ſon, …en entitled to lands by the cuſtom of borough engliſh, ſhall have the writ of error, and not …e heir at common law, for this remedy deſcends with the lands. *Id. ibid.* Yet a brother of …e half-blood is not entitled to bring a writ of error on a fine levied by his elder brother; …ough if there had not been ſuch fine the land would have deſcended to him. Co. Lit. 14. …a. 6.

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(*If there*) But it hath been adjudged in a later caſe, that although a fine may be reverſed as …part of the land, and remain good as to the reſidue, yet that it cannot be reverſed *in toto* as to …e perſon, and remain good *in toto* as to another. Zouch v. Thompſon, 1 Ld. Raym. 179.

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(*Fines may*) Doubts were entertained, ſoon after the Reſtoration, reſpecting the power of …rliament to ſet aſide a fine obtained by force and fraud. Lords' Journals, vol. 11. p. 191. 209. …Car. 2. Comm. Journ. vol. 8. p. 344. 13 & 14 Car. 2. c. 27. Cruiſe on Fines, 347.

By the ſtatute 23 *Eliz. c.* 3. § 2. "No fine ſhall be reverſed for falſe "or incongruous Latin, razure, interlining, miſ-entering of any procla-"mations, miſ-returning or not returning of the ſheriff, or want of form "in words, and not in ſubſtance."

By ſtatute 10 & 11 *W.* 3. *c.* 14. a writ of error to reverſe a fine muſt …e brought and proſecuted within 20 years after the fine levied.

A writ of error can only be brought to reverſe a judgment in a court of Co. Lit. …ecord, for to amend errors in a baſe court, which is not of record, a 288. b. …rit of falſe judgment lies, returnable in the court of Common Pleas.

A writ of error, properly ſpeaking, is a proceeding in the nature of an F. N. B. 21. …ppeal; it is therefore uſually brought to reverſe a fine in the court of 9 Vin. Abr. …King's Bench, that court having an appellant juriſdiction over the court 486. …of Common Pleas. But where the error aſſigned in the judgment doth …not ariſe from any fault in the court, but from ſome defect in the executi-…on of the proceſs, or from ſome matter of fact, the writ of error muſt be …brought in the ſame court where the judgment was given; in caſes of this …kind, therefore, in the court of Common Pleas.

Co. Lit. 260. a. 3 Bl. Com. 407.

During the term in which a judicial act is done, the record may be amended or invalidated, without a writ of error; because, during the term, the record is in the breast of the court, and the rules are altered at the discretion of the judges; and now the courts of justice will allow amendments to be made at any time, while the suit is depending, notwithstanding the record be made up, and the term be past; for they consider the proceedings as in *fieri* until the judgment is given.

(*a*) Bohun's case, 5 Co. 43. (*b*) Dowling's case, *id.* 44. (*c*) 1 Ld. Raym. 209.

As to the amendment of fines, the court of Common Pleas has frequently permitted it, where any palpable mistake or misprision has been made by the officers of the court, in the entry of the king's silver (*a*), proclamations (*b*), or the description of the lands; and this even after error brought upon the very point.

Pig. Recov. 218. Cas. of Pr. 52. Barnes, 216. 24. 3 Wils. 58.

Powell v. Peach, 2 Bl. Rep. 1202. (*d*) Heath v. Sir I. E. Wilmot, 2 Bl. Rep. 778.

But it will not allow the number of acres to be increased where the deed of uses is general, and the fine is levied by a husband and wife. Nor where a fine is recorded of one term, will it alter it, and make it a fine of another (*d*). Neither will it permit a change of the christian name of the parties (*e*).

(*e*) Dixon v. Lawson, 2 Bl. Rep. 816.

(*f*) Gage's case, 5 Co. 45 b. (*g*) Lord Pembroke v. Lord Jeffries, 1 Salk. 52. 2 Ld. Raym. 1066.

The judges have, in some instances (*f*), directed the original writ upon which a fine has been levied to be amended; but the propriety of such amendments seems, from some modern determinations (*g*), to be extremely doubtful.

Lindsay v. Gray, 2 Bl. Rep. 1013.

In a late case, the court of Common Pleas refused to amend the return of a writ of covenant, on which a fine had been levied, because the deed of uses was suspicious, the fine having been taken from a dying woman. But Sir *Wm. Blackstone* observes, that the court gave no opinion as to the propriety of such an amendment in a fair case.

By the statute of 23 *Eliz. c.* 3. § 10. it is enacted, That no fine levied before that act, which shall be exemplified under the great seal, shall, after such exemplification, be in anywise amended. And by the statute 27 *Eliz. c.* 9. § 10. no fine levied before that act, which shall be exemplified under any judicial seal of any of the shires of *Wales*, or the town or county of *Haverfordwest*, or under the seal of any of the counties palatine, shall, after such exemplification, be in anywise amended.

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Fines and Recoveries.

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(*These statutes*) *A.* tenant for years, remainder to *B.* for life, remainder to the first and other sons of *B.* in tail, remainder to *B.* in tail; *A.* and *B.* join in a lease and release, to make a tenant to the *præcipe*, and suffer a recovery. It was holden, that the estate-tail to the sons of *B.* was not devested by the recovery, nor did *A.* and *B.* incur any forfeiture of their respective estates; whether *A.* had forfeited or not, it was immaterial to consider, as there was no one to take advantage of it but *B.*; and *B.* had a remainder in tail subsequent to that limited to his sons; upon which the recovery might lawfully operate; and the recompence in value could not go to the sons because their estate-tail preceded that of which the recovery was suffered: such estate, therefore could not be displaced, or in any manner affected by the recovery. Smith v. Clifford, 1 Term Rep. 738.

(E) Of the other Effects of a Recovery.

(A) Who may ſuffer a Recovery.

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(*When recoveries*) Common recoveries ſuffered by privy ſeal are now diſuſed, and private acts of parliament are univerſally ſubſtituted in their ſtead Cruiſe on Recov. 184. For notwithſtanding the precautions of the judges, recoveries ſuffered in that manner might be reverſed by writ of error. Cro. Car. 307. 1 Mod. 48.

When, therefore, an infant is to ſuffer a recovery, he muſt make a tenant to the *præcipe* by feoffment, and give liberty of ſeiſin in perſon, by which means the feoffment is only voidable; whereas if the infant appointed an attorney to give liberty of ſeiſin for him, the feoffment would be abſolutely void. Perk. 12. 3 Burr. 1804.

An infant truſtee may join in a common recovery, in conſequence of the ſtatute 7 *Ann. c.* 19., if he is directed to do ſo by the court of Chancery. *Ex parte* Johnſon, 3 Atk. 559.

The king cannot ſuffer a common recovery, for if he does, he muſt either be tenant or vouchee; and in both caſes the demandant muſt count againſt him, which the law does not allow. Pig. 74. Plowd. 244. Cro. Car. 96.

Idiots, lunaticks, and generally all perſons of non-ſane memory, are diſabled from ſuffering common recoveries, as well as from levying fines; though if an idiot or lunatick does ſuffer a common recovery, and appears in perſon, no averment can afterwards be made that he was an idiot or lunatick But if he appears by attorney, it ſeems that ſuch an averment would be admitted, upon the ſame principle that an averment of infancy may be made againſt a warrant of attorney, acknowledged by an infant for the purpoſe of ſuffering a common recovery, as the fact of idiotcy may be tried by a jury, with as much propriety as the fact of infancy. Cruiſe on Recov. 185.

In a celebrated caſe which was lately determined by the Houſe of Lords of *Ireland*, the majority of the judges were of opinion, that the deſcription of a warrant of attorney, taken by the chief juſtice of the court of Common Pleas for the purpoſe of ſuffering a common recovery, was not concluſive evidence of the capacity of the perſon acknowledging ſuch a warrant of attorney. Hume v. Burton, Cruiſe on Recov. Append.

Although no averment of idiotcy or lunacy can be made againſt a recovery, where the parties appear in perſon, yet evidence of weakneſs of underſtanding has been admitted, to invalidate a deed to make a tenant to the *præcipe* for ſuffering a recovery; and the recovery has in that manner been ſet aſide. 2 Vez. 403. 3 Atk. 313. Jones v. Cave, *Hereford* Lent Aſſizes, 1765, *coram* Sir I. E. Wilmot. Cruiſe on Recov. § 303.

(B) Of what Things a Recovery may be ſuffered, and by what Means.

A COMMON recovery may be ſuffered of all things whereof a writ of covenant may be brought for the purpoſe of levying a fine, as of honor, barony, caſtle, meſſuage, curtilage, land, meadow, paſture, underwood, warren, furze, heath, moor, &c. And in general a common Cruiſe on Recov. 163.

recovery

recovery may be ſuffered of any thing whereof a writ of entry *ſur diſſ* or any other writ of entry will lie.

In conſequence of the ſtatute 32 *Hen.* 8. *c.* 7. § 7., a common reco may now be ſuffered of every kind of eccleſiaſtical or ſpiritual profits, a tithes, oblations, portions, penſions, *&c.*

5 Co. 40. Poph. 22. S. C.

It was determined in *Dormer*'s caſe, that a common recovery migh ſuffered of an advowſon in groſs, upon a writ of entry. Mr. *Pigot* that this muſt be underſtood of an advowſon appendant to a manor, could not be of an advowſon in groſs, ſince the parſon has the freeh and that therefore it ought not to be by writ of entry *en le poſt*, bu writ of right of advowſon.

Bayley v. Univerſity of *Oxford* 2 Wilſ. 116.

A common recovery may, however, be ſuffered of an advowſon in g and a ſmall quantity of land on a writ of entry *ſur diſſeiſin*.

Pig. 97. *Vide* Turner v. Turner, 1 Br. Ch. Rep. 316.

A recovery may be ſuffered of a rent-charge iſſuing out of lands; not of an annuity which is charged only on perſonal eſtate.

Pig. 96. 18 Vin. Abr. 218.

It is ſaid in *Pigot* and *Viner*, that a common recovery cannot be fered of a fiſhery, common of paſture, eſtovers, ſervices to be d nor of a quarry, a mine, or market, for they are not in demeſne, profit only.

Cowp. 346.

As to what ſhall be a ſufficient deſcription in a common recovery, further the caſe of *Maſſey* v. *Rice*.

(C) What Eſtates and Intereſts may be bar by a common Recovery: And herein of the S gle and Double Voucher.

Lacey v. Williams, 2 Salk. 568. 1 Ld Raym. 222. 475. Carth. 472. (*a*) Anon. 4 Leon. 84. Goldſb. 82.

ON a writ of error to reverſe a common recovery, the error aſſi was, that the tenant to the *præcipe* had not acquired the freehold after the *teſte* of the writ of *ſummoneas ad warrantizandum*, ſo tha was not ſeiſed of the freehold at the return of the writ of entry: bu court held it to be ſufficient, if he acquires the freehold at any time b judgment is given. And if he has it when judgment is given (*a*), alth the eſtate be afterwards defeated, yet the recovery will be good.

Lincoln College caſe, 3 Rep. 58. Griffin v. Stanhope, Cro Ja. 454. 1 Vent. 358. Paulin v. Hardy, Skin. 63. Shep. Tou. 41.

Although a perſon has acquired the freehold by diſſeiſin, yet he w a good tenant to the *præcipe;* and in all caſes where the validity of a mon recovery is conteſted, the court will ſuppoſe that there was a tenant to the *præcipe*, if nothing appears to the contrary.

If a writ of entry is brought againſt the tenant of the freehold a ſtranger, the recovery will be valid, for the recompence in value wi to the perſon who has really loſt the eſtate.

Marquis of Wincheſter's caſe, 3 Co. 1.

If there are two joint-tenants of a manor, and a writ of entry of whole manor is brought againſt one of them, on which a common very is ſuffered, it will only be good for the moiety of the perſon a whom the writ was brought; but as to the other moiety, it will be for want of a tenant to the *præcipe*.

1 Keb. 735. 785.

As it is abſolutely neceſſary that the tenant to the *præcipe* h have an eſtate of freehold, it follows, that no perſon who has not a

e of freehold can of himſelf ſuffer a common recovery, becauſe 5 Atk. 155. cannot convey a freehold to the perſon againſt whom the writ is to be 4 Br. P. C. 405. ought.

It has been long ſettled, that a deviſe to executors for payment of debts, Co. Lit. d until debts are paid, only gives the executors a chattel intereſt in 42. a. nds thus deviſed, and therefore does not prevent the diſpoſal or deſcent 8 Co. 96. a. f the freehold; ſo that if after ſuch a deviſe the teſtator gives the ſame nds to a perſon for life, the freehold will veſt in ſuch deviſee immediately n the death of the teſtator, and he will be enabled to make a good tenant o the *præcipe*.

So, if a teſtator gives his executors full power to receive the meſne Carter v. rofits of his eſtates in a particular place upon truſt to pay his debts, and Barnardiſ- fterwards deviſes thoſe eſtates to a perſon for life, the freehold will be- ton, 1 P. ome veſted in ſuch deviſee on the death of the deviſor, and he may make Wms. 505. 2 Br. P. C. a good tenant to the *præcipe*. 1.

As it is neceſſary, that the perſon who ſuffers a common recovery ſhould ave not only an eſtate of freehold in the lands, but alſo an eſtate in poſ- eſſion, it followed that either where the lands are let out on leaſes for ives, or where there was an eſtate for life prior to the eſtate of inheri- tance, that the perſons entitled to the inheritance were diſabled from ſuf- fering recoveries of them. To remove the diſability in the firſt inſtance, it was uſual for the perſon who intended to ſuffer the recovery to get a conditional ſurrender from the leſſee for life, in order to become ſeiſed of a freehold in poſſeſſion, and be thereby enabled to make a good tenant to the *præcipe*. But this being productive of ſeveral obvious inconveniencies, it is enacted by ſtat. 4 *Geo.* 2. *c.* 20., with a retroſpect and conformity to the ancient law (*a*), that a good tenant to the *præcipe* may be made, with- (*a*) Pig. 41. out the ſurrender of ſuch leaſes, or the concurrence of the leſſees. But 1 Burr. 143. this ſtatute does not extend to eſtates for life, which are prior to the eſtate of which the recovery is intended to be ſuffered: ſuch eſtates muſt, therefore, ſtill be ſurrendered to the perſon againſt whom the writ of entry is brought, this caſe being expreſsly excepted in the ſtatute 20 *Geo.* 2. *c.* 20. § 2.

The prior eſtate for life ought to be ſurrendered to the perſon who has Pigot, 90. the remainder or reverſion before he makes a tenant to the *præcipe*; but if the ſurrender is made after the execution of the deed, by which the lands are conveyed to the perſon who is to be tenant to the *præcipe*, it muſt then be made to him, otherwiſe it will be void, becauſe the perſon who is to ſuffer the recovery has then no reverſion in him for the ſurrender to operate upon.

Common recoveries having been long conſidered as common aſſurances Cruiſe on of lands, and in the nature of conveyances by conſent, the judges have, Recov. 36. in conſequence of particular circumſtances, ſometimes preſumed that the (*b*) Green tenant for life had ſurrendered his eſtate, although a ſurrender was not v. Froud, actually proved. As where the poſſeſſion has accompanied a recovery for 3 Keb. 310. a long time (*b*). So where collateral evidence has been given of a ſurren- 1 Mod. 117. der by the tenant for life (*c*). But where neither of theſe occur, ſuch a 1 Ventr. preſumption will not be admitted (*d*). 257. (*c*) Warree v. Gren-

ville, 2 Str. 1129. (*d*) Goodtitle v. Duke of Chandois, 2 Burr. 1065.

Where indeed, after a recovery the deeds were ſuppreſſed by the tenant Gartſide v. for life, ſo that it could not be made out whether he had ſurrendered his Ratcliffe, eſtate for life to the tenant to the *præcipe* or not, it was decreed in Chan- 1 Ch. Ca. 292.

cery

eery for the recovery, without allowing a trial at law: for where deed are ſuppreſſed *omnia præſumuntur*.

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(*In a writ*). But if the fine be in itſelf void, as if the perſon who levied it had no eſtate freehold in the land, then the recovery will be void, becauſe in that caſe the fine paſſeth no e tate. Dormer v. Parkhurſt, 3 Atk. 135. 4 Br. P. C. 405.

3 Keb. 597. It hath been ſaid by Sir *M. Hale*, that the cognizee of a fine *ofl. par* would be a good tenant to the *præcipe* in a recovery ſuffered the ſame da and the court would preſume a priority to ſupport a conveyance.

1 Vent. 195. 1 Mod. 107. Cro. Ja. 643. 2 Roll. Rep. 245. If a fine be levied to a leſſee for years of the ſame land for the purpo of making him tenant to the *præcipe* in a common recovery, the term ſo years will not be merged by the fine: for in the third ſection of the ſta tute of Uſes, 27 *Hen.* 8. there is a ſaving to all perſons and their heir who ſhall be ſeiſed to any uſe, of all ſuch former right, title, &c., as the had to their own uſe, in any manors, lands, &c., whereof they ſhall be ſei ed to any other uſe.

Pig. 54. Ld. Al ham v. Ld. Angle- ſey, Gilb. Rep. 16. 2 Salk. 676. 11 Mod. 210. 1 Str. 17. Where a fine is levied for the purpoſe of making a tenant to the *præci* it will be ſufficient, although no uſe be declared on it.

Cruiſe on Recov. 58., &c. A huſband ſeiſed *jure uxoris* may make a tenant to the *præcipe* by fi without his wife's joining him in it.

Taylor v. Atkins, 1 Burr. 60 5 Br. P. C. 247. Cowp. 689. It hath been heretofore thought that a good tenant to the *præci* might be made by a feoffment with livery of ſeiſin: but this doctrine ha lately been denied.

Hynde's caſe, 4 Co. 71. Ca. temp. Talb. 167. A good tenant to the *præcipe* may be made by bargain and ſale enrolled and the bargainee may appear and vouch before entry, or before the ba gain and ſale is enrolled, provided it be enrolled within ſix months. as pre ſcribed by the ſtatute: for although the freehold does not paſs from th bargainor until the enrolment, yet as ſoon as that is done, the freehold i conſidered as having paſſed from the bargainor at the time when the ba gain and ſale was executed, by relation.

Lloyd v. Ld. Say and Sele, 1 Salk. 341. 10 Mod. 40 1 Br. P. C. 379. As common recoveries are much favoured by the courts of law, a ba gain and ſale to make a tenant to the *præcipe*, will not be deemed void o account of any trifling miſtake or inaccuracy.

Barker v. Keate, 1 Mod. 262. 2 Mod. 249. A tenant to the *præcipe* may alſo be made by leaſe and releaſe; and th reſervation of a pepper-corn is a ſufficient conſideration to raiſe a uſe t ſupport a common recovery.

10 Mod 45. God. 147. In ſome caſes a common recovery may operate by eſtoppel, althoug there be no tenant to the *præcipe*; but this is only where the perſon wh ſuffers the common recovery is tenant in fee, for the iſſue in tail canno be bound by eſtoppel, as they do not claim from their immediate anceſtors but from the firſt purchaſers, *ſecundum formam doni*.

The ſtatute 14 *Geo.* 2. *c.* 20. § 5. enacts, that after twenty years a reco very ſhall be deemed valid, if it appears on the face of it, that there wa a tenant to the writ, and if the perſons joining in ſuch recovery had a ſu ficient eſtate and power to ſuffer the ſame, notwithſtanding the deed o deeds for making the tenant to ſuch writ ſhould be loſt or not appear.

An

And § 7. of the ſame ſtatute ſubſtantiates all recoveries, where the ... or deed to make the tenant to the *præcipe* is *ſubſequent* to the ...gment given, and the writ of ſeiſin awarded, provided it be of the ...e term.

Where it appeared from the return of the writ of ſeiſin, that ſeiſin had ...n delivered prior to the date of the conveyance for making the tenant to ...*præcipe*, yet as all the proceedings were in the ſame term, the reco... was holden to be good under the above ſtatute of 14 *Geo.* 2. *c.* 20. ..., that act being a remedial act, and therefore to be extended to all ...es of ſimilar inconveniency. Goodright v. Rigby, 2 H. Bl. Rep. 46. 5 Term Rep. 176. S. C. affirmed in error.

A. being ſeiſed of a manor to him and his wife, and to the heirs male ...f the body of the huſband; *A.* bargained and ſold the manor to a ſtran..., who ſuffered a common recovery, in which *A.* was vouched, who ...uched over the common vouchee. It was adjudged, that although *A.* ...ne was vouched, and not his wife, yet that the eſtate tail was barred, ...r the huſband coming in as vouchee, the recovery barred all eſtates ...hich were ever in him. Fitzwilliam's caſe, 6 Co. 32.

Where tenant in tail before marriage, conveyed his eſtate to the uſe of ...himſelf and his intended wife for their lives, with remainder to the heirs ...f their bodies, remainder to himſelf and his intended wife in fee, and af...erwards ſuffered a recovery, in which he only was vouched; Lord *Cam...den* held, that the recovery was a ſeverance of the jointure, and paſſed a ...moiety. Moody v. Moody, Ambl. 649.

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(*The tenant*) There adjudged that a covenant by tenant in tail to ſtand ſeiſed to the uſe of himſelf for life, remainder to *A.* in tail, is void; becauſe the remainder is to take effect after his death. And in the caſe of Salkeld the recovery was adjudged good.

A. tenant for life, remainder to truſtees to preſerve contingent re...mainders, remainder to the firſt and every other ſon in tail male, remain...der to the daughters in tail general, remainder to the heirs of his body, ...with remainders over. *A.* ſuffers a recovery with ſingle voucher, being himſelf tenant to the writ. Adjudged by the Houſe of Lords, that this recovery with ſingle voucher did not bar the remainders over. Meredith v. Leſlie, 6 Br. P. C. 209.

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(*And as a common recovery*) Hudſon v. Benſon, 2 Lev. 28. 1 Mod. 108. Sir T. Raym. 236. 1 Freem. 362. S. C.

A. deviſed a rent of 50*l. per annum*, to be iſſuing out of lands, to his ſon and his heirs; and if his ſon ſhould die without heirs-male of his body, then he deviſed it over; the ſon ſuffered a recovery of this rent, and died without iſſue male. Lord Chief Juſtice *Bridgman*, and all the other judges were of opinion, that the recovery was good, and the re...mainder well barred; and this judgment was affirmed in the court of King's Bench. Smith v. Farnaby, Carter, 52. Sid. 285. Weeks v. Peach, Lut. 1224.

A diſtinction has, however, been adopted between a grant of a rent-charge in tail, with a remainder over of the ſame rent-charge in fee, and a grant of a rent-charge in tail, without any ſubſequent limitation of it in fee. In the firſt caſe, the tenant in tail acquires an eſtate in fee-ſimple in the rent-charge by means of the common recovery; but in the ſecond he only acquires a baſe fee, determinable on his deceaſe and failure of the iſſue. Chaplin v. Chaplin, 3 P. Wms. 229. For the principles on which this diſtinction is founded, ſee Mr. Butler's note, Co. Lit. 298. a. n. 2.

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Page 550 (*But in the*) Burr. 2223. They must be of the gift of the king, by way of reward. Perkins v. Sewell, 1 Bl. Rep. 654.

Johnson v. Earl of Derby, Pigot, 201. 11 Mod. 304. 2Show.104. The only mode of acquiring a good title to an estate-tail whereof the reversion is fairly in the crown, is by an act of parliament, enacting that the reversion shall be devested out of the crown, and vested either in the tenant in tail, or in some other private person, by which means it becomes barrable by recovery. Cruise on Recov. § 277. *Vid.* Strickland's Act, 30 Geo. 3. § 51.

William Earl of *Derby* conveyed lands to trustees, to the intent that they should convey the same to Queen *Elizabeth*, her heirs and successors, that the Earl might accept of a grant from the crown of the same lands to him and the heirs male of his body, leaving the ultimate reversion in the crown, which was accordingly done. It was determined, that the estate-tail was not within the protection of the above statutes, it being a fraudulent contrivance to create a perpetuity.

Page v. Hayward, 2 Salk. 570.

A devise was to *A.* and the heirs of her body, upon condition and provided she intermarried with, and had issue male by one surnamed *Sear*, and in default of both conditions to *E.* in the same manner, *&c.* married one whose surname was *Cliff*, and with him levied a fine, and suffered a recovery of the lands, in which she and her husband (with another party not material to the present point) were vouched. It was adjudged by the whole court, *inter al*, that if the estate had been to *A* and the heirs of her body by a *Searl* begotten, *provided* and upon *condition*, if she marry any but a *Searl*, that then it shall remain and be to *J. S.*, and his heirs: a common recovery suffered before marriage, would bar the estate tail and remainders; and her subsequent marriage with another would not have avoided the recovery.

Gulliver v. Shuckburgh Ashby, 4 Burr. 1929.

So, lands were devised to several persons successively in tail, and a clause was inserted by the testator to the effect following; *viz.* "Provided always, and this devise is expressly upon this condition, that "whenever it shall happen that the said estates shall descend or come to "any of the persons hereinbefore named, that he or they do and shall "then change their surname, and take upon them and their heirs, the "name of *W* only, and not otherwise." But there was no devise over upon breach of the proviso. *A.* the first tenant in tail, two years after his coming to the possession of the estates, suffered a common recovery, in which he was vouched; but he never took upon him the surname of *W*. The person next in remainder entered for breach of the proviso in *A.* not having changed his name. The whole court agreed, that if this proviso were considered as a condition, it was collateral and subsequent, and was therefore destroyed by the recovery.

Driver v. Edgar, Cowp. 379

A. devised to his daughter an *express estate-tail*, but afterwards said, that such devise should be void as to *inheritance of heirs* if she should die *without issue*, and that in such case the estate should descend to his heir male. The daughter suffered a recovery to the use of herself in fee: such recovery is good.

Plunkett v. Holmes, 1 Lev. 11. Sir T. Ray. 28. Gilb. Uses, 133.

A person devised lands to his eldest son *Thomas* for life, and if he died without issue living at the time of his death, then he devised the lands to another son and his heirs; but if *Thomas* had issue living at the time of his death, then the fee should remain to right heirs of *Thomas* for ever. *Thomas* entered upon the death of his father, and suffered a common recovery, and afterwards died without issue. It was resolved, that *Thomas* was

tant for life, with a contingent remainder in fee to his right heirs, and that the contingent remainder was deſtroyed by the recovery.

So, where lands were deviſed to *A.* for life, without impeachment of waſte; and in caſe he ſhould have any iſſue male, then to ſuch iſſue male, and his heirs for ever, and if he ſhould die without iſſue male, then to *B.* and his heirs for ever. *A.* entered, ſuffered a common recovery, and died without iſſue; and it was held, that the remainders over being contingent, were barred by the recovery. Loddington v. Kime, 1 Ld. Raym. 203. Salk. 224. 3 Lev. 431. Fearne, 282. Carter v. Barnardiſton, 1 P. Wms. 505. 2 Br. P. C 1. S. P. Doe v. Holm, 3 Wilſ. 237. S. P. Goodright v. Dynham, Dougl. 264. Goodright v. Billington, *id.* 753. S. P.

Sir *Francis North* purchaſed certain lands in *Eſſex* from *Richard Allington*, who was *ceſtui que truſt* in tail of them, with remainders over; and had ſuffered a common recovery: but there was no legal tenant to the *præcipe*, the freehold being in the truſtees, who were not parties to the recovery. Yet decreed that the remainders expectant on the eſtate-tail were well barred by this recovery. North v. Champernoon, 2 Chan. Ca. 63, 78. S.C. 1 Vern. 13. 1 P. Wms. 9.

Recoveries of this kind only operate on the truſt eſtate whereof they are ſuffered, and the equitable remainders expectant thereon; but do not affect any legal eſtate, ſo that a legal remainder cannot be barred by an equitable recovery. Robinſon v. Cumming, Ca. temp. Talb. 167. 1 Atk. 473.

Thus, *John Thornton* being ſeiſed of the premiſes for life, with remainder to his firſt ſon, *Thomas* in tail, remainder to his ſecond ſon, *James*, in tail, forfeited in the rebellion in 1745. The eſtate for life being put up for ſale by the commiſſioners, was bought by *Thomas* (the tenant in tail), but in the name of a truſtee. *Thomas*, thus having the equitable eſtate for the life of his father, and the legal eſtate tail, ſuffered a recovery, and ſoon after died, leaving iſſue a daughter, wife to the plaintiff. *James*, the ſecond ſon, took poſſeſſion, ſuffered a recovery, (after the death of his father and the truſtee, in whom his eſtate veſted,) and died, leaving two daughters, the defendants, who were in poſſeſſion. The bill was filed by *Salvin*, in right of his wife, for an account of profits, and to have the eſtate delivered up. Upon the hearing at the *Rolls*, his honour ordered the bill to be retained for a year, with liberty for the plaintiff to try the validity of the recovery at law. But it was the opinion of the court, that *Thomas*'s eſtate for life being an equitable eſtate, and his eſtate-tail a legal eſtate, he was not enabled to ſuffer either a perfect legal or a perfect equitable recovery, and therefore, the recovery ſuffered operated nothing. Salvin v. Thornton, cited in Br. Ch. Ca. 73.

In recoveries of this kind, there muſt be an equitable tenant to the *præcipe*, that is, the truſt eſtate muſt be conveyed to a third perſon, againſt whom the writ muſt be brought, in the ſame manner as in recoveries of legal eſtates. Cruiſe on Recov. 2, 3.

If there be a *ceſtui que truſt* for life before the *ceſtui que truſt* in tail, ſo that in caſe the legal eſtate had been conveyed according to the truſts, the tenant in tail could not bar the eſtate-tail by a common recovery, there, the *ceſtui que truſt* in tail cannot bar his eſtate-tail by a recovery. 2 Ch. Ca. 64.

Where an eſtate-tail is conveyed or deviſed to truſtees and their heirs, upon truſt to pay debts, or ſuch debts as are ſpecified, and after payment of ſuch debts or when ſuch debts ſhall be paid, then in truſt for *A. B.*, or in truſt to convey ſuch parts of the eſtate as ſhall remain unſold to *A. B.*; in either of thoſe caſes *A. B.* has a truſt eſtate in the ſurplus, See Cruiſe on Recov. 274.

plus, vested in him immediately upon the execution of the deed, the death of the testator, and may suffer an equitable recovery of such estate.

Philips v. Brydges, 3 Vez. jun. 120.

A testator devised his estates at *B.* to *C.*, *E.*, *F*, and *K.* in fee, in trust to pay his mortgages and debts, and after payment he directed the to convey the estates to the persons to whom he had devised his estates at *T.* He then devised his estates at *T.* subject to a life-estate therein to his wife the said *C.* to the said *E.*, *F*, and *K.* in fee, in trust out of the rents and profits to discharge his debts and mortgages, and to raise portions for his two grand-daughters: and from and after such payment he devised his estates at *T.* to the said *E.* and his heirs, to the use of him and his heirs upon the trusts following, *viz.* to the use of his grandson *F. T. W.* during his life, and after his decease to the use of the heirs male of his body remainder to the said *E.* in tail male, remainder to the said *F.* in tail male, remainder to the said *K.* in tail male, remainder to *D.* in tail male with the reversion to his own right heirs. The testator's wife died in his lifetime. On the death of the testator in 1764, a bill was filed in the name of *F. T. W.*, then an infant, to have the trusts of the will carried into execution; and by a decree in 1765 the will was established and the usual directions were given. No farther proceedings took place. In 1772 *F. T. W.* came of age; and the trustees under the will having sold part of the estates for payment of the debts, put him in possession of the rest: but no conveyance of the legal estate was executed. In 1772 and 1780 *E.* and *F.* two of the trustees and devisees in tail in remainder died. In 1785, the devised estates were conveyed by lease and release by *F. T. W.* to *J. P.* in order to make a tenant to the *præcipe*, and a recovery was shortly afterwards suffered of them to the use of *F. T. W.* in fee. *K.* the only surviving trustee, in whom the legal estate was vested, did not join in this transaction. Part of the estates were afterwards settled on the marriage of *F. T. W.*, and by his will he devised the remainder, and died without issue male. *K.* also died. A bill being filed after the death of *F.* to revive the proceedings in the former cause, and praying that the defendant, the son of *K.*, might be decreed to convey the estates settled on the marriage of *F. T. W.* to the uses of the settlement, and to convey such of the estates as were sold to the use of the purchasers, and the residue to the uses of the will of *F. T. W.*; the defendant insisted, that by the union of the equitable and legal estates in his father *K.* he had a legal remainder in tail in the estates, whereof the recovery was suffered; and therefore such remainder was not barred for want of a legal tenant to the *præcipe*. But it was decreed, that *K.* was only trustee for himself in remainder after an estate-tail in *F. T. W.*; and that therefore the recovery well barred that remainder: that *K.*'s equitable interest did not merge in his legal interest, inasmuch as it was not commensurate and co-existent with it: that an estate in fee may exist in a trustee, and a partial interest in the equitable estate may at the same time subsist for the benefit of such trustee.

(D) Of erroneous and void Recoveries, who may avoid them, and by what Method.

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(*If tenant in tail*) The right to bring a writ of error descends to the person to whom the land would have descended in case the recovery had not been suffered. Henningham v. Windham, 1 Leon.

Leon. 261. But it is not required of the plaintiff in error to ſet forth a complete title in the writ. Sheepſhanks v. Lucas, 1 Burr. 412.

Although nothing can be aſſigned for error which contradicts the record, and, therefore, no incapacity in a vouchee can be aſſigned for error, where he appeared in perſon; yet if a vouchee appear by attorney, an averment may be then made, either that ſuch vouchee died before the day on which judgment was given, or that he laboured under ſome perſonal diſability which rendered him incapable of ſuffering a recovery, for this is matter collateral to the record, and triable by a jury. Wynne v. Wynne, 1 Wilſ 42. Cruiſe on Recov. §83. Swan v. Broome, 3 Burr. 1595. 1 Bl. Rep. 496.

526. 6 Br. P. C. 132. Hume v. Burton, Cruiſe on Recov. Append.

In a writ of error in the King's Bench in *Ireland*, the caſe was, that in a writ of error to reverſe a common recovery, the defendant pleaded that he was an infant, and prayed that the parol might demur. To this the plaintiff demurred; and judgment was given that the parol ſhould demur; which judgment was affirmed.—*Note*, to the writ of error in this court, the defendant again pleaded his infancy, and prayed the parol might demur, which was diſallowed. *Non datur enim exceptio ejuſdem rei cujus petitur diſſolutio.* Forteſcue Aland v. Malone, Fitzg. 114.

A recovery ought not to be reverſed, unleſs writs of *ſcire facias* are iſſued againſt the terre-tenants and the heir; becauſe the errors in a recovery ought to be examined, until all the parties intereſted in ſupporting it, are before the court. Lord Pembroke's caſe, Rep. temp. Holt, 614. But the iſſuing of writs of *ſcire facias* to the terre-tenants is not deemed to be *ex neceſſitate juris*, but only diſcretionary in the court. Kingſton v. Herbert, 2 Show. 490. 3 Mod. 119. And *per* Lord Mansfield, by the eſtabliſhed mode of proceeding, there muſt be a *ſcire facias* againſt the terre-tenants, otherwiſe it is an irregularity, but no more. Hall v. Woodcock, 1 Burr. 359.

(*In a common*) Barton's caſe, Poph. 100. Cro. El 388.

A common recovery was ſuffered, but no writ of entry was filed; in conſequence of which, a writ of error was brought; it was moved that it might be examined, whether any writ of entry had been filed or not: but the court denied it, though if it appear upon record that a writ has been filed, then they would conſider, whether a new writ ſhould be filed or not; and it was ſaid, that if a recovery was exemplified purſuant to the ſtatute 23 *Eliz.* though ſome part of it was loſt, yet it would be valid. Anonymous, Lit. Rep. 299.

By a rule of the court of *C. P.* made *Tr.* 30 *Geo.* 3. "It is ordered, that from and after the firſt day of *Michaelmas* term then next enſuing, in every common recovery wherein the vouchee or vouchees ſhall perſonally appear at the bar of that court for the purpoſe of ſuffering ſuch recovery, the writ of entry ſhall be ſued out and produced, at the time of the recording of the vouchee's or vouchees' appearance at bar, at the foot of the *præcipe* in ſuch recovery." 1 H. Bl. 526.

The court of Common Pleas will not enlarge the return of a writ of ſummons, ſo as to make a term intervene between the teſte and return. Barnard v. Woodcock, 2 Bl. Rep. 1201.

Gibbons v. Stevenſon, *id.* 1223.

By ſtatute 10 & 11 *W.* 3. *c.* 14. the writ of error to avoid a recovery muſt be brought within twenty years; which twenty years are to be reckoned, Lloyd v. Vaughan, 2 Str. 1257.

reckoned, it hath been adjudged, not from the time when the ti accrued to the perſon ſeeking to avoid it, but from the time when the r covery was ſuffered.

Cruiſe on Recov. § 300. Booth, 77. Pigot, 156. 3 Reev. 362. Hence too it may be invalidated on a trial in ejectment, as in 2 Vez. 403., and 3 Atk. 313. *ſupr.* B.

Although none but thoſe who have an immediate intereſt in the lan are allowed to bring a writ of error to reverſe a recovery; yet it is p mitted to ſtrangers whoſe intereſts are affected by a recovery to falſify And a recovery may be falſified by ſeveral ways: 1. By entry and pl 2. By action. 3. By action and plea. 4. By plea only. By entry a plea, when the party's entry is not taken away by the recovery and brings an aſſiſe, and the recovery is pleaded againſt him, then he plea matter to avoid the recovery.

Booth. 77. 6 Co. 8. b.

A recovery may alſo be falſified by action and plea, when the entry the party that hath right is taken away by the recovery, and upon a r action brought, the recovery is pleaded in bar of his right. This m be falſified by plea.

Co. Lit. 46. a.

By the common law, if the tenant of the freehold had ſuffered a co mon recovery, it operated as a good bar to all terms for years derived o of the freehold; for the perſon who recovered the lands, was ſuppoſed come in by a title paramount, ſo that he was not bound by the leaſes the perſon againſt whom he recovered: beſides, a termor for years cou not in any caſe falſify a common recovery.

Plow. 83.

By the ſtatute of *Glouceſter*, 1 *Edw.* 1. *c.* 11. a remedy was given the leſſee for years, by way of receipt and trial, whether the recove was upon good title, or by way of colluſion; and in caſe it appear that the recovery was by colluſion, then the leſſee for years was perm ted to enjoy his term, and the execution was ſtaid until the determinati of the term.

Bro. Ab. tit. *Leaſe*, 26. Fitz. N. B. 198. & 220. Vaugh. 127.

The operation of this ſtatute not having been found ſufficiently exte ſive, another act was made 21 *Hen.* 8. *c.* 15. whereby it was provid that a tenant for years might falſify a feigned recovery had againſt t perſon in reverſion; and that no eſtate held by ſtatute merchant, ſtap or elegit, ſhould be avoided by means of any feigned recovery.

Ferres v. Ferres, 2 Eq. Ca. Abr. 695. Stanhope v. Thacker, Pr. Ch. 435.

A recovery, as well as a fine may be invalidated by the court of Cha cery: for where it appears to have been unduly obtained, that court w either compel the recoveror to convey the eſtate to the perſon who entitled in equity to have it, or declare the recoveror to be a truſtee ſuch perſon.

Chapman v. Bacon, Pigot. 170. Thurban v. Pantry, *id.* 171.

The court of Common Pleas will permit an amendment of recoveri as well as of fines, where an evident miſtake has been made in the nam or deſcriptions of the parties, (*a*), or in the deſcription of the eſtates (or when there has been a clerical miſtake in the entry of the judgm (*c*), or in the return of the writ of ſeiſin (*d*).

Mayor v. Coulthaid, 2 Bl. Rep. 1230. Lord and Biſcoe, Barnes, 24. (*b*) Skinner v. La Pigot, 172. Brooke v. Biddulph, *id. ibid.* Henzell v. Lodge, 2 Bl. Rep. 747. 3 Wilſ. 1 Watſon v. Cox, 2 Bl. Rep. 1065. (*c*) Barnes, 20. 22. (*d*) Wilton v. Fairfax, Barnes, Watſon v. Lockley, 2 Wilſ. 2.

1 H. Bl. 72.

But an amendment will not be permitted on affidavit only: it muſt pear on the face of the deed to lead the uſes, that there is ſufficie ground for an amendment.

Nor will it be allowed in the deſcription of the eſtates comprehended in recovery, where the recovery, as it ſtands, has lands of the vouchee to operate upon. Acton v. Baldwin, 2 Bl. Rep. 874.

And in general no amendment will be allowed in a common recovery, unleſs there is an evident miſtake of the clerk, or ſomething to amend by. 1 Wilſ. 35. Cruiſe on Recov. § 83.

See ſtat. 23 El. c. 3. § 10. and 27 El. c. 9. § 10.

(E) Of other Effects of a Recovery.

A Perſon who was ſeiſed to him and the heirs male of his body, remainder to his own right heirs, previous to his marriage, conveyed eſtate to truſtees to the uſe of himſelf for life, remainder to the uſe his intended wife for life, remainder to his firſt and other ſons in tail ale: the marriage took effect, and they had iſſue a ſon: nineteen years erwards the huſband ſuffered a common recovery, and declared it to be to uſe of *A. B.* and his heirs, in truſt to ſell the eſtate for the payment of debts: *A. B.* ſold the land for the payment of the debts, according the truſt repoſed in him: the tenant in tail died, and his ſon claimed eſtate. The court were unanimouſly of opinion, that the recovery ured to the uſes of the ſettlement, and therefore that the purchaſer had title. Goodright v. Mead, 3 Burr. 1703.

A father by ſettlement on his marriage conveyed an eſtate to the uſe himſelf for life, remainder to the firſt and other ſons of the marriage in il. Afterwards, the ſon on his marriage conveyed part of the eſtate by ſe and releaſe to the uſe of himſelf for life, remainder to his intended ife for life, remainder to the heirs of the body of the wife, remainder his own right heirs. Some years after this ſettlement, the father and mortgaged the eſtate for a term of years, and ſuffered a common recovery, and declared the uſes to the mortgagee, and then to the father life, remainder to the ſon in fee. Lord *Hardwicke* was clearly of opinion, that the recovery enured to the uſes of the ſettlement on the marriage of the ſon. Cheney v. Hall, Ambl. 526.

Forcible Entry and Detainer. Page 555

(*At common*) An indictment will lie at common law for a forcible entry, 3 Burr. 1731. for this an offence at common law, and not one created by ſtatute. Sayer's Rep. 226. And if there two counts in an indictment, one upon the ſtatute, and the other, general, at common law, the former be bad, and the latter good, the indictment may be ſupported. R. v. Bathurſt, 225.

(A) The ſeveral Statutes made relating to this Subject.

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(*By the* 15 *R.* 2. *cap.* 2.) The juſtices muſt ſet the fine, and they muſt do it before they commit the offender, though they may take a reaſonable time to conſider of it. But if no fine is ſet by the juſtices, the King's Bench cannot ſet it; but, upon having the proceedings removed before

before them by *certiorari*, will quash the conviction. R. v. Elwell, 2 Str. 794. 2 Ld. Raym. 1
R. v. Layton, 1 Salk. 353. The conviction too will be quashed if there be no adjudication
the person upon whom the fine is imposed shall be committed until it is paid. R. v. Lord,
Rep. 176. And the fine must be assessed upon every offender separately, and not upon the o
ders jointly: and the justice ought to estreat the fine, and to send the estreat into the exche
that from thence the sheriff may be commanded to levy it for his majesty's use. Dalt. c.
But upon payment of the fine to the sheriff, or upon sureties found (by recognizance) for the
ment thereof, it seemeth, that the justice may deliver the offenders out of prison again at
pleasure. *Ibid.*

(E) What ought to be the Form of a Reco grounded upon these Statutes.

Rex v. Wanhope, Say. Rep. 142.

In a late case in which the court of *K. B.* quashed an indictment, cause it did not appear, what estate the person expelled had in the mises; they said, that it was absolutely necessary that this should app otherwise it will be uncertain, whether any one of the statutes relativ forcible entries does extend to the estate from which the expulsion The 5 *R.* 2. *c.* 7. the 15 *R.* 2. *c.* 2. and the 8 *H.* 6. *c.* 9. extends onl estates holden by tenants for years, tenants by copy of court roll, and nants by elegit, statute merchant, and statute staple.

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FORGERY.

(A) In what Cases the making and altering of Writing shall be said to be so far false and fra dulent as to amount to Forgery.

(*The notion*) It was said in argument, and seemingly adopted by the court in the case of lock v. Harris, 3 Term Rep. 176., that it is no answer to the charge of forgery to say that was no *special intent* to defraud any *particular person*, because a *general* intent to defraud is suffi to constitute the crime; for if a person do an act, the *probable* consequence of which is to def it will, in contemplation of law, constitute a fraudulent intent.

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(*Also the making*) In all forgeries indeed, the instrument itself must be false: and therefo a person give a note entirely *as his own*, and *on his own account*, his subscribing it with a fict name will not make it a forgery. But if he gives the note in a different character than which he really bears, as if pretending to be the executor of *A.* he receives money from account of his supposed testator, and gives a note for it as and in the name of executor o this is a forgery, for in this case, the instrument is false in itself, Dunn's case. Leach's Case

R. v. Aickles, Leach's Cases, 345.

So, a person who has been known by a name which was not his and who afterwards, for the purposes of concealment, assumes his name, and in that name draws a bill of exchange, is not guilty of forg although the bill was drawn for the purposes of fraud.

(C) W

(C) What Offences of this Kind are made Forgery by the Statute, and of the punishment to be inflicted on Persons guilty of Forgery.

A man may be guilty of forgery within several of the above statutes, though the person whose name or signature he purports to forge be not in existence. As, if a person alter his own name indorsed on a bill of exchange to the name of a person beginning with the same initial, although there is no known person in existence, answering to the name forged. So, where a person in possession of a promissory note, which had been lost, indorses it in a fictitious name in order to get it discounted. Upon the same principle, a man may be indicted for forging a *last* will and testament, although the supposed testator be alive. Foſt. 116. Bolland's case. Leach's Cases, 78. R. v. Tuft, *Leiceſter* Lent Aſſ. 1776. R. v. Cogan, Leach, 356.

If a bill of exchange payable to *A.* or order, get into the hands of another person of the same name with the payee, and such person, knowing that he is not the person in whose favour it was drawn, indorse it, he is guilty of forgery. Mead v. Young, 4 Term Rep. 28.

A forged draught on a banker is an order for the payment of money within the 7 *Geo.* 2. *c.* 11., although no person of the name forged ever got cash there. Locket's case, Leach. 89.

To forge a note in imitation of a bank note, although there be no water-mark, and the word *pounds* be omitted, is a capital offence. Elliot's case, *id.* 162.

An entry of the receipt of money or notes made by a cashier of the bank of *England* in the bank book of a creditor, is an accountable receipt for the payment of money within 7 *Geo.* 2 *c.* 22., and altering the principal sum by prefixing a figure to increase its numeration, is a capital forgery. Harrison's case, *id.* 166.

So, is a forgery with intent to defraud *the stewards of the feast of the sons of the clergy*. Jones and Palmer's case, Leach, 295.

But a forged order for the delivery of goods, to be within 7 *Geo.* 2. *c.* 22. must be positive and compulsory. It must likewise be directed to the person who holds the goods, and it must appear upon the indictment that the person whose name is charged to be forged, had an authority to make such order as the forged order purports to be. *Id.* 108. 266. Clinch's case, *id.* 437. Foſt. 120. R. v. Jones, Dougl. 300.

Where an indictment stated that the instrument forged "purported to be a bank note," but, in fact, it was very different and distinguishable from a security; the court held that the defect could not be supplied, so as to support the indictment, by any representations of the party at the time he uttered it.

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FRAUD.

(A) What Acts are condemned in the Common Law Courts as fraudulent, though not within the express Provision of any Act of Parliament.

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(*Such as* (*b*) And this though it be read to him by a stranger to the party to whom the deed made. 2 Co. 9.

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(*If a vintner*) See Barker v. Braham, 2 Bl. Rep. 869.

(B) What Acts are deemed fraudulent in the Courts of Equity.

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(*It is clearly*) Where a court of equity absolutely sets aside a deed for fraud, and the estate question passed by that deed only, it will not direct a reconveyance. *Secùs*, where the estate has been conveyed to a third person as an instrument not privy to the fraud; or if the deed is set aside upon paying so much money, for there, till payment, the estate remains. Bates v. Graves. 2 Ves. jun. 294. In Chesterfield v. Janssen, 2 Vez. 155. Lord Hardwicke enumerates four species of fraud: 1st, Fraud arising from facts and circumstances of imposition, which is the plainest case; 2dly, Fraud may be apparent from the intrinsick value and subject of the bargain itself, such as no man in his senses, and not under delusion, would make on the one hand, and as no honest or fair man would accept on the other; which are inequitable and unconscionable bargains, and of such even the common law has taken notice: a third is that which may be presumed from the circumstances and condition of the parties contracting; and this goes farther than the rule of law, which is, that fraud must be proved, not presumed: but it is wisely established in a court of equity, to prevent taking any surreptitious advantage of the weakness or necessity of another, which knowingly to do, is equally against conscience, as to take advantage of his ignorance: a fourth kind of fraud may be collected or enforced, in the consideration of a court of equity, from the nature and circumstances of the transaction, as being an imposition and deceit on other persons not parties to the fraudulent agreement.

Broderick v. Broderick, Vin. Abr. tit. *Circumvention*, p. 3. 1 P. Wms. 239. In this case it was decreed, that the defendant do account for the rents and profits of the freehold leases to the plaintiff, the plaintiff to have all just allowances

Francis Broderick, being seised of a considerable estate in fee, made his will, and devised it to *Thomas Broderick*, the defendant; *Francis* himself executed the will, but it was not attested in his presence by three witnesses. *Francis* died, and the defendant *Thomas*, finding that the will was void for 100 guineas paid by him to the plaintiff *George Broderick*, who was *Francis*'s heir at law, procured from the plaintiff a release, which recited that *Francis*, by his last will duly executed, had devised his estate to the defendant *Thomas*; and the defendant *Thomas* thinking himself not safe with the release only, for 50 guineas more prevailed with the plaintiff to convey the lands by lease and release to one *Day*, who was trustee to the defendant *Thomas*, to whom *Day* afterwards conveyed. Afterwards, the defendant *Thomas*, upon a valuable consideration, conveyed part to one *Parker*, who had not any other notice of the validity of the will, save that he heard it mentioned in common discourse. The plaintiff brought his bill against *Thomas Broderick*, *Day*, and *Parker*, to have the release, lease and release, delivered up as fraudulently obtained; and it not appearing that they knew at the time of his making the release, &c. that the will was bad, Lord *Harcourt* decreed that they should be delivered up; and it not appearing

ing that *Parker* was privy to the fraud, though he had heard of the invalidity of the will as above, it was decreed that he, upon receiving his purchase-money with interest, should convey to the plaintiff, and should account for the rents and profits which he had received, and be allowed what he had laid out in repairs or otherwise.

for debts and legacies paid by him and to account for 150 guineas to the defendant, with interest, &c. As to the purchaser *bonâ fide* of part of the freehold lands, he shall reconvey to the plaintiff, upon payment of the purchase money with interest at 5*l.* per cent., because he had notice of the invalidity of the devise by common report, though not actual notice from the plaintiff or defendant; and though he was not a fraudulent purchaser, yet he was a rash one, and ought to have inquired into the validity of the will, or gotten the heir at law to join in the conveyance to him. *Ex relatione alterius.* Vin. Abr. *ubi supr.*

The father had, on his marriage, articled to settle his whole estate upon that marriage; but neglecting so to do, when the eldest son attained his full age, he, without giving the son notice of the articles, and by threats and promises, prevailed with him to join in making a settlement on the younger children, and thereby to give the father a power of making a jointure upon another wife: the father afterwards gave a bond to make such jointure, and married. This bond was set aside as against the heirs, and the first articles were established, and the wife was put to seek satisfaction of her bond out of the personal estate.

Jevers v. Jevers, 4 Br. P. C. 199. 2 Eq. Cas. Abr. 54. pl. 13. See too Scrope v. Offley, 4 Br. P. C. 237. S. P.

Where on a treaty for a lease, it appeared that the agents of the lessor had in his presence represented the quantity of land proposed to be demised to be much more than it actually was; and that the lessor, knowing that this was a misrepresentation, had assented to it, because he did not think it prudent to disclose the truth; the contract was set aside as fraudulent.

Mead v. Webb, 4 Br. P. C. 497.

An estate was settled after marriage upon trust, *inter al.* to raise portions for the daughters of the marriage upon failure of issue male, to whom the estate was limited in tail: one of the daughters gives a general release to her brother, but neither party at the time of such release being given had any knowledge of the settlement. The release, therefore, though general, was holden not to extend to the settlement, and the trusts of it were decreed to be performed.

Ramsden v. Hylton, 2 Vez. 304.

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(*If A. bar.*) In the case of Mocatta v. Murgatroyd, 1 P. Wms. 394, Lord Cowper is reported to have decreed that the first mortgagee shall in such case be postponed, though there be no actual proof of his knowing the contents of the deed he attested. But Mr. Cox, the editor of that book, has not been able to find this decree in the registrar's book. And Lord Thurlow said, in the case of Becket v. Cordley, that he thought this case of Mocatta v. Murgatroyd went too far in imputing notice to the first mortgagee from the *mere* circumstance of his being a witness to the second mortgage, since it is in common practice for persons to attest the execution of deeds without being made acquainted with their contents.

A father purchased lands to him and his heirs, and when he was on his death-bed sent for his eldest son, and told him that these lands were bought with his second son's money, whereupon the eldest son promised that his brother should enjoy them accordingly. The father dies. The Lord Keeper *Wright* and the Master of the Rolls held, that the eldest son was entitled to these lands, because by the statute of frauds, there ought to have been a declaration of the use or trust in writing. But Lord *Cowper* was of another opinion, because of the fraud here manifest, in that the eldest son promised the father on his death-bed, that the other should enjoy the lands, so that he took this to be a case out of the statute.

Sellack v. Harris, 5 Vin. Abr. tit. *Contract &c.* (H), p. 31.

Leiſter v. Foxcroft, cited in Gilb. Eq. Rep. 11.

So, where a parol building-leaſe was made of ground, and when th leſſor was dying, he declared, he thought he ought to make a leaſe in wri ing; but the heir told him, he ſhould not diſcompoſe himſelf, for that h would ſupply it; whereby, and by other fraudulent means, the leſſee w hindered from ſeeing the leſſor, and having the leaſe executed accordingly the Lords held this to be out of the ſtatute, and made it good to t leſſee.

Gilb. Eq. Rep. *ibid.*

So, if a man has made his will, and his ſon executor, and when he dying, ſays, that he has a mind to have his wife executrix, and the ſ ſays, "don't trouble yourſelf to alter it, for I will let her have the ſurpl "and act as executor;" a court of equity will decree acccordingly.

Young v. Peachy, 2 Atk. 254.

So, where a father prevailed with his daughter and her huſband to jo with him in ſuffering a recovery for a particular purpoſe, and afterwar made uſe of it for another purpoſe, Lord *Hardwicke* relieved againſt upon the ground of fraud. In this caſe the deed to lead the uſes w general to the father and his heirs.

Middleton v. Lord Onſlow, 1 P. Wms 768. See too Spurnett v. Spiller, 1 Atk. 105. S. P.

Where, on the conſent of the wife and her truſtees, and in order to compoſition with the huſband's creditors, the court of Chancery order part of the wife's fortune to be paid to the creditors conſenting to acce ſuch compoſition, and to diſcharge him of the debts; and ſome of t creditors, upon executing the deed of compoſition, took private ſecuriti poſt-dated, for part of their debts, beſides their ſhare with the other cre tors; ſuch ſecurities were ſet aſide, as a fraud on the wife, the truſte and the court.

Cockſhott v. Bennett, 2 TermRep 763.

So, too, at law; where all the creditors of an inſolvent conſented accept a compoſition upon an aſſignment of his effects by a deed of truſt which they were all parties, and one of them, before he executed, tained from the inſolvent a promiſſory note for the reſidue of his deman by refuſing to execute till ſuch note was made; the note was adjudged vo as a fraud on the reſt of the creditors, and therefore incapable of be ratified or revived by a ſubſequent promiſe.

Jackſon v. Duchaire, 3 TermRep 551.

Upon the ſame principle, where *A.* agreed to give *B.* a certain ſum goods in advancement of *C*, it was holden, that a ſecret agreement tween *B.* and *C.* that the latter ſhould pay a further ſum, was void as fraud upon *A.*, and that *B.* could not recover ſuch further ſum againſt *A*

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(*If a ſecurity*) Where advantage has been taken of the weakneſs of parties, and conveyan therefore ſet aſide, ſee White v. Small, 2 Ch. Ca. 103. Clarkſon v. Hanway, 2 P. Wms. 2 Bennet v. Vade, 2 Atk, 324 Evans v. Blood, 4 Br. P. C. 557. Bridgeman v. Green, 2 Ves. 6 Filmer v. Gott, 7 Br P. C. 70

(*Where an agreement*) See the caſe of Savage v. Taylor, Caſ. temp Talb. 234, where the c followed the ſame middle line of conduct.

Oſmond v. Fitzroy, and *e contra.* 3 P. Wms. 129. In giving judgment in this caſe, Sir J. Jekyll ſaid, "Where a man gives a bond, if

The Duke and Ducheſs of *Cleveland*, being about to ſend Lord *Sou ampton*, their eldeſt ſon, to travel, employed one *Oſmond* as a ſervant to tend upon the young lord, then an infant of about ſeventeen, and (as anſwer of *Oſmond* it was admitted) *to prevent his being impoſed upon.* terwards, on the Lord *Southampton's* returning from abroad, *Oſmond* continued in his ſervice, and, when his lordſhip was about twenty-ſe years of age, prevailed on him to enter into a bond for the payment 1000*l.* to him the ſaid *Oſmond.* The bond was prepared by *Oſmond*, kept ſecret from the duke and dutcheſs. There were alſo ſome proof the weak capacity of the young lord, and that at that time he was unabl

raiſe money to pay off the bond. Under all theſe circumſtances the court thought the bond fraudulently obtained, and relieved againſt it.

there be no fraud or breach of

uſt in the obtaining of it. equity will not ſet aſide the bond only for the weakneſs of the obli- ge, if he be *compos mentis*; neither will this court meaſure the ſize of people's underſtandings or incapacities, there being no ſuch thing as an equitable incapacity, where there is a legal capacity." But in Griffin v. Deveuille, Lord Thurlow obſerved, that in almoſt every caſe upon this ſubject, a principal ingredient was a degree of weakneſs ſhort of *legal incapacity*; and that in this very caſe of Oſmond v. Fitzroy, no relief probably would have been given, if the court had not conſidered Lord Southampton as more liable to impoſition, than the generality of mankind. Cox's note, 3 P. Wms. 130.

A court of equity will relieve againſt an unequal contract entered into by a perſon in embarraſſed circumſtances, for to avail oneſelf of the diſtreſſes of another, carries ſomewhat of fraud in it.

Boſanquet v. Daſhwood Ca. Temp. Talb. 38.

Proof v. Hines, *id.* 111. Heathcote v. Paignon 2. Br. Ch. Rep. 167. See 3 Wooddeſ. 457.

It will relieve, too, where there is a manifeſt inequality between parties ariſing from the relation in which they ſtand to each other. Such is the relation of guardian and ward; and therefore a court of equity will not allow any gift or releaſe to a guardian from his ward on his coming of age, or give validity to any contract the terms of which are not perfectly fair and equal, made by perſons in that ſituation, or between whom a ſimilar confidence hath exiſted; ſuch alſo is the relation of parent and child (*a*), attorney and client (*b*), and ſteward or agent and his principal (*c*).

Duke Hamilton v. Mohun, 1 P. Wms. 118. Hylton v. Hylton, 2 Vez. 547. Griffin v. De Veuille, 3 Wooddeſ. App. 16. (*a*) Gliſſen v. Okeden, 2 Atk. 258. and 3 Br. P. C. 560. Cocking v. Pratt, 1 Vez. 400. Hawes v. Wyatt, 3 Br. Ch. Rep. 156. (*b*) Proof v. Hines, Ca. temp. Talb. 111. Walmſley v. Booth, 2 Atk. 25. Oldham v. Hand, 2 Vez. 259. Welles v. Middleton, printed caſes in the Houſe of Lords 1785. Newman v. Payne, 2 Vez. jun. 199. and 4 Br. Ch. Rep. 350. (*c*) Cray v. Mansfield, 1 Vez. 381. Cartſide v. Iſherwood, 1 Br. Ch. Rep. 558. Fox v. Mackreth, 2 Br. Ch. Rep. 400. Crow v. Ballard, 4 Br. Ch. Rep. 117.

For the ſame reaſon a court of equity will relieve againſt bargains with heirs apparent, or perſons in remainder, for their expectations: ſo likewiſe, with ſailors for their prize-money (*a*).

Berney v. Pitt, Vern. 14. Knott v. Hill., Id. 27. Wiſeman v. Beake, Id. 121. Cole v. Gibbons, 3 P. Wms. 290. Earl of Cheſterfield v. Janſen, 1 Atk. 342. 351. and 2 Vez. 144. 155. Barnardiſton v. Lingood, 2 Atk. 133. Gwynne v. Heaton, 1 Br. Ch. Rep. 1. (*a*) Baldwin v. Rochford, 1 Wils. 229. Taylor v. Rochford, 2 Vez. Jun. Howe v. Weldon, Id. 516.

Upon principles of publick policy, a court of equity treats as fraudulent all agreements for the purchaſe of publick offices, even though ſuch offices ſhould not be within the ſtatute of 5 & 6 *Edw.* 6. Agreements of this kind are indeed conſidered in the ſame light in a court of law.

Law v. Law Ca temp. Talb. 140. and 3 P. Wms. 391. Hanningſon v. Du Chaſtel, 1 Br. Ch. Rep. 124. Morris v. M Culloch, Ambl 432. Garforth v. Fearon, 1 H. Bl. 327. Parſons v. Freeman, Id. 322.

(C) Of fraudulent Conveyances to defeat Creditors and Purchaſers within the 13 *Eliz. c.* 5 & 27 *Eliz. c.* 4.

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(*It ſeems by*) The principles and rules of the common law, as now univerſally known and underſtood, are ſo ſtrong againſt fraud in every ſhape, that the common law would have attained every end propoſed by the ſtatutes of 13 El. c. 5. and 27 El. c. 4. *Per* Lord Mansfield, Cowp. 434.

Although

Cowp. 434. Although the ſtatute of 13 *Eliz. c.* 5. ſubjects the parties to the fraud which it provides againſt, to certain penalties, and therefore, it ſhould ſeem, ought to be conſtrued ſtrictly, yet Lord *Mansfield* obſerved, that the ſtatutes of 12 & 27 *El.* cannot receive too liberal a conſtruction, or be too much extended in ſuppreſſion of fraud.

(*A. being*) See too Worſley v. De Mattos, 1 Burr. 467.

Partridge v. Gopp, Ambl. 596. So, where an executor advanced ſums of money to his daughters, who were legatees under the will of which he was executor; to two of them on marriage, to the others as a voluntary gift; and afterwards died inſolvent, having received aſſets; Lord *Northington* held the voluntary gifts to be fraudulent, though there was no evidence in the cauſe, and the daughters in their anſwers denied that the money advanced was on account, or in part of their legacies, or that it was to their knowledge or belief part of the perſonal eſtate of the teſtator, his Lordſhip obſerving, that it is the motive of the giver, not the knowledge of the acceptor, that is to weigh.

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(*But if a perſon*) 1 Ventr. 194. 1 Sid. 349. 2 Roll. Rep. 306. "If there be, ſaith Lord Hardwicke, a voluntary conveyance of real eſtate or chattel intereſt by one not indebted at the time, though he afterwards becomes indebted, if that voluntary conveyance was for a child and no particular evidence or badge of fraud to deceive or defraud ſubſequent creditors, that will be good; but if any mark of fraud, colluſion, or intent to deceive ſubſequent creditors appear, that will make it void." Townſend v. Wyndham, 2 Vez. 11. Ruſſel v. Hammond, 1 Atk. 15. Stileman v. Aſhdown, 2 Atk. 493. However, in the caſe of Jones v. Marſh, Ca. temp. Talb 64. Lord Talbot declined giving any opinion how far a family ſettlement, without any conſideration would be fraudulent againſt ſubſequent creditors though the party was not indebted at the time; and in Hungerford v. Earle, 2 Vern. 261, Hutchins, Lord Commiſſioner, held ſuch ſettlement to be void. It is obſerved however, that Lord Talbot was not, by the circumſtances of the caſe before him, called upon to give his opinion; and that the opinion of Hutchins was evidently influenced by the proviſions of the ſettlement not having been purſued. Fonbl. Eq. Tr. 263 note.

Cadogan v. Kennet, Cowp. 432. *A.* being indebted, by ſettlement before marriage, in conſideration of the marriage, and of 10,000*l.* the wife's fortune, which was ſuppoſed to be more than the amount of his debts at that time, conveys all his real eſtate and houſehold goods (his real eſtate alone not being thought an adequate ſettlement) in truſt for himſelf for life, remainder to his wife for life, remainder to his firſt and other ſons in ſtrict ſettlement: the wife being a ward of Chancery, the ſettlement was approved of by a Maſter, and the goods enumerated in a ſchedule. *A*, after the marriage, continued in poſſeſſion of the goods; after which a creditor, *at the time of the ſettlement* having obtained judgment, took them in execution, whereupon the truſtee commenced an action againſt him. It was holden, that the ſettlement was good againſt creditors; that poſſeſſion was no circumſtance of fraud in this caſe, for that it was part of the truſt that the goods ſhould continue in the houſe. But if the ſettlor had let the houſe and furniture, reſerving one rent for the houſe, and another for the furniture, or if the rent could be apportioned, the creditors would be entitled to the ſhare of ſuch rent reſerved, or to ſuch apportionment of it in reſpect of the goods. And there having been a ſale of part in this caſe, it was agreed, that the value ſhould be veſted in the funds on the truſts of the ſettlement, and the intereſt during *A.*'s life paid to the defendant. The reſt of the goods were ordered to be delivered to the plaintiffs.

Cowp. 434. Where there had been a decree in the court of Chancery and a ſequeſtration; and a perſon, with knowledge of the decree, bought the houſe and goods belonging to the defendant, and gave a full price for them; yet the court ſaid, that the purchaſe being with a manifeſt view to defeat the creditor, was fraudulent; and therefore, notwithſtanding a valuable conſide-

ration

…ion, void. So, if a man knows of a judgment and execution, and with … view to defeat it purchaſes the debtor's goods, it is void; becauſe the …rpoſe is iniquitous. For if a tranſaction be not *boná fide*, the circum…nce of its being done for *a valuable conſideration* will not alone take it out …f the ſtatute.

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(*Therefore if a*) See *acc.* 3 Co. 83. a. Cro. El. 444. Doe v. Routledge, Cowp. 785.

So, where one, *after marriage*, made a ſettlement of an eſtate upon …mſelf for life, remainder to his wife for life, remainder to their iſſue in …l; and three years afterwards mortgaged the eſtate to *B.* who was ap…ized of the ſettlement; it was holden, that the ſettlement was void as …ainſt the mortgagee within the ſtatute of 27 *Eliz. c.* 4.; and the ſettle…ent being made void by the ſtatute, notice could make no difference. Chapman v. Emery, Cowp. 278.

(*Fraudulent*) Franklin v. Thornebury, 1 Vern. 132. Villers v. Beamont, *Id.* 100. Bale v. …ewton, *Id.* 464. Clavering v. Clavering, 2 Vern. 473. Boughton v. Boughton, 1 Atk 325. *acc.* …d if there be two or more voluntary conveyances, the firſt ſhall prevail unleſs the latter be for …yment of debts. 1 Ch. Rep. 99.

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(*But if a ma*-) See too Edwards v. Harben, 2 Term Rep. 587. and *ſupra*, 21.

Where a father ſettled an eſtate upon his ſon, but took back an annuity …the value of it, Lord *Hardwicke* held that this was tantamount to a con…nance in poſſeſſion, and that the ſettlement was void as againſt credi…rs. Ruſſell v. Hm 11. 1 Atk. 13.

A. entered into articles of partnerſhip in fifths with three others for 21 …ars in digging for mines in *A'*.s lands, *A.* to have two-fifths, and in con…deration of his ownerſhip of the land, to have a tenth out of the ſhare of …e other partners. In purſuance of theſe articles, they ſearched for mines, …d in about two years, and after having expended about 120*l* they diſco…ed a valuable mine, which they worked for three months, when *A.* died: …on *A.*'s death, his widow ſet up a voluntary ſettlement made after mar…ge. But the court inclined to think that the partners were as purchaſers, …d that the voluntary ſettlement was void as to them. Shaw v. Standiſh, 2 Vern 326

In the above caſe it was ſaid to have been adjudged at law, that a leſſee …a rack-rent and who paid no fine, was a purchaſer within the ſtatute, and …ould avoid a voluntary conveyance.

So, where, on an ejectment brought by the aſſignee of a mortgagee, it was …jected, that it did not appear, that any money was paid upon the original …rtgage, and therefore it was fraudulent; and being fraudulent in the crea…n, though the preſent aſſignee paid a valuable conſideration, yet this …ould not purge the fraud, and make it good againſt the defendant, who …s a purchaſer *boná fide*, and for a valuable conſideration; *Holt*, C. J. an…wered, that the firſt mortgage was good between the parties; and being …, when the firſt mortgagee aſſigned for a valuable conſideration, this was …l one, as if the firſt mortgage had been upon a valuable conſideration: for …e aſſignee ſtands in his place, and therefore is within the ſecond proviſo …f the ſtatute of 27 *El. c.* 4. Andrew Newport's caſe, Skin. 423., and 3 Lev. 387. S. C. by the name of Smartle v. Williams.

So, where a woman, entitled to 6000*l.* ſecured by her mother's marriage-…tlement, ſubject to the contingency of being leſſened by the birth of …nother daughter, married clandeſtinely without any ſettlement; and after Wheeler v. Caryll, Ambl. 121.

the

the marriage her father ſecured the 6000*l.* upon his eſtate, upon which h huſband made a ſettlement upon her; ſuch ſettlement was adjudged to b good againſt the huſband's creditors.

Jones v. Marſh, Ca. temp. Talb 64.

So, where the huſband, ſome time after marriage, in conſideration of a additional portion of 100*l* paid by the wife's mother, ſettled an eſtate 100*l.* per ann. upon himſelf for life, remainder to his firſt and other ſon *&c.* and his mother, having an intereſt in the eſtate, joined with him in t conveyance; and thirteen years after, he mortgaged his eſtate with the uſu covenants; and upon his death the mortgagee brought his bill againſt t ſon to foreclоſe; Lord *Talbot* ſaid, that it would be very hard to call th a fraudulent ſettlement; ſince it was in conſideration of a marriage ha and of an additional proviſion of 100*l.* paid by the wife's relations, whi cannot be ſaid to be voluntary againſt a creditor who lent his money th teen years after.

Ambl 121. The like law if the particular aſſignee of the huſband for a valuable conſideration, apply to equity. Jewſon v. Mouſon, 2 Atk. 432.

If a woman is entitled to a truſt term, which the huſband cannot lay ho of and poſſeſs, nor get at without the aſſiſtance of a court of equity; if t truſtees will not raiſe the portion, and the huſband goes into equity for ai the court will decree an adequate ſettlement to be made on the wife, a will ſupport it as a good ſettlement for a valuable conſideration. So, if aft marriage, the wife being entitled to ſuch a portion, which the huſband ca not touch without the aid of the court, and which the truſtees will not p without the huſband's making a ſettlement; if the huſband does agree to i and do that which the court would decree, it is a good ſettlement again creditors.

Roe v. Mitton, 2 Wilſ. 356.

John Hamerton being ſeiſed in fee of an eſtate, and having a mother wi had an annuity of 50*l. per ann.* iſſuing out of the whole, and alſo two br thers, *Thomas* and *Vavaſor*; and being about to be married; his mothe previouſly to the marriage, conſented to part with her ſecurity upon th *whole* eſtate for her annuity, and to take, inſtead thereof, a ſecurity for th ſame upon *part* of the eſtate; and accordingly ſhe and *John* (the intende huſband) join in a fine to deliver the whole eſtate from the annuity, and conſideration of the marriage, and of a portion of 1300*l.*, and of th grant and releaſe of the annuity, *John* conveys to truſtees that they ſhou pay 50*l.* per ann. to the mother out of *part* of the eſtate for her life, th as to the whole, to the uſe of *John* for life, remainder to truſtees to pr ſerve contingent remainders, remainder to the firſt and every other ſon tail-male, remainders to *Thomas Hamerton* and *Vavaſor Hamerton*, ſeverall one after the other in tail-male in ſtrict ſettlement, remainder to the daught and daughters of the marriage of *John Hamerton* and his intended wif remainder to *John Hamerton* in fee. There was no iſſue of the marriage afterwards *John Hamerton* mortgaged the eſtate to *Monckton*, and ackno ledged a fine to him *ſur conceſſit*, then *Monckton* purchaſed of *John Ham ton* in fee for a valuable conſideration, and took a fine from him *ſur conuſan de droit come ceo, &c.*; *John Hamerton* died without iſſue, but *Thom Hamerton* left a ſon, who brought an ejectment to recover the eſtate. was holden that this was a good ſettlement againſt purchaſers, the conſid ration given by the mother making her a purchaſer for her younger ſons.

Doe v. Routledge, Cowp. 705.

William Watſon in 1763, ſurrendered a copyhold eſtate, to which h was entitled in fee, to the uſe of himſelf for life, remainder to the defe dant *Routledge*, (who was his nephew by a ſiſter,) his heirs and aſſigns, a was admitted thereupon. This ſurrender was voluntary, and without an conſideration, other than natural love and affection. In the year 170

Routled

Routledge paid his addreſſes to a woman, whom he afterwards married, and ſhewed a copy of the ſurrender to her father, but whether this had any influence in procuring the marriage did not appear. Afterwards, in 1773, *William Watſon* ſurrendered the ſame eſtate to the uſe of *Hugh Watſon*, a nephew by a younger brother, his heirs and aſſigns; and by a deed of the ſame date, executed by *William Watſon*, reciting that *Hugh Watſon*, upon the propoſal and at the requeſt of *William Watſon*, had agreed with *William Watſon* for the abſolute purchaſe of the ſaid eſtate for the ſum of 200*l*, and alſo the ſurrender in purſuance thereof, *William Watſon* acknowledges the receipt of the 200*l*. from *Hugh Watſon*, and enters into the uſual covenants: there was a receipt indorſed on the deed for the 200*l*., and it was no proof that it was paid. *Hugh Watſon* was accordingly admitted upon the ſurrender, and entered into poſſeſſion. It was in evidence that before, and at the time of the ſurrender to him, he knew of the ſurrender to *Routledge*; that the eſtate at the time of the ſurrender to *Hugh Watſon* was worth between 50*l*. and 60*l*. per ann. and the inheritance worth between 1800*l*. and 2000*l*. It did not appear that *William Watſon* was indebted at the time of making the firſt ſurrender, or at the time of his death. It was holden, that the firſt ſettlement, though voluntary, was good within the 27 *El*., for that there is no part of the act which affects voluntary ſettlements *eo nomine*, unleſs they are fraudulent: and that the deed of 1773 was not ſuch a deed as ought to ſet the firſt ſettlement aſide, ſuppoſing the firſt to be affected by the act, inaſmuch as the conſideration money was by no means adequate to the value of the eſtate, and the whole tranſaction was merely colourable.

(D) In what Court Fraud is cognizable.

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(*It is clearly agreed*) But every kind of fraud is equally cognizable, and equally adverted to in a court of law; and ſome frauds are only cognizable there; as fraud in obtaining a deviſe of lands, which is always ſent out of the equity courts to be there determined. 3 Bl. Comm. 431. And Lord Mansfield in the caſe of Bright v. Eynon, 1 Burr. 396. ſays, that courts of equity and courts of law have a concurrent juriſdiction to ſuppreſs and relieve againſt fraud. But the interpoſition of the former is often neceſſary for the better inveſtigating of truth, and to give more complete redreſs. And Lord Loughborough C. in the caſe of Bates v. Graves, 2 Vez. jun. 295, "When the court of Chancery has declared a deed to be ſet aſide for fraud and impoſition, I muſt ſuppoſe that it would be equally ſet aſide at law upon pleading to it." For courts of law relieve by making void the inſtrument obtained by fraud. Wood's Inſt. 296.

(*But it hath*) Kerrick v. Bransby, 3 Br. P. C. 358., and Webb v. Cleverden, 2 Atk. 424. Bennet v. Vade, *Id.* 324. Anon. 3 Atk. 17. Bates v. Graves, 2 Vez. jun. 287.

(E) Where a Wrong-doer is further punishable than by making void the fraudulent Act.

It is alſo enacted by 30 *Geo.* 2. c. 24. "That all perſons who knowingly and deſignedly by falſe pretences ſhall obtain from any perſon money, goods, wares, or merchandizes, with intent to cheat and defraud any perſon or perſons of the ſame, ſhall on conviction be put in the pillory,

"or

" or publickly whipped, or fined and impriſoned, or tranſported, for
" term of ſeven years, as the court ſhall in diſcretion think fit."
R. v. Smith, Cowp. 24. Upon this ſtatute no *certiorari lies*.

R. v. Maſon, 2 Term Rep. 581. R. v. Munoz, 2 Str. 1127. In an indictment upon this and the preceding ſtatute, the falſe pretens and falſe tokens made uſe of by the defendant muſt be ſet forth: if th are not, it is error for which a judgment againſt the defendant will be verſed.

GAME.

Rex v. Davis, 6 Term Rep. 177. PROOF that the defendant " did keep and uſe a gun with intent to
" and deſtroy the game" is ſufficient evidence to ſupport a conv tion on the game laws, though the witneſs may allege a very ſufficient r ſon for imputing ſuch intent to the defendant. It is not the province the court to examine whether the concluſion drawn by the magiſtrate be be not the inevitable concluſion from the evidence. It is ſufficient in co victions, if there were ſuch evidence before the magiſtrate, as in an acti might be left to a jury.

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(*Alſo the common law*) See *acc.* 3 Term Rep. 334.

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(*But the principal*) A diploma granted by any *Scotch* univerſity conferring the degree of d tor of phyſick, does not give a qualification under this act. And though *the ſon of an eſquire, of any other perſon of higher degree*, is qualified by this act to kill game; yet *the eſquire himſelf, other perſon of higher degree*, derives no qualification under it. Jones v. Smart, 1 Term Rep. 44

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(*By the* 5 *Annæ*) The word *no* is inſerted inſtead of the words *if any*, which are in the a ſince that word ſeemeth neceſſary to make up the ſenſe; and the word *confirmed* is added for t like reaſon. And indeed there have been too many inadvertencies in the drawing up of this ac for there is falſe grammar in no fewer than ſix places, beſides other miſtakes. 2 Burn's Juſt. t *Game*, 253.

(*And for the*) A poulterer is not a chapman within the meaning of this ſtatute. Kearle Boutler, Say Rep. 191.

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(*And it is further enacted*, " *That if*) By 25 Geo. 3. c. 50. every perſon who ſhall kill ga ſhall deliver to the clerk of the peace his name and place of abode, and take out annually a ce tificate thereof charged with a ſtamp duty of 2*l.* 2*s.*; and by 31 Geo. 3. c. 21. with a farth duty of 1*l.* 1*s.*: and all deputations of game-keepers ſhall be regiſtered, and the game-keepe ſhall annually take out a certificate thereof charged with a duty of 10*s.* 6*d.* which is doubled the above ſtatute of 31 Geo. 3. c. 21. Every perſon killing game without a certificate incurs penalty of 20*l.*; and any perſon in purſuit of game, who ſhall refuſe to produce his certificate to diſcloſe his name and place of abode, or who ſhall give a falſe account of himſelf, incurs a p nalty of 50*l.* The certificate will not authorize unqualified perſons to kill game; nor can a ce tificate taken out by a game-keeper under a deputation be given in evidence for killing game o of the manor in reſpect of which it is granted.

Though it is a rule of law not to permit a queſtion reſpecting the boundaries of a manor to diſcuſſed in an action on the game-laws; Calcraft v. Gibbs, 4 Term Rep. 681. and Hawkins Bailey; and Blunt v. Grimes there cited; yet it is no defence to ſuch an action that the defe dant acted as game-keeper under a deputation from a perſon claiming to be lord of the manor, there appear to be no ground for the claim. Calcraft v. Gibbs, *ubi ſupra*. and 5 Term Rep. 19.

(*By the* 9 *Ann.*) In an action therefore upon this ſtatute for expoſing a hare to ſale, it is ſu ficient to allege, that the defendant had a hare in his poſſeſſion. Jones v. Biſhop, Say. Rep. 64.

" Provid

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Provided, That all) The 26 G. 2. c. 2. extends the time to the end of the ſecond term.

hath been determined, that in an information on the acts of 22 & 23 . 2. c. 25. and 5 *Ann. c.* 14. not only the negative qualifications muſt et out; but (*a*) that the time when the offence was committed muſt alſo ated. Rex v. Mancot, 1 Str. 66. R. v. Hill, 2 Ld Raym. 1415.

Jarvis, 1 Burr. 148. Bluet v. Needs. Com. Rep. 522. R. v. Wheatman, Dougl. 331. v. Pullen, 1 Salk. 369. R. v. Chantler, *id.* 378. R. v. Simpſon, 10 Mod. 248. In an however, it is enough to ſtate that the defendant was not duly qualified. Bluet v. Needs, Rep. 522.

a conviction for deer-ſtealing, the county where the offence was com- ed was mentioned only in the information, and not in the evidence of witneſſes; and therefore that not appearing to be proved, the convic- was quaſhed. Anon. cited in 2 Ld. Raym. 1387.

conviction on the 5 *Ann.* ſet out the vill, but not the pariſh wherein offence was committed: upon motion to quaſh it for this defect, a part he penalty being given to the poor of the pariſh; the court ſaid, if was a pariſh of the ſame name with the vill, they would intend it to extenſive with it; if the vill was extraparochial, then the informer entitled to the whole penalty. R. v. Wyatt, 2 Ld. Raym. 1478.

A conviction for deer-killing will be quaſhed, if made upon the evidence the informer. R. v. Stone, 2 Ld. Raym 1545.

A conviction for keeping (only) a lurcher is good, for the bare keeping it is evidence of the purpoſe for which it is kept. But it is not ſo in caſe of a gun, for the keeping of a gun is an ambiguous act: in order fore to bring the party keeping it within the ſtatute, it muſt be ſhewn it was kept for the purpoſe of killing game. However a conviction the defendant *kept and uſed a gun to kill* and *deſtroy the game*, hath been nly adjudged to be ſufficient. R. v. Filer, 1 Str. 497. R. v. Gardner, 2 Str. 1084. Wingfield v. Stratford, 1 Wilſ. 315. R. v. Thompſon, 2 Term Rep. 18.

an action on the 5 *Ann. c.* 14. for keeping and uſing a dog to kill the , it muſt be ſhewn what ſort of dog it was; that it may appear whether re one of the dogs mentioned in the ſtatute; for this being a penal ſhall not be extended by equity; in an action therefore for uſing a d, the judgment was reverſed, the word hound not being to be met in the ſtatute Reaſon v. Liſle, Com. Rep. 575. Hooker v. Wilks, 2 Str. 1126.

hath been adjudged that a conviction *ſuper præmiſſis* for three penalties l. each for killing three hares, where it appears that all was done in ſame day, is bad, for the ſtatute does not give 5l. for every hare, it g all but one offence. Marriot v. Shaw, Com. Rep. 274. Ld. Manſfield, in the caſe of

s v. Durden, Cowp. 646., declared, that "killing a ſingle hare was an offence; but that ng ten more in the ſame day would not multiply the offence, or the penalty impoſed by the te for killing one." See a ſimilar deciſion on this point in the caſe of Reg. v. Matthews, Mod. 26., and ſee 3 Term Rep. 510.

Two or more perſons cannot be convicted in ſeparate penalties under *Ann.* for uſing a grey-hound to deſtroy game, for it is only one of- ce. Rex v. Bleaſdale, 4 Term Rep. 809.

It is not to be forgotten that none of the above ſtatutes *qualify* any one, cept in the inſtance of a game-keeper, to kill game: the circumſtance of 2 Bl. Com. 418.

having

having 100l. per ann. and the reſt, are not properly qualifications, but emptions, and the perſons, ſo exempted from the penalties of the g ſtatutes, are not only liable to actions of treſpaſs by the owners of land, but alſo if they kill game within the limits of any royal franc they are liable to the actions of ſuch who may have the right of chaſe free warren therein.

GAMING.

Mynd v. Francis, Anſtr. 5. Hudſon v. Davis, *Id.* 504. Cowan v. Phillips, *in Scacc.* Hil. 37 G. 3.

BY 9 *Ann. c.* 14. two ſorts of action are given for money wo play: the one to the party loſing, if he ſues in three months; other, after that period, to the firſt informer. To entitle a party th fore to maintain a bill for a diſcovery upon this act, it muſt appear on the face of the bill, either that he is himſelf the loſer of the mo or that the three months have elapſed, and that he has actually inve himſelf with the character of informer by having commenced a ſu law. He need not indeed ſtate in terms that the action he has c menced is a *qui tam* action; if the right to ſue in the character of former appears on the bill, the court will preſume the action to be reg ly inſtituted.

Newman v. Franco, Anſtr. 519. Andrews v. Berry, *Id.* 634.

A party is entitled in equity to a diſcovery againſt ſecurities given money loſt at play, as well as for the money only.

Turner v. Warren, 2 Str. 1079. Briſtow v. James, 7 Term Rep. 257. Brandon v. Plate, 2 H. Bl. 308.

The action of debt given to the loſer of money at play by the a act of Queen *Anne* is given on the ground of a contract, not by wa penalty. Hence, a defendant may be holden to bail in it; and it be pleaded in abatement to it that the money was due from others named as well as from the defendant. Hence alſo the right to ſue tranſmiſſible to the aſſignees of a bankrupt.

(A) How far reſtrained by the Common Law.

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(*Alſo it is agreed*) With reſpect to wagers, in general they may be conſidered as legal, if they not an incitement to a breach of the peace, or to immorality; or if they do not affect the feel or intereſt of a third perſon, or expoſe him to ridicule: or if they are not againſt ſound policy, Coſta v. Jones, Cowp 729. Atherſord v. Beard, 2 Term Rep. 610. Goode v. Elliott, 3 T Rep 697. "This ſpecies of contract." Lord Mansfield, in the caſe here cited, ſays, "ha fact gone to an extent that is much to be complained of. And whether it would not have b better policy to have treated all wagers originally as gaming contracts, it is now too lat diſcuſs." This better policy prevails in *Scotland*, and hath lately been ſanctioned by a deci of the Houſe of Lords of this country. Bruce v. Roſs, 14th *April* 1788. Printed Caſes of Lords.

But ſee Younge v. Moore, 2 Wilſ. 67. *contr.*

(*But it ſeems*) This poſition is unfounded. 3 Burr. 1008.

(B) Ho

(B) How far reſtrained by Statute.

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And by p. 3.) The words "contract or contracts for the ſame" are not in 9 Ann. c. 14., and are probably left out deſignedly. 2 Bur. Rep. 1081.

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But it ſeems) But ſee Boyer v. Brampton, 2 Str. 1155. Lowe v. Waller, Dougl. 736.

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And it is further enacted, that any) To loſe 10*l.* at one *time* is to loſe it by a ſingle ſtake or throw: to loſe at one *ſitting*, is to loſe it in a courſe of play where the company never parts, though the perſon may not be actually gaming the whole time. *Per* Blackſtone, J. 2 Bl. Rep. 1227.

Upon this act it hath been determined, that although both the ſecurity and the contract are void as to money won at play, only the ſecurity is void as to money lent at play; and that the contract as to that remains, and the lender may maintain an action for it. Barjeau v. Walmſley, 2 Str. 1249. Alcinbrook v. Hall, 2 Wilſ. 309. Robinſon v. Bland, 2 Burr. 1077.

A bill of exchange given for money won at play, cannot be recovered even by an indorſee for valuable conſideration, and without notice, the original vice of the conſideration affecting the ſecurity even in the hands of an innocent and *bonâ fide* holder. Bowyer v. Bampton, 2 Str. 1155. Peacocke v. Rhodes, Dougl. 614. Lowe v. Waller, *id.* 716.

If money be paid on a ſecurity made void by the ſtatute, it may be recovered back; and the action may be brought after the expiration of three months, the time within which the loſer of money actually paid at the time it is loſt muſt bring his action to recover it back; for that limitation doth not extend to payments made on account of ſuch void ſecurities. Rawden v. Shadwell, Ambl. 269. Turner v. Warren, 2 Str. 1079.

As the ſecond ſection of this ſtatute impowers any perſon to ſue for and recover the money; and then directs that a moiety of it ſhall be to the uſe of the poor of the pariſh where the offence ſhall be committed; therefore, the declaration may be laid either "to render to the informer only," or, "to render to the informer and the poor;" and conſequently, may the judgment be likewiſe. Frederick v. Lookup, 4 Burr. 2021.

If a defendant be convicted in an information upon that clauſe of the ſtatute, which ſays that he ſhall forfeit five times the value, the court cannot impoſe upon him; but the only judgment they can give, is, *quod convictus eſt*; a new action muſt be brought upon that judgment for the forfeiture. Rex v. Luckup, 2 Str. 1048.

In an action to recover back money loſt at any game within this ſtatute, it muſt be ſtated that ſome one was actually playing at ſuch game, elſe a wager of above 10*l.* laid upon his ſide is not a betting within the act. Lynal v. Longbotham, 2 Wilſ. 36. It was ſaid in this caſe, that this ſtatute is penal, and not remedial: but where the action is, as here, by the party who has loſt the money, the ſtatute is remedial, and not penal, and therefore a new trial may be had after verdict for the defendant. Bones v. Booth, 2 Bl. Rep. 1226. And ſo it was conſidered in the caſe of Turner v. Warren, 2 Str. 1149., where the court obliged the defendant to give ſpecial bail.

A foot-race, and a horſe-race, are games within the ſtatute: ſo it ſeems is cricket. Indeed, it ſeems immaterial to conſider whether the game Lynall v. Longbotham,

2 Wilſ. 36. Blaxton v. Pye, game itſelf, be lawful or not; if a man loſes 10*l.* by playing or b at it, it is within the ſtatute.

id. 309. Goodburn v. Marley, 2 Str. 1159. Jeffreys v. Walter, 1 Wilſ. 220. Clayton v nings, 2 Bl. Rep. 706.

Rex v. Liſton, 5 Term Rep. 338. The ſtatute of 27 *Geo.* 3. *c.* 1. which takes away the ſummary jur tion of magiſtrates over the lotteries, extends only to ſtate lotte and does not repeal their power over the games of chance or lot prohibited by ſtat. 12 *Geo.* 2. *c.* 28.

The 13 *Geo.* 2. *cap.* 19. enacts that no plate under the value of ſhall be run for, or be advertiſed or proclaimed to be run for, by any h *&c.* under a penalty of 200*l.*; and that no perſon ſhall run any matc tween any horſe, *&c.* for any ſum of money, plate, prize, or other whatſoever, unleſs ſuch match ſhall be ſtarted or run at *Newmark Black Hambleton*, or ſuch ſum of money, *&c.* be of the real and in ſick value of 50*l.* or upwards.

Bidmead v. Gale, 4 Burr. 2432., and 1 Bl. Rep. 671. Upon this act it hath been determined, that a match for 25*l.* each play or pay, the plaintiff to pay the defendant 5*l.* before-hand, is a m for 50*l.*

Johnſon v. Bann, 4 Term Rep. 1. The ſtatute having prohibited any horſe-race for a ſmaller ſtake 50*l.*, of courſe no action can be maintained to recover a wager on ſ race.

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Gaol and Gaoler.

(B) Who are to be at the Charge of repairi them.

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(*Although divers*) In a report which was made by the Attorney and Solicitor General Grey and Willes, and ſubmitted to the king, 21 *Jan.* 1767, upon a queſtion which was at time agitated between the biſhop of Ely, as lord of the franchiſe of Ely, on the one part, the inhabitants of the franchiſe on the other, touching the repairs of the gaol, the editor m with the following paſſage: "Although all gaols, whether in counties at large, or in parti franchiſes, are deemed to belong to the crown, as far as the publick adminiſtration of juſti concerned, and it is but the cuſtody of them that is placed in the hands of ſheriffs, or the of franchiſes, yet we are not able, in a matter which lies buried in much obſcurity, and ſcarcely ever been called into publick diſcuſſion in modern times, to find upon what auth a great writer in our law, has inferred from the poſition "that all priſons belong to the cro "they are therefore to be repaired at the common charge." Nor does it appear by whom, from what perſons, and in what manner the charge could have been raiſed. It ſeems m more probable, that from the time that the publick gaols were rejoined to the counties, and c mitted to the ſole cuſtody of the ſheriffs, the charge of keeping and preſerving them in a pr condition lay in the firſt inſtance on the ſheriffs, and it is probable that the ſheriffs might h an allowance for extraordinary expences of that ſort in their accounts in the Exchequer: we obſerve, that in the ſtatute of 23 *H.* 8. for building new gaols in ſeveral counties part larly mentioned, at the charge of the reſpective counties, proviſion is made that ſheriffs be allowed what they ſhall expend in the future neceſſary reparations of ſuch new-built g in their accounts in the Exchequer. In the ſame manner, it ſhould ſeem, that lords of f chiſes who have the cuſtody of publick gaols in their reſpective juriſdictions committed to th and are thereby reſponſible to the publick for their priſoners, ſhould be bound to provide ſu

sufficient gaols as incidental to their publick truſt; and they having no accounts with the Exchequer, can have no ſuch allowance made to them, but may well be ſuppoſed to ſubmit to ſuch charge in conſideration of the honourable exemption of their franchiſe."——In this caſe it was the opinion of the above great law officers, that the *onus* of repairing the gaol at Ely lay upon the ſee of Ely, and not upon the inhabitants; an opinion which they grounded, not upon any general law of the queſtion, but upon evidence laid before them of ſuch a charge upon the lands of the franchiſe being coeval with the franchiſe. In conſequence of this opinion orders were given by the Lords of the Treaſury to the Attorney General to proceed at the expence of the crown againſt the Biſhop of Ely, in order to have the point ſolemnly ſettled; but Dr. Mawſon, who then filled that ſee, was ſo well ſatisfied with the report, that he readily ſubmitted without any farther litigation, and gave immediate orders for the repair of the gaol, which was accordingly done at his expence.

(*But this matter*) Explained and amended by 24 G. 3. ſeſſ. 2, c. 54.

The lord of a franchiſe is not, as ſuch, bound to repair a gaol within it; but he may be ſubject to ſuch a charge by immemorial uſage. Rex v. Earl of Exeter, 6 Term Rep. 373.

(D) Of the Duty and Power of Gaolers and Keepers of Priſons: And herein,

BY 29 *Geo.* 3. *c.* 67. it is enacted, "That at the firſt ſeſſion of the peace to be holden after *Michaelmas* in every year, the gaoler, or other officer having the care or ſuperintendance of any gaol within the juriſdiction of the court holding ſuch ſeſſion, ſhall deliver to the chairman or other magiſtrate preſiding in ſuch court, a certificate according to the form hereunto annexed, ſubſcribed by himſelf and verified by him, to the beſt of his knowledge and belief, on his oath, to be taken either before ſuch court, or in caſe of ſickneſs, or inability from any other cauſe to attend, then before ſome juſtice of the peace for the county, town, or diſtrict in which ſuch gaol ſhall be ſituated, and that ſuch certificate ſhall expreſs, after each of the proviſions therein enumerated, whether ſuch proviſion is or is not complied with or obſerved within ſuch gaol; and ſuch certificate ſhall be read publickly in open court in the preſence of the grand jury, and entered upon record as part of the minutes of the ſaid ſeſſion."

And by § 2. "The ſaid court of quarter ſeſſion ſhall thereupon take the ſaid certificate into their conſideration, and ſummon any perſon or perſons named therein to appear before them, and ſhall give ſuch directions, and make ſuch orders relative to any of the matters contained in ſuch certificate, as to ſuch juſtices ſhall ſeem meet, and ſhall and may take ſecurity from any perſon or perſons whom the ſame may concern for his or their due compliance therewith."

By § 3. a gaoler neglecting to deliver ſuch certificate forfeits 50*l.* if the gaol be a county gaol, and 20*l.*, if any other gaol.

Certificate referred to in the body of this act.

} AT the general quarter ſeſſions of the peace, for the
wit. holden at this
of in the year of our Lord
the certificate of in purſuance of the ſtatute in this caſe
made and provided, reſpecting the gaol of

22 &

22 & 23 C. 2. c. 20, enacts, that

Felons and debtors ſhall be kept ſeparate, under pen ties upon the ſheriff or gaoler.

24 G. 2. c. 40, enacts, that,

1. No gaoler ſhall ſell, lend, uſe, give away, or ſu ſpirituous liquors within any gaol, under a penalty.

2. Copy of the clauſe laſt mentioned, as alſo of t other clauſes reſpecting the ſame, ſhall be hung up in gaol, under a penalty.

32 G. 2. c. 28, enacts, that

The clerk of the peace ſhall cauſe a liſt of the fees p able by debtors, and the rules and orders for the gove ment of gaols and priſons, to be hung up in the co where the aſſizes or ſeſſions ſhall be held, and ſend a ther copy to the gaol; and the gaoler ſhall cauſe the ſa to be hung up in a conſpicuous place in the ſaid gaol.

13 G. 3. c. 58, enacts, that

Clergymen may be provided to officiate in gaols.

14 G. 3. c. 20, enacts, that

Perſons acquitted, or diſcharged upon proclama for want of proſecution, ſhall be diſcharged immedia in open court, and without fee.

14 G. 3. c. 59. enacts, that,

1. The walls and ceilings of cells in gaols ſhall ſcraped and white-waſhed once in the year at leaſt.

2. That the cells ſhall be kept clean; and

3. That they ſhall be ſupplied with freſh air, by ve lators or otherwiſe.

4. That there ſhall be two rooms ſet apart for the ſic

5. That a warm and cold bath, or bathing tubs, be provided.

6. That this act ſhall be hung up in the gaol.

7. That a ſurgeon or apothecary ſhall be appointed, a ſalary.

(F) How maintained in Priſon.

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(*By* (*a*) *ſome*) This privilege, that the defendant ſhall not wage his law, appears to be giv the gaoler, not becauſe he is compellable to maintain the priſoner, as Lord Coke ſuppoſeth, merely as a reward or additional incitement to the exerciſe of humanity; and in that ſen ſeems to be explained by the court in 1 Ld. Rolle's Reports, 331., where it is ſaid, "that defendant ſhall not in any ſuch caſe wage his law, becauſe it is a work of charity;" and th fore the gaoler has not the ſame remedy for proviſions thus ſupplied to the priſoner, a has for the cuſtomary fees due to him, that of detaining him in priſon till payment.—The tot is indebted for this remark to the caſe from Ely above referred to.

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(*By the* 22 & 23 *Car.* 2.) But ſuch clauſe does not exclude a limitation of the quantity quor allowed to each perſon. Lord Loughborough's Obſervations on *Engliſh* Priſons, 31.

(G) Of the Offence of breaking Gaol.

The extenſive inquiries of the late Mr. *Howard* into the ſtate of ſons, have lately excited the attention of the legiſlature to this ſub

d the reader will find a variety of important proviſions, too numerous detail in a work of this kind, in *ſtat.* 19 *Geo.* 3. *c.* 54. 24 *Geo.* 3. *ſ.* 2. *c.* 54, 55. 31 *Geo.* 3. *c.* 46. 34 *Geo.* 3. *c.* 84.

GAVELKIND.

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(A) Of the Original, Continuance, and ſeveral Properties of this Cuſtom.

(*Of the many*) For the etymology of the word *gavelkind*, and the origin, antiquity, and univerſality of this cuſtom, ſee the three firſt chapters of Mr. Robinſon's Common Law of *Kent*; and ſee alſo Mr. Whitaker's Hiſt. of *Mancheſter*, vol. 1. p. 360.

But if a man has lands of the cuſtom of borough-engliſh, and likewiſe lands at common law; and having two ſons, deviſes the latter to his heir according to the cuſtom of borough-engliſh, the youngeſt ſon ſhall take, and the deviſe ſhall not be defeated becauſe he is not heir at common law, the elder brother being alive; ſince that was probably the reaſon of his taking the deviſe, as the latter would have deſcended to him, had the brother been dead. So, if a man having gavelkind lands, deviſes other lands to his heirs in gavelkind, all his ſons ſhall take as ſufficiently deſcribed by this deviſe, though not heirs by the common law. Newcomen v. Barkham, 2 Vern. 732. Pr. Ch. 464.

And if a man ſeiſed in fee of lands in gavelkind made a gift in tail, leaſe for life to *J. S.*, remainder to his own right heirs, it ſeems, all the ſons ſhall take by the name of heirs, for the remainder limited to the right heirs of the donor is only a reverſion, he bearing in himſelf during the life (in judgment of law) all his heirs, and, therefore, the heir ſhall take it by deſcent. Co. Lit. 22. b. Dav. 31. a.

So, if a man ſeiſed of lands in gavelkind, make a feoffment to the uſe of himſelf and his wife in tail, remainder to his own right heirs, this remainder ſhall go to the heirs by the cuſtom. For it is the old uſe, and the heirs take by deſcent, their anceſtor having a precedent eſtate of freehold, and not by purchaſe. 26 H. 8. 4. b. Bro. *Cuſtom*, pl. 1. Lamb. 548. Rob. Gav. 119. See Mr. Hargrave's learned notes, Co. Lit. 10. a. n. 3. 27. b.

But we muſt diſtinguiſh between a condition in groſs, and a condition incident to a reverſion; for of the latter the ſpecial heir ſhall take advantage, though not of the former. A man made a leaſe of land, parcel borough-engliſh, and parcel at common law, by indenture for twenty-one years. Provided that if the leſſor, his heirs or aſſigns, ſhould give a year's warning to the leſſee that he, his heirs or aſſigns, would dwell there, then the leaſe ſhould be avoided: the leſſor died leaving two ſons; the eldeſt aſſigned over his part to the youngeſt; and the queſtion was, whether the youngeſt ſon was ſuch a perſon as could give warning, or, whether the condition was not gone by the ſeverance of the reverſion on the death of the father? *Manwood* and *Monſon*, Juſtices, were of opinion, that he might give warning, and that the law which ſevered the reverſion, Moor, 113. Godb. 2. S. C.

has ſevered the condition alſo; and ſo for one part, as heir in borou engliſh, and for the other, as aſſignee of the elder brother, (by ſtat. *H.* 8. *c.* 34.) he ſhall take advantage of the condition. But if a m makes a feoffment in fee of borough-engliſh lands on condition, and di having iſſue two ſons, the eldeſt only ſhall take advantage of the co tion, for it is a condition in groſs; but in this caſe there was a rever in the leſſor.

Co. Lit. 215. Mr. Robinſon obſerves that it is difficult to reconcile

If a leaſe for years be made of two acres, one of the nature of rough-engliſh, the other at common law, on condition, and the leſſor leaving iſſue two ſons, each of them ſhall enter for the condition brok for by act of law, a condition may be apportioned.

this paſſage with another in the ſame book; *viz.* That if a man ſeiſed of lands *ex parte m* makes a gift in tail or leaſe for life, the heir of the part of the mother ſhall have the reverſ and the rent alſo, as incident thereunto, ſhall paſs with it; but the heir of the part of the ther ſhall not take advantage of a condition annexed to the ſame, becauſe it is not inci to the reverſion, nor can paſs therewith. Co. Lit. 12. b. But as this is not warranted by caſe cited as an authority for it by Lord Coke, Mr. Robinſon adheres to the other opinion as agreeable to common reaſon. Robinſon Gav. 121.

Rob. Gav. 121.

Manwood, in *Dy.* 316. *b.* puts this caſe: A man ſeiſed in fee of lan gavelkind, has iſſue two ſons, and by his laſt will deviſes the land to eldeſt ſon, on condition that he pay to the wife of the deviſor 100*l.* a certain day; and he fails of payment; whether the younger may enter a moiety on his brother, by a limitation implied in the eſtate? *Qu.* this doubt is, as Lord *Coke* obſerves, well reſolved by the following de

Wellocke v. Hammond, 3 Co. 20. Cro. El. 204. 2 Leon. 114.

mination: A copyholder in fee of land deſcendible in borough-eng having three ſons and a daughter, after a ſurrender to the uſe of his deviſes the land to his eldeſt ſon, paying to his daughter and each of other ſons 40*s.* within two years after his death: the eldeſt ſon is admit and does not pay the money; the youngeſt ſon enters on the land, his entry was holden lawful: for though the word *paying* in caſe will may make a condition, yet here the law conſtrues it a limitation which the youngeſt ſon in borough-engliſh may take advantage; and the ſame as if he had deviſed the land to his eldeſt ſon till he made de in payment: for if it ſhould have been a condition, then it would deſcended to the eldeſt, and it would, conſequently, have been at pleaſure whether his brothers or ſiſter ſhould be paid or not.

Rob. Gav. 122.

But if a man, having three ſons, deviſe gavelkind lands to his *ſe* ſon, paying, or upon condition to pay to each of his other ſons and the deviſee fail of payment, Mr. *Robinſon* thinks, that the youn ſon cannot take advantage of this by entering into a third part, but in der to defeat the deviſe, the eldeſt ſon ought firſt to enter upon the wh agreeably to the determination in the caſe of *Curtis* v. *Woolverſtone*, *Ja.* 56. where a man having three ſons and ſeveral daughters, dev lands deſcendible in borough-engliſh to his *ſecond* ſon in fee, on condi to pay 20*l.* to each of his daughters at their age of 21; and the dev not paying the money at the time, the youngeſt ſon entered in his name; ſuch entry was holden ill; for this ſhall not be taken as a lim tion, but as a condition, it differing from the reaſon of the of *Wellocke* v. *Hammond*, where had it been conſtrued a condit it had been void and to no purpoſe; bus it ſhall be expounded cording to the common law, where it is not neceſſary to give it a cont expoſition.

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(Others have) And in the caſe of Game v. Sims, Lord Coke ſaith, that if the heir at common law be vouched for warranty, who vouches the heirs in gavelkind, becauſe of the poſſeſſion, they all ſhall vouch over, and what is recovered in value ſhall go only to the heirs in gavelkind. So, if two be vouched where one has nothing, and they vouch over, the recovery in value goes only to him who had the intereſt. Cro Ja. 218. And of the ſame opinion, both as to heirs in gavelkind and borough-engliſh, was Holt, C. J. in the caſe of Page v. Hayward. Rob. Gav. 131.

Three men levied a fine with a warranty for the heirs of them all; the court doubted whether they ſhould receive it, for that the warranty ſhould be for the heirs of one in certain; but becauſe the land is gavelkind, and the conuſors heirs by the cuſtom, the court received them. 24 E. 3. 66. b. Fitzh. Fines, 113. Bro. Fines, 65.

(Likewiſe the wife) But authorities are not wanting to ſhew that this preſumption falls only upon evidence of the commiſſion of the act of fornication itſelf, though the declaration of it be not made in this publick manner. Rob. Gav. 165., and the authorities there produced.

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(Lambert is of) There is no caſe in the books to warrant this opinion of Mr. Lambard; and it is obſervable, that the word *veſtu* is not in the edition of the book referred to, viz. the *Cuſtumals* printed by Tottel; nor in a manuſcript copy of that record fairly written on vellum, amongſt a collection of the old ſtatutes in *Lincoln's-Inn* Library. But were Mr. Lambard's the right reading, it might, as Mr. Robinſon obſerves, bear ſome doubt whether he has not put too ſtrong an interpretation on this word; for an eſtate *veſted*, by no means imports that the tenant has a poſſeſſion in deed, but only that the eſtate is not in abeyance or contingency; and undoubtedly the eſtate *veſts* in the heir at law immediately on the death of his anceſtor, which is before entry and ſeiſin in law. But let the proper ſenſe of this ſingle word be what it will, it can ſcarcely be ſufficient to add ſo unreaſonable a qualification to the cuſtom, as that the laches of the huſband in gaining an actual ſeiſin by entry, ſhall prejudice the wife, without a ſtrong uſage accordingly. Rob. Gav. 171, 2.

(All gavelkind) Rob. Gav. 234.

(B) The particular Caſes which have been adjudged relating to this Cuſtom.

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(And was ſeiſed) But where a truſt of gavelkind lands is executory, and to be carried into execution by a court of equity, that court will direct the conveyance to be made according to the rules of the common law, and not according to the cuſtom. Roberts v. Dixon, 1 Atk. 607. Starkey v. Starkey, *infra*, tit. *Uſes and Truſts* (H), S. P.

GRANTS.

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(The word) The legal import of the word "grant," and its operation in conveyances of eſtates in fee-ſimple, in gifts in tail, and in leaſes for lives and for years, is explained by Mr. Hargrave in his very learned note upon Co. Lit. 384. a.

(Heir that can) That is, a *general* occupant; for according to Lord Coke, Co. Lit. 388., if heirs are named in the grant of a rent *pur autre vie*, they ſhall take. Dy. 186. in marg. 1 Roll. 155. Mo. 623. 664. Godb. 172.

(C) What Name or Deſcription of the Grantor or Grantee will make the Grant certain enough

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(*But if a*) See Mr. Hargrave's note upon theſe caſes in Co. Lit. 3 b.

(D) Of what Intereſt in the Grantor he may diſpoſe: And herein,

(*The common law*) See Mr. Juſtice Buller's comment upon the doctrine of maintenance 1 Term Rep. 340. and ſee the caſes on this head in tit. *Aſſignment*.

(I) How grants are to be expounded: And herein

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(*Grants are*) Words ſhall always operate according to the intention of the parties, if by they may: and if they cannot operate in one form, they ſhall operate in that which by law ſhall feſtuate the intention. Cowp. 600. For the judges have more conſideration of the ſubſta namely, the paſſing of the eſtate, than of the ſhadow, namely, the manner of paſſing it. Lev. 372. Hence, a deed made to one purpoſe, may enure to another; if meant for a rele it may amount to a grant of the reverſion; or *e converſo*. Touchſt. 82. Goodtitle v. Ba Cowp. 597.; ſo, if meant for a releaſe. Roe v. Tranmer, 2 Wilſ. 75., or grant, Oſma Sheaſe, 3 Lev. 370., it may operate as a covenant to ſtand ſeiſed. A conveyance by l and releaſe, having the word "grant" in it, may take effect as a grant and aſſignment, and a leaſehold intereſt. Marſhall v. Frank, Gilb. Eq. Rep. 143. Pr. Ch 480. Doe v. Willia 1 H. Bl. 25. And a deed intended as an appointment to uſes may, having the words "l and appoint" in it, operate as a grant ſo as to paſs a reverſion. It is not neceſſary that the w "grant" ſhould be uſed in a grant ſo long as the intention to grant be manifeſted in the d Shove v. Pincke, 5 Term Rep. 128. But in expounding a grant according to the *intent*, it m be done *according to the intent at the time of the grant*; as, if I grant an annuity to *J. S.* until h promoted to a competent benefice, and at the time of the grant he is but a mean perſon, and terwards is made an archdeacon, yet if I offer him a competent benefice at the time of the gr the annuity ceaſeth. Cro. El. 35.

Athrington v Biſhop of Cheſter, 1 H. Bl. 418.

Where the grant of a rectory from the crown contained an excep of all advowſons of the rectories, vicarages, and churches belonging to premiſes, it was holden, that a perpetual curacy belonging to the rec was not included in the exception, but paſſed by the grant; for a cont conſtruction would have ſevered the nomination of the curate from the f out of which he was to be ſupported; would have made it queſtionable was to maintain him, and left the eccleſiaſtical court deſtitute of me to compel ſuch maintenance by ſequeſtering the profits of the living.

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(*The office*) In 3 Leon. 60. it is ſaid that the *habendum* ſhall never introduce one who is a ſt ger to the premiſes to take as grantee, but he may take by way of remainder.

(*If a prebendary*) Touchſt. 91. 3 Atk. 82. Therefore an heir-loom, though neither land tenement, but a mere moveable, yet being inheritable, is comprized under the general w *hereditament*; and a condition, the benefit of which may deſcend to a man from his anceſto alſo an hereditament. 3 Co. 2.

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(*It ſeems agreed*) See Hargr. note 2 Co. Lit. 12. b. 13th Edit.

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GUARDIAN.

(*A (a) guardian*) So in the *Roman* law, the *poteſtas*, or authority of the tutor, was exerci only for the benefit of the min or.

The *curators* were not appointed, except in particular cases, till the minor attained the age of liberty. Before that time he was under the care of persons called *tutores*.

(A) The several Kinds of Guardians: And herein,

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(*By the statute*) See Hargr. note on this passage.

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(*But this sort*) See Mr. Hargrave's note on this species of guardianship, Co. Lit. 74. b. n. 11. 4th edit.

(2. *By the common*) See 1 P. Wms. 260 9 Mod. 142. Hargr. Co. Lit 87. b. n. 6.

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(*But neither*) See Mr. Hargr. Co. Lit. 74. b. n. 12.

(4. *Guardian*) As to guardianship by nurture, Mr. Hargrave observes, that it only occurs where the infant is without any other guardian; and none can have it except the father or mother. 8 E. 4. 7. b. Br Guard. 7 3 Co. 38. It extends no farther than the custody and government of the infant's person, and determines at fourteen, in the case both of males and females. Lord Chief Baron Comyns indeed refers to Fleta, as if, according to that ancient book, grandfathers and great grandfathers might be guardians by nurture; 3 Com. Dig. 421.; but the passage cited doth not point at this species of guardian, it describing the *patria potestas* in general, and being apparently borrowed from the text of the *Roman* law; nor will it bear the least application to guardianship, as our own law regulates it. Hargr. note 13. Co. Lit. 119. b.

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(*The* 12 *Car.* 2.) Other persons are also disabled. See the 9 & 10 W. c. 32., and the statutes relative to the qualifications of officers. See also Swinb. part 3. § 10.

(2. *That though*) But though a testamentary guardian shall have the custody of the infant's real estate, a lease granted by him of such estate is absolutely void. Roe v. Hodgson, 2 Wilf. 129. 135.

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(3. *That this*) Melliſh v. De Coſta, 2 Atk. 15.

(9 *Also if*) 1 P. Wms. 704. 1 Vez. 160. *Ex parte* Lady Ann Brydges, H. T. 1791. (*a*) It will not remove a mother on account of her being married to a second husband, even though she be deviſee in remainder of the real estate, in case the infant ward should die without issue. Morgan v. Dillon, 9 Mod. 135. 3 Br. P. C. 341. Melliſh v. De Coſta, 2 Atk. 15. See too 1 Wooddeſ. 461.

11. That as the statute declares the guardianship shall continue till twenty-one, if so prescribed by the father, it shall not be determined sooner even by the marriage of the infant. Mendez v. Mendez, 3 Atk. 625.

12. Though a natural daughter hath been holden to be within the statute of 4 & 5 *P. & M. c.* 8. yet natural children are not within this statute. But though not within this last statute, the court of Chancery will adopt the nomination of the father, without referring it to a Master, unless some objection be stated to the person named by the father. And though a grandfather (*a*) cannot appoint a testamentary guardian for his grandson, yet if he leave him an estate upon that condition, and the father do not submit to it, it will work a forfeiture. Rex v. Corneforth, 2 Str. 1162. Ward v. St. Paul, 2 Br. Ch. Rep. 583. and Peckham v. Peckham, Ambl, 306.

there cited. (*a*) Blake v. Leigh.

13. An appointment of a testamentary guardian by a mother is absolutely void, Vaugh. 180. *Ex parte* Edwards, 3 Atk. 519.

14. If a father dispose of the custody of an infant by deed, such disposition may be revoked by will. But if there be a covenant in the deed Ld. Shaftesbury v. Hannam,

Finch's Rep. 323. deed (*b*), that the father will not revoke it, a court of equity will not set it aside unless the trust be abused.

(*b*) Lecone v. Sheires, 1 Vern. 442.

Swinb. p. 3. c. 12. 15. As the statute prescribes no particular form of appointment, it is immaterial by what words the guardian is appointed, provided the father's intent be sufficiently apparent.

(C) By what Authority Guardians are appointed And herein of the proper Jurisdiction in restraining and punishing Abuses by Guardians, and others, in relation to Infants.

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(*It is clearly*) This jurisdiction of the court of Chancery, in the case of infants, Mr. Hargrave conceives to have originated in usurpation, the arguments in general adduced in its support being very weak and insufficient, and its commencement of a very late date. Co. Litt. 128. note 1. But see a very able attempt to rescue it from this aspersion by the learned and spirited annotator on *the Treatise of Equity*. Fonbl. Eq. Tr. 228. note a.

(*And as the*) Pre. Ch. 106. 2 Ld. Raym. 1334. 1 P. Wms. 703. 2 P. Wms. 112 561. 3 P. Wms. 116. 118. 154. 1 Vern. 442. Cas. Temp. Talb. 58. 1 Stra. 168. 2 Stra. 982. Atk. 395. (*b*) A guardian appointed by the court is competent to consent to the marriage of an infant. *Ex parte* Birchell, 3 Atk. 813. But a petition that a guardian may be assigned unless to carry on a suit or protect an interest, must be pursuant to the statute. *Ex parte* Bechet, 1 Br. Ch. Rep. 556. (*c*) It is now settled that an order of maintenance may be made upon a petition without a bill, though a different practice seems to have once prevailed. *Ex parte* Kent, 3 Br. Ch. Rep. 88. *Ex parte* Salter, *id.* 500. In allowing maintenance the court will attend to the circumstances and state of the family; as, where there is an elder son, and younger children who have no provision, it will allow a more ample maintenance to the guardian of the eldest son, that he may be enabled to maintain the younger children. Hervey v. Hervey, 1 P. Wms. 21. Pierpoint v. Lord Cheney, 1 P. Wms. 493. Petre v. Petre, 3 Atk. 511. Roach v. Garvan, 1 Vez. 160. And it will in some cases allow the principal to be broken in upon for the maintenance of the infant. Barlow v. Grant, 1 Vern. 255. Hervey v. Hervey, 1 P. Wms. 21. (*d*) If a man marry a ward of the court without consent, he will be committed, though it should appear that he did not know that she was so; Herbert's case, 3 P. Wms. 116.; and there must be a proper settlement made on the wife before the contempt can be cleared. Stevens v. Savage, 1 Vez. jun. 154.

Duke of Beaufort v. Bertie, 1 P. Wms. 702. Butler v. Freeman, Ambl. 302. Ld. Shaftsbury's case, 2 P. Wms. 117., and Potts v. Norton, in note (1) 110 of Mr. Cox's edition of that book. Powell v. Cleaver, 2 Br. Ch. Rep. 499. But qu. if such child should not be a ward of the court? *Ex parte* Warner, 1 Br. Ch Rep. 101. (*a*) Goodall v. Harries, 2 P. Wms. 561. (*b*) Foster v. Denny, 2 Ch. Ca. 237. Roach v. Garvan, 1 Vez. 160.

The court will interpose, too, even against that authority and discretion which the father hath in general in the education and management of his child; *à fortiori*, it will interpose against persons who derive their whole authority from the father: and therefore, although it cannot remove a testamentary guardian, or consider his conduct a contempt unless the infant be a ward of the court (*a*), yet it may impose such restriction as will prevent him from prejudicing the interests of the ward (*b*).

(*But it is*) The right also of appointing guardians of the personal estate, and if there is no other guardian by tenure or otherwise, of the person, is claimed by the ecclesiastical courts, and seems warranted, within the province of York, by immemorial custom. Swinb. 210. 4 Burn's E. L. 102. This claim hath however in modern times been treated as a presumption, and their power hath been confined merely to the appointment of guardians *ad litem*. 3 Atk. 631. 1 Burr. 1436. Co. Lit. 88. b. n. 16.

Where

When, from a defect of the law, the infant finds himself wholly provided with a guardian, he may elect one himself. This may happen, either *before* fourteen, when the infant has no property such as attracts a guardianship by tenure, and the father is dead without having exerted his power of appointing a guardian for his child, and there is no other; or *after* fourteen, when the custody of the guardian by socage terminates, and from the want of the father's appointment there is no other ready to succeed to the trust, and to take care of the infant or his property. Co. Lit. 88. b. n. 16.

(D) Of the Manner of appointing and admitting a Guardian.

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(*The respective*) A person who is reduced by age or infirmities to a second infancy, may also defend by guardian. Pr. Ch. 429.

(E) At what Time the Authority of a Guardian ceases, and what Acts will determine it.

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(*If a feme infant*) 1 Vez. 91. Though the court of Chancery cannot appoint a guardian after marriage, yet it will not determine a guardianship, or discharge any order made for a guardian because of marriage. Roach v. Garvan, 1 Vez. 159.

(G) What Things a Guardian may lawfully do, and will bind the Infant.

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(*As the authority*) See *acc.* Arthington v. Coverley, 2 Eq. Ca. Abr. 518. Mr. Hargrave observes in his edition of Co. Lit. note 1. 89. a., that though this last case "may remove all doubts about the legal right of an infant of the most tender age to present, still it remains to be seen whether the want of discretion would induce a court of equity to control the exercise, where a presentation is obtained from the infant without the concurrence of the guardian.'.

(*If a guardian*) Exceptions cannot be taken to an infant's answer. Stradwick v. Pargiter, Amb. 338. Nor will an infant's not replying to an answer, be an admission of the facts in the answer, as in the case of an adult, for an infant can admit nothing. Legard v. Sheffield, 1 Atk. 377.

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(*A guardian*) Where the committee of a lunatick invested part of the lunatick's personal estate in a purchase of lands made in the lunatick's name; it was holden, that he had exceeded his power, by changing the personal estate into a real, and thereby defeating the next of kin in favour of the heirs at law; and therefore the court decreed, that the purchased lands should be sold, and the money divided amongst the next of kin, according to the statute of distributions. 2 Vern. 192. Awdley and Awdley. A guardian cannot change the nature of the ward's estate, unless by some act manifestly for the ward's advantage. Tullitt v. Tullitt, Ambl. 370. Therefore, where an estate in mortgage descends to an infant, the guardian must not let the interest run in arrear to increase the personal estate, but should regularly apply the profits of the estate to keep it down. Jennings v. Looks, 2 P. Wms. 278.

(H) Of

(H) Of the Infant's Remedy againſt his Guardian for Abuſes by him.

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(*If a guardian accepts*) So jealous are courts of equity of the influence ariſing from this relation, that they will in general reſcind any tranſaction between guardian and ward. See caſes referred to *ſupr.* tit. *Fraud*, 306.

(*If a guardian, after*) P. 9 Car. C. B. on the argument of the caſe of Blundell v. Baggallay, commonly called the earl of Nottingham's caſe, Juſtice Barclay ſaid, that he whom Lord C. in this caſe calls an Abator, muſt be taken for a diſſeiſor, as he had actual poſſeſſion by poſſeſſion of the guardian. Lord Nott. MSS.—See Cro. Car. 302. Lit. Rep. 372. 1 Ves. 35. 80. Co. Lit. 271. a. n. 2. 13th edit.

(I) Of obliging a Guardian to account, and what Allowance he ſhall have.

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(*By the* (*a*) *common*) 1 P. Wms. 119. The court of Chancery will permit a ſtranger to come in and complain of the guardian and abuſe of the infant's eſtate. Earl of Pomfret v. Lord Windſor, 2 Vez. 484.

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Vol. III.

Habeas Corpus.

Rex v. Reynolds, 6 Term Rep. 497.

IF an apprentice of the age of eighteen voluntarily enter into the ſervice, his maſter is not entitled to ſue out a *habeas corpus* to bring him up. The writ of *habeas corpus* can be taken out only at the inſtance of a party who is in cuſtody, or with his conſent, but here, the apprentice is not in cuſtody.

(A) Of the Nature and ſeveral Kinds of Writs of *Habeas Corpus*.

Page 2

(*There is likewiſe*) Where a defendant charged with proceſs out of *B. R.* is removed *before* declaration to the *Fleet* priſon, the plaintiff in order to enable himſelf to declare againſt him in *B. R.*, muſt remove him there by this writ; otherwiſe his proceeding muſt be in *C. P.* Maddock v. Fletcher, Barnes, 384. Beaſley v. Smith, *id.* 402. If defendant be removed after declaration delivered, the plaintiff may proceed where he hath declared. Aſh v. Day, 384.

This writ doth not lie for the plaintiff in an inferior court to remove the body of the defendant into *B. R.* to anſwer to a new action there for the ſame debt. Melſome v. Gardiner, Cowp. 116. If a defendant is in cuſtody at the ſuit of the crown, he cannot be turned over by a *habeas corpus* to another priſon at the inſtance of a private perſon for debt, on an allegation of a pardon by act of parliament, but it muſt be by ſuggeſtion on record, that the crown may reverſe it. Rex v. Pawlett, Andr. 274 A priſoner in the Fleet for contempt in the Exchequer in not paying a debt to the crown, may be brought into *B. R.* by *habeas corpus*, and ſurrendered to the marſhal, in diſcharge of bail in another cauſe, and cannot be remanded to the Fleet on motion; but a *habeas corpus* muſt be brought from the Exchequer, which the marſhal will return there, and they will remand to the Fleet. So, in civil cauſes between ſubject and ſubject and in criminal caſes at the ſuit of the crown. Chitty's caſe, 1 Wilſ. 248. See too the caſe of the bail of Boice and Sellers, 1 Str. 641. A *habeas corpus* may be had to bring up an impreſſed man, or a ſoldier, in diſcharge of bail; but as ſoon as he is ſurrendered and committed, he will be diſcharged. Bond v. Iſaac, 1 Burr. 339.

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(*There are alſo*) And this writ as well as the *habeas corpus ad reſpondendum* ſhould be directed to e warden of the *Fle t*, or keeper of any inferior priſon, returnable at a day certain in court. dd's Pr. 170, 171.

It was refuſed to bring up a perſon who was in the capacity of a common ſailor on board a n of war, and not detained there as a priſoner, becauſe there was no affidavit of his having en ſerved with a ſubpœna, and being willing to attend. Rex v. Roddam, Cowp 672.

——It will not be granted to bring up a priſoner of war; the uſual way of obtaining the ſence of ſuch a witneſs, is by order from the ſecretary of ſtate. Furley v. Newnham, ougl. 419.

B) Of the *Habeas Corpus ad Subjiciendum*: And herein,

(*But notwithſtanding*) See Wilkes's caſe, 3 Wils. 172. *Wood's* caſe, 2 Bl. Rep. 745. S. C.

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(*Hence it was*) See *acc.* 2 Burr. 856.

Page 5

(*A motion was*) Notwithſtanding this deciſion, a doubt having ariſen in my Lord Ferrers' ſe, whether the court of King's Bench could iſſue an attachment againſt a peer during the ſit- g of Parliament, and execute it upon him *only for a contempt of their court*, the queſtion was oved in the Houſe of Lords, and after ſome debate, that Houſe reſolved, that neither privi- ge of peerage, nor of parliament, extended ſo far as to exempt a peer or lord of parliament om paying obedience to a writ of *habeas corpus* directed to him. See Lords Journals, 7 *Feb.* 57, 8 *Jan.* 1757. 1 Burr. 631.

A huſband is entitled to a *habeas corpus* for his wife; and though it be ggeſted by affidavit that articles of ſeparation have been executed be- een them, yet the court will not therefore ſuperſede the writ, or diſ- enſe with the production of the party. Rex v. Mary Mead, 1 Burr. 542. Rex v. James Win- ton, 5 Term Rep. 89.

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(*By the* 31 *Car.*) Admitted in caſe of felony by Lord *Camden*, 5 Wils. 158. 11. St. Tr. 4. but it is ſaid in Lord *Montgomery's* caſe 10 Mod. 334. that a commitment for *treaſon general-* is good. And ſo it was holden in Sir W. *Wyndham's* caſe, 3 Vin. Abr. 530. Str. 2. A mmitment for a libel *generally* is good. 3 Wilſ. 158. 11. St. Tr. 304.

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(*And it is further enacted p.* 7.) For upon the alarm of any dangerous conſpiracy againſt the vernment; it hath been uſual to ſuſpend the operation of this clauſe of the ſtatute by paſſing act to empower his Majeſty to detain for a limited time perſons committed by the privy- uncil for high-treaſon, ſuſpicion of treaſon, or treaſonable practices, who are not to be bailed tried by any judge or juſtice of the peace without order from the council ſigned by ſix of the embers. See 34 Geo. 3. c. 54.

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(*By the* (*a*) And if not ſigned, it need not be obeyed. Rex v. Roddam. Cowp. 672.

(*The method*) But it hath been long ſettled that a return muſt be made to the *firſt* writ, elſe an ttachment will iſſue immediately. Rex v. James Winton, 5 Term Rep. 89.

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(*But it has*) Q. If any reaſonable difference?

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(*Rudyard an attorney*) A return that "he had not at the time of receiving the writ, nor hath e ſince had the body of *A. B. detained* in his cuſtody, ſo that he *could not* have her, &c." is bad. Rex v. James Winton, 5 Term Rep. 89. See an obſervation on the kind of certainty required these returns. Dougl. 159.—If the power of commitment be at common law, it is not ne- eſſary to ſtate it in the return. In Croſby's caſe, 3 Wilſ. 188., 2 Bl. Rep. 754., the power of the peaker of the Houſe of Commons was not alleged. Dougl. 156. *arguendo.*

Page 14

(*And though*) Where there is a conviction, the court will not diſcharge on the warrant of com- itment without having the conviction before them. Rex v. Elwell, Bart. 2 Str. 794.

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(*If on the return*) In disposing of the party, the court will exercise their discretion upon circumstances of the particular case before them. A young lady, a minor, who was marriable, and lived with her guardian, was brought up by a *habeas corpus* taken out by a man claimed her as his wife: she denied the marriage, and expressed a wish to remain with her dian, which the court ordered, and hearing that the man had a design to seize her, sent a tip home with her to protect her. Rex v. Clarkson, 1 Str. 444. A child so young as to be pable of exercising any judgment of its own, was delivered by the court into the custody of *legal* guardian appointed by the father's will. Rex v. Johnson, 1 Str. 579. 2 Ld. Raym. S. C. On a *habeas corpus* sued out by a father in order to have his son, an infant, who was by an aunt, delivered to him, the court having consulted the boy's inclinations, and entertai a bad opinion of the father's design in applying for the custody of the child, refused to give up to him. Rex v. Smith, 2 Str. 982. A young lady of full age having been decoyed from father in order to be married to a mean person, and brought back by the father's means to house, a *habeas corpus* was sued out by one of the decoyers; but upon the court being told by young lady that she was desirous of going back to her father, they said she was at liberty to so. Rex v. James Clarke, 1 Burr. 606. On a *habeas corpus* by the father of a kept mistr aged eighteen, directed to her keeper, the court discharged her from all restraint, and gave liberty to go where she pleased. Rex v. Sir Francis Delaval, 3 Burr. 1434. On a *habeas co* by a husband for his wife, it appeared that articles of separation had been executed between th in consideration of money received by the husband, who had also covenanted not to molest wife, or any one with whom she might live: the court held this agreement a formal renun tion by the husband of his marital right to seize her, and force her back to live with him, told the lady that she was at liberty to go where, and to whom she pleased. Rex v. M Mead. 1 Burr. 542. So, where the wife had fled to her own family for protection from her h band who had used her very ill, and upon her appearance on the return of the writ she s the peace against him, the court refused to deliver her up to him. Anne Gregory's cas Burr 1991. Where a defendant was brought up from the Admiralty, there charged with e bezzling the goods of a ship; on affidavit of a cause of action on a note in B. R., that court t him from the Admiralty, and delivered him into the custody of their marshal, for the caus the Admiralty court, they said, might as well be followed in an action of trover. Ruther v. Scott, 2 Str. 936. A person committed by a secretary of state to the custody of a messe on suspicion of high treason, and kept there two years, was discharged, because the Attor General would not undertake to prosecute directly. Rex v. Fitzgerald, 1 Wilf. 254. B. cannot remand a person to the custody of a king's messenger, but must commit him to their m shal. Rex v. Dr. Shebbeare, 1 Burr. 460. Where a sane person confined by her husband i mad-house, was brought up, and intended to demand the peace, but had not articles re stampt, the court permitted her to go away with a friend, he undertaking to produce Rex v. Turlington, 2 Burr 1115.——On a *habeas corpus* returnable before the chief justice commitment by another judge is good, without amendment of the return. Mercfield Hulls, Barnes, 20.——The Common Pleas cannot commit to the Fleet a prisoner on a tice's warrant, for want of sureties on an indictment of bastardy, or on *excommunicato capi* out of Chancery, returnable in B. R. or on an extent out of the Exchequer, but must rema him. But perhaps they might do so, if he were committed only on Exchequer process, on cognizance forfeited at sessions. *Ex parte* Martin, Barnes, 223.

In the year 1757, the above act of the 31 C. 2. c. 2., came under discussion in both Houses Parliament, upon the following occasion: A gentleman having been impressed before the co missioners under a pressing act passed in the preceding session, and confined in the Savoy, friends made application for a writ of *habeas corpus*, which produced some hesitation, and di culty; for, according to the above statute, the privilege relates only to persons committed criminal, or supposed criminal matters; and this gentleman did not stand in that predicame Before the question could be determined, he was discharged, in consequence of an applicat to the Secretary at War; but the nature of the case seeming to point out a defect in the a bill for giving a more speedy remedy to the subject upon the writ of *habeas corpus*, was prep ed, and presented to the House of Commons. It imported, that the several provisions made the above act of 31 Car. 2. for the awarding of writs of *habeas corpus* in cases of commitme or detainer for any criminal or supposed criminal matter, should in like manner extend to cases where any person, not being committed or detained for any criminal or supposed crimi matter, should be confined, or restrained of his or their liberty, under any colour or pretc whatsoever; that upon oath made by such person so confined or restrained, or by any other p son on his behalf, of any actual confinement or restraint, and that such confinement or restra to the best of the knowledge and belief of the person so applying, was not by virtue of commitment or detainer for any criminal or supposed criminal matter; an *habeas corpus* direc to the person or persons so confining or restraining the party, should be granted in the sa manner as is directed, and under the same penalties as are provided by the said act in the case

per

(E) Of the *Habeas Corpus ad faciendum & recipiendum.*

THIS writ is commonly called a *habeas corpus cum causâ*, and is grantable at all times of common right, whether in term or vacation, without motion in court. 1 Lev. 1. 2 Mod. 306.

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ons committed or detained for any criminal or ſuppoſed matter; that the perſon before m the party ſhould be brought by virtue of an *habeas corpus* granted in the vacation-time un- the authority of this act, might and ſhould, within three days after the return made, pro- d to examine into the facts contained in ſuch return, and into the cauſe of ſuch confinement reſtraint, and thereupon either diſcharge, or bail, or remand the party ſo brought, as the ſhould require, and as to juſtice ſhould appertain. The reſt of the bill related to the return he writ in three days, and the penalties upon thoſe who ſhould neglect or refuſe to make the rn, or to comply with any other clauſe of this regulation. See the bill, and the arguments and againſt it, in the Appendix to Vol. 7. Debrett's Debates, from 1743 to 1774. The bill s ſoon paſſed by the Commons; but in the Houſe of Lords, it was thrown out at the ſecond ding, and the judges were ordered to prepare a bill to extend the power of granting writs of *as corpus ad ſubjiciendum* in vacation-time, in caſes not within the ſtatute of 31 Car. 2. c. 2., ll the judges of his majeſty's courts at *Weſtminſter*, and to provide for the iſſuing of proceſs vacation-time to compel obedience to ſuch writs; and that in preparing ſuch bill they take o conſideration, whether in any, and what caſes, it may be proper to make proviſion that truth of the facts contained in the return to a writ of *habeas corpus* may be controverted by avits or traverſe, and ſo far as it ſhall appear to be proper, that clauſes be inſerted for that poſe, and that they lay ſuch bill before the Houſe in the beginning of the next ſeſſion of liament. The matter, however, was never reſumed.

When the above bill was before the Lords, the following queſtions were propoſed to the ges: —1ſt, Whether in caſes not within the act of 31 Car 2. c. 2., writs of *habeas corpus ad iciendum*, by the law as it now ſtands, ought to iſſue of courſe, or upon probable cauſe verifi- by affidavit?—2d, Whether in caſes not within the ſaid act, ſuch writs of *habeas corpus*, by law as it now ſtands, may iſſue in vacation by fiat from a judge of the court of King's Bench, mable before himſelf?—3d, What effect will the ſeveral proviſions propoſed by this bill, as the awarding, returning, and proceeding upon returns to ſuch writs of *habeas corpus*, have in ctice? and how much will the ſame operate to the benefit or prejudice of the ſubject?—4th, ether at the common law, and before the ſtatute of *habeas corpus* in the 31ſt of King Charles 2. and which of the judges, could regularly iſſue a writ of *habeas corpus ad ſubjiciendum* in time of ation, in all or in what caſes particularly?—5th, Whether the judges at the common law, before the ſaid ſtatute, were bound to iſſue ſuch writ of *habeas corpus* in time of vacation, the demand of any perſon under any reſtraint? or might they refuſe to award ſuch writ, they thought proper?—6th, Whether the judges at the common law, and before the ſaid ſta- e, were bound to make ſuch writs iſſued in time of vacation returnable *immediate?* and could y enforce obedience to ſuch writ iſſued in time of vacation, if the party ſerved therewith uld neglect or refuſe to obey the ſame, and by what means?—7th, Whether, if a judge, before ſaid ſtatute, ſhould have refuſed to grant the ſaid writ on the demand of any perſon under reſtraint, had the ſubject any remedy at law, by action or otherwiſe, againſt the judge for refuſal?—8th, Whether in caſe a writ of *habeas corpus ad ſubjiciendum* at common law be di- ed to any perſon returnable *immediate*, ſuch perſon may not ſtand out an *alias* and *pluries ha- corpus*, before due obedience thereto can be regularly enforced by the courſe of the common ?—9th, Whether the ſaid ſtatute of 31 Car. 2. and the ſeveral proviſions therein made for immediate awarding and returning the writ of *habeas corpus*, extend to the caſe of any com- ed againſt his will, in time of peace, either into the land or ſea ſervice, without any colour legal authority, or to any caſe of impriſonment, detainer or reſtraint whatſoever, except s of commitment or detainer for criminal, or ſuppoſed criminal matters?—10th, Whether, in caſes whatſoever, the judges are ſo bound by the facts ſet forth in the return to the writ of as corpus, that they cannot diſcharge the perſon brought up before them, although it ſhould ear moſt manifeſtly to the judges, by the cleareſt and moſt undoubted proof, that ſuch return alſe in fact, and that the perſon ſo brought up is reſtrained of his liberty by the moſt unwar- table means, and in direct violation of law and juſtice?—The third queſtion was waved at requeſt of the judges. Upon the firſt queſtion they all delivered their opinions in the very e words, "that in caſes not within the act of 31 Car. 2., writs of *habeas corpus ad ſubjiciendum*

By the ſtatute of 43 *Eliz. c.* 5. it is enacted, "That no writ of *habeas corpus*, or other writ to remove any cauſe depending in an inferi court, having juriſdiction thereof, ſhall be received or allowed by t judges or officers of ſuch court, but they may proceed therein, if no ſuch writ were ſued forth or delivered; except the ſaid writ delivered to ſuch judges or officers before the jury have appeared, a one of them is ſworn." And by 21 *Jac.* 1. *c.* 23. § 21. "no w of *habeas corpus*, *certiorari*, or other writ, except writs of error, or a taint to ſtay or remove any cauſe depending in an inferior court of cord having juriſdiction thereof, ſhall be received or allowed by t judges or officers of ſuch court, but they may proceed therein, & except the ſaid writ be delivered to ſuch judges or officers, before iſ or *demurrer* joined in the ſaid cauſe; ſo as the ſame be not join within ſix weeks next after the arreſt or appearance of the defe dant."

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dum, by the law as it now ſtands, ought not to iſſue of courſe, but upon probable cauſe veri by affidavit."———Mr. Juſtice *Noel*, upon the 2d and 4th queſtions, delivered his opini "That at the common law, before the ſtatute 31 Car. 2. no judge could regularly iſſue a writ *habeas corpus ad ſubjiciendum* in vacation; but, by the law as it now ſtands, upon the practice the court of King's Bench ever ſince the ſaid ſtatute, ſuch writs may iſſue in the vacation by fiat from a judge of the court of King's Bench, returnable before himſelf, in caſes not within ſaid act."—Upon the 5th queſtion, "That the judges at the common law; and before the ſtatute were not bound to iſſue ſuch writs of *habeas corpus ad ſubjiciendum* in vacation, upon demand of any perſon under reſtraint; and might refuſe to award ſuch writ, if they thought p per, in the time of vacation."—Upon the 6th queſtion, "That the judges, at the common and before the ſaid ſtatute, were not bound to make ſuch writs, ſo iſſued in vacation, returna *immediatè*; and they could not enforce obedience to ſuch writ iſſued in the vacation, if the pa ſerved therewith ſhould neglect or refuſe to obey the ſame."—Upon the 7th queſtion, "Tha a judge, before the ſaid ſtatute, ſhould have refuſed to grant the ſaid writ upon the demand any perſon under any reſtraint, the ſubject had not any remedy at law, by action or otherw againſt the judge, for ſuch refuſal."—Upon the 8th queſtion, "That in caſe a writ of *ha corpus* at the common law had been directed to any perſon returnable *immediatè*, the court alw granted an *alias* and *pluries habeas corpus* before due obedience could be enforced; but, ſince ſtatute 31 Car. 2. the *alias* and *pluries* have been omitted."—Upon the 9th queſtion, "That ſtatute 31 Car. 2., and the proviſions therein made, for the immediate awarding and return the writ of *habeas corpus* do not extend to the caſe of any man compelled againſt his will, time of peace, either into the land or ſea ſervice, without any colour of legal authority, nor any caſes of impriſonment, detainer, or reſtraint, except caſes of commitment for criminal ſuppoſed criminal matter."—Upon the 10th queſtion, "That the judges are not in all caſes wh ſoever to bound by the return to the writ of *habeas corpus*, that they cannot diſcharge the per brought before them, if it ſhould appear moſt manifeſtly to the judges, by the cleareſt and m undoubted proof, that ſuch return is falſe in fact, and that the perſon ſo brought up is reſtra ed of his liberty by the moſt unwarrantable means, and in direct violation of law and juſtice."

Mr. Juſtice *Wilmot*, upon the 2d queſtion, delivered his opinion, "That in caſes not with the act 31 Car. 2. writs of *habeas corpus ad ſubjiciendum*, by the law as it now ſtands, may iſſue the vacation by fiat from a judge of the court of King's Bench, returnable before himſelf." Upon the 4th queſtion, "That after the reſtoration, and before the ſtatute 31 Car. 2. the ch juſtice and other judges of the court of King's Bench did, in fact, iſſue writs of *habeas cor ad ſubjiciendum*, in time of vacation, in criminal caſes; and thinks ſuch practice was legal, a warranted by the ſame principles which now ſupport the practice of iſſuing writs in vacation all caſes which are not within the 31 Car. 2. but thinks there was no ſettled regular practice iſſuing writs of *habeas corpus ad ſubjiciendum* in vacation, in any caſe before the ſtatute 31 Car. at the inſtance of a perſon under reſtraint."—Upon the 5th queſtion, "That the judges, at t common law, and before the ſaid ſtatute, were not, nor are now, bound to iſſue ſuch writs *habeas corpus* in time of vacation, upon the demand of any perſon under reſtraint; and, if th thought proper, might, and now may, refuſe to iſſue ſuch writs upon the demand of any per under reſtraint; for he thinks a copy of the commitment muſt be produced, or there muſt ſome caſe made, before the judges are, or ever were, bound to grant ſuch writs at the inſtan of a perſon under reſtraint." Upon the 6th queſtion, "That the judges, at the common

This laſt ſtatute, it hath been holden, doth not extend to the caſe of an interlocutory judgment; and the modern practice is to allow the *habeas corpus* as upon the 43 *Eliz.* provided it be delivered at any time before the jury are ſworn; and ſo it is where iſſue is joined within ſix weeks next after the defendant's arreſt or appearance.

Cox v. Hart, 2 Burr. 758. Bevan v. Proteſk, *id.* 1151. But *contr.* Wyatt v. Markham, Barnes, 221. Hornbuckle v. Eaton, *ibid.*

By § 3. of the laſt mentioned ſtatute, "If any cauſe commenced in an inferior court be removed by any writ or proceſs, and afterwards remanded by *procedendo* or other writ, ſuch cauſe ſhall never afterwards be removed or ſtayed before judgment by any writ out of any court whatſoever." By § 4. "If in any cauſe not concerning freehold or inheritance, or title of land, leaſe, or rent, commenced or depending

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and before the ſaid ſtatute, were not bound to make writs of *habeas corpus ad ſubjiciendum* iſſued in vacation-time returnable *immediatè*; and thinks the judges, in time of vacation, cannot enforce obedience to any writs of *habeas corpus* iſſued in time of vacation, whether they iſſue in caſes within the 31 Car. 2. or in caſes out of that act, if the party ſerved therewith ſhould neglect or refuſe to obey the ſame by any means whatſoever."—Upon the 7th queſtion, "That if a judge, before the ſaid ſtatute, ſhould have refuſed to grant the ſaid writ upon the demand of any perſon under reſtraint, the ſubject had no remedy at law, by action or otherwiſe, againſt the judge for ſuch refuſal."—Upon the 8th queſtion, "That in caſe a writ of *habeas corpus ad ſubjiciendum* at the common law, and before the ſtatute, had been directed to any perſon returnable *immediatè*, ſuch perſon might have ſtood out an *alias* and *pluries habeas corpus*, before due obedience thereto could have been regularly enforced by the courſe of the common law: but the method of proceeding by *alias* and *pluries* in caſes out of the act of 31 Car. 2. has been long gone into diſuſe; and in caſe a writ of *habeas corpus ad ſubjiciendum* at the common law be now directed to any perſon, returnable *immediatè*, he is of opinion, that the court would enforce obedience to ſuch writ by attachment."—Upon the 9th queſtion, "That the ſaid ſtatute of the 31ſt of King Charles 2. and the ſeveral proviſions therein made for the immediate awarding and returning the writ of *habeas corpus*, do not extend to the caſe of any man compelled againſt his will, in time of peace, either into the land or ſea ſervice, without any colour of legal authority; or to any caſes of impriſonment, detainer, or reſtraint whatſoever, except caſes of commitment for criminal or ſuppoſed criminal matters."—Upon the 10th queſtion, "That in no caſes whatſoever, the judges are ſo bound by the facts ſet forth in the return to the writ of *habeas corpus*, that they cannot diſcharge the perſon brought up before them, if it ſhould appear moſt manifeſtly to the judges, by the cleareſt and moſt undoubted proof, that ſuch return is falſe in fact; and that the perſon ſo brought up is reſtrained of his liberty by the moſt unwarrantable means, and in direct violation of law and juſtice; but by the cleareſt and moſt undoubted proof he means the verdict of a jury, or judgment on demurrer, or otherwiſe, in an action for a falſe return; and, in caſe the facts averred in the return to a writ of *habeas corpus* are ſufficient in point of law to juſtify the reſtraint, he is of opinion, that the court, or judge before whom ſuch writ is returnable, cannot try the facts averred in ſuch return by affidavits in any proceeding grafted upon the return to the writ of *habeas corpus*."

Mr. Juſtice *Bathurſt*, upon the 2d and 4th queſtions, delivered his opinion, "That at common law, and before the 31 Car. 2. no judge could regularly iſſue a writ of *habeas corpus ad ſubjiciendum*, returnable before himſelf, in time of vacation, for the purpoſe of bailing or diſcharging; but by the law as it now ſtands, ſuch writ may iſſue in the vacation, by fiat from a judge of the court of King's Bench."—Upon the 5th queſtion, "That no judge at the common law, and before the ſaid ſtatute, was bound to iſſue ſuch writ of *habeas corpus ad ſubjiciendum* in time of vacation, upon the demand of any perſon under reſtraint; and the judges might refuſe to award ſuch writ, if they thought proper."—Upon the 6th queſtion, "That the judges by the common law, and before the ſtatute, were not bound to make ſuch writ, ſo iſſued in time of vacation, returnable *immediatè*; and they could not enforce obedience to ſuch writ iſſued in time of vacation, if the party ſerved therewith refuſed to obey the ſame."—Upon the 7th queſtion, "That the ſubject had not any remedy by law or otherwiſe, againſt a judge for what he did in his judicial capacity before the ſtatute 31 Car. 2."—Upon the 8th queſtion, "That at common law, the court always granted an *alias* and *pluries habeas corpus* before they enforced obedience by attachment or otherwiſe; but ſince the ſtatute of the 31 Car. 2. the practice has been in that reſpect altered."—Upon the 9th queſtion, "That the words of the ſtatute 31 Car. 2.

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" depending in any ſuch inferior court of record, it ſhall appear or
" laid in the declaration, that the debt, damages, or things demand
" do not amount to five pounds, ſuch cauſe ſhall not be ſtayed or
" moved by any writ or writs whatſoever, other than writs of error
" attaint."

Arming-ton's caſe, Palm. 403.

But ſoon after the paſſing of this ſtatute a method of evading it
deviſed, by ſetting up another action for a fictitious demand of 5*l.* or
wards, and then upon the *habeas corpus* both cauſes were removed.
order to prevent this it was enacted by 12 *Geo. c.* 29 § 3. " that
" judges of ſuch inferior courts as are deſcribed in the ſtatute of
" may proceed in ſuch cauſes as are therein ſpecified, which appear or
" laid not to exceed the ſum of five pounds, although there may be oth
" actions againſt the defendant, wherein the plaintiff's demands
" exce

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and of the ſeveral proviſions therein made for the immediate awarding and returning the
of *habeas corpus*, do not extend to the caſe of any man compelled againſt his will, in time
peace, either into the land or ſea ſervice, without any colour of legal authority, or to any
of impriſonment, detainer, or reſtraint whatſoever, except caſes of commitment for crimi
or ſuppoſed criminal matter; but in favour of liberty, the judges of the court of King's Ben
have, in conformity to that ſtatute, extended the ſame relief to all caſes."—Upon the
queſtion, " That the judges are not in all caſes ſo bound by the return to the writ of *habeas cor*
that they cannot diſcharge the perſon brought before them, in caſe it manifeſtly appears to
that ſuch return is falſe, and that the perſon is reſtrained of his liberty by the moſt unwarran
ble means, and in direct violation of law and juſtice."

Mr. Baron *Adams*, upon the 2d queſtion, delivered his opinion, " That, in caſes not with
the ſaid act, by the law as it now ſtands, ſuch writs may iſſue, in time of vacation, by
from a judge of the court of King's Bench, returnable before himſelf."—Upon the 4th que
on, " That it appears to him, that at the common law, before the reſtoration, the judges
not iſſue ſuch writs of *habeas corpus* at the prayer of the ſubject in time of vacation, but that
began firſt to be put in practice about that time; yet he cannot ſay, they could not have do
it before, as the ſame authority which warranted their doing it then, would have warranted
before, had it been thought neceſſary or expedient."—Upon the 5th queſtion, " That
judges at the common law, and before the ſaid ſtatute, while no ſuch practice was as yet
tled and eſtabliſhed by uſage, were not bound to iſſue ſuch writs of *habeas corpus* in time of
cation, but apprehends that the judges of the court of King's Bench, upon a caſe properly
before them, are bound at this day, the practice ſtanding confirmed and eſtabliſhed by ſo lon
an uſage, to iſſue ſuch writ in the vacation in caſes not within the ſaid ſtatute."—Upon the 6
queſtion, " That as at the common law, and before the ſaid ſtatute, the judges were not bou
to iſſue ſuch writs of *habeas corpus* in the vacation, ſo they were not bound to make it returna
immediate, nor had any means of enforcing obedience to it."—Upon the 7th queſtion, " That
a judge, before the ſaid ſtatute, had refuſed to grant a writ of *habeas corpus*, the ſubject had
remedy againſt the judge for ſuch refuſal."—Upon the 8th queſtion, " That in no caſe a firſt
judge could do more than grant an *alias* or *pluries habeas corpus*; but as to writs iſſued by
court, the court have of late years adopted a practice of granting an attachment to enforce ob
dience to the firſt writ."—Upon the 9th queſtion, " That the ſaid ſtatute of the 31ſt of Ki
Charles 2. and the ſeveral proviſions therein, do not extend to any caſes of impriſonment
reſtraint whatſoever, except caſes of criminal or ſuppoſed criminal matter."—Upon the 10
queſtion, " That if an action was brought for a falſe return made to an *habeas corpus*, and there
the return ſhould be falſified by judgment upon verdict, demurrer, or otherwiſe, the judges mig
thereupon iſſue an *alias habeas corpus*, and upon that diſcharge the party; but that, in all ca
whatſoever, when the matter comes before the court, ſingly upon the return made to the *ha
beas corpus*, if that return contains a ſufficient and juſtifiable cauſe of reſtraint, the judges m
determine upon the cauſe as it there appears, and cannot hear any proof in contradiction
it; but are ſo bound by the facts ſet forth therein, that though they be falſe in fact, and th
party in truth reſtrained of his liberty by the moſt unwarrantable means, and in direct violati
on of law and juſtice, they cannot diſcharge him, but he is driven to his action."

Mr. Baron *Smythe*, upon the 2d queſtion, delivered his opinion, " That, in caſes not with
the ſaid act, ſuch writs of *habeas corpus*, by the law as it now ſtands, may iſſue in the vacatio
by

exceed the ſum of five pounds." And by the ſtatute of 19 *Geo.* 3. 70. § 6. " no cauſe where the cauſe of action ſhall not amount to ten pounds or upwards ſhall be removed or removable into any ſuperior court by any writ of *habeas corpus* or otherwiſe, unleſs the defendant " ſhall

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flat from a judge of the court of King's Bench, returnable before himſelf."—Upon the 4th ſtion, " That, at the common law, and before the ſaid ſtatute of the 31ſt of King Charles the judges of the court of King's Bench could iſſue ſuch writs of *habeas corpus* in time of va- tion, where a probable cauſe was ſhewn that the perſon was unjuſtly impriſoned, or bailable." Upon the 5th queſtion, " That, at the common law, and before the ſaid ſtatute, the judges the court of King's Bench were bound to iſſue ſuch writs of *habeas corpus* in time of vacati- , if a probable cauſe was ſhewn, but not without."—Upon the 6th queſtion, " That the ges at the common law, and before the ſaid ſtatute, were not bound to make ſuch writs, iſſued in time of vacation, returnable *immediatè*, but ought to make them returnable before emſelves, or in court, as would beſt anſwer the purpoſes of juſtice. They could not in va- ion-time enforce obedience to ſuch writ; but, if the party ſerved therewith, ſhould neglect refuſe to obey the ſame, the court of King's Bench, in the next term, could enforce obedi- ce to ſuch writ by attachment."—Upon the 7th queſtion, " That a judge, before the ſaid tute, for his refuſal to grant a writ of *habeas corpus*, where he ought to have granted it, uld have been liable to puniſhment in the ſame manner as for any other breach of his duty." Upon the 8th queſtion, " That, in caſe ſuch writ of *habeas corpus*, at the common law, be ected to any perſon returnable *immediatè*, ſuch perſon may ſtand out an *alias* and *pluries*, if party ſuing out the writ chooſes to ſue out an *alias* and *pluries habeas corpus*; but the court ll grant an attachment for the firſt diſobedience, without putting the party to his *alias* and *ries*."—Upon the 9th queſtion, " That the ſaid ſtatute of the 31ſt of King Charles 2. and the veral proviſions therein, do not extend to any caſes of impriſonment, detainer, or reſtraint atſoever, except caſes of commitment for criminal, or ſuppoſed criminal matters."—Upon 10th queſtion, " That the judges were ſo bound by the facts ſet forth in the return to the rit of *habeas corpus*, that they cannot enter into proof by affidavits to controvert the re- rn; the facts ſet forth in the return can be controverted or contradicted only by the verdict of ury."

Mr. Baron *Legge*, upon the 2d queſtion, delivered his opinion, " That, in caſes not within the d act, ſuch writs of *habeas corpus*, by the law as it now ſtands, may iſſue in the vacation, by from a judge of the court of King's Bench, returnable before himſelf."—Upon the 4th ſtion, " That, at the common law, and before the ſtatute of *habeas corpus* in the 31ſt of g Charles 2. no judge could regularly iſſue a writ of *habeas corpus ad ſubjiciendum*,, in time vacation, in any caſe."—Upon the 5th queſtion, " That the judges, at the common law, d before the ſaid ſtatute, were not bound to iſſue ſuch writ of *habeas corpus ad ſubjiciendum*, time of vacation, upon the demand of any perſon under reſtraint; but might refuſe to award h writ, if they thought proper."—Upon the 6th queſtion, " That the judges, at the common w, and before the ſaid ſtatute, were not bound to make ſuch writs, iſſued in time of vacation, rnable *immediatè*, and could not enforce obedience to ſuch writ iſſued in time of vacation, the party ſerved therewith ſhould neglect or refuſe to obey the ſame, by any means."—Upon 7th queſtion, " That if a judge, before the ſaid ſtatute, ſhould have refuſed to grant the d writ upon the demand of any perſon under any reſtraint, the ſubject had not any remedy law, by action or otherwiſe, againſt the judge for ſuch refuſal."—Upon the 8th queſtion, That in caſe a writ of *habeas corpus ad ſubjiciendum*, at the common law, had been directed to perſon, returnable *immediatè*, ſuch perſon might have ſtood out an *alias* and *pluries habeas pus*, before due obedience thereto could have been regularly enforced by the courſe of the com- law; but as the law now ſtands, the practice has long prevailed, for the court of King's ch to enforce the firſt *habeas corpus* by an attachment."—Upon the 9th queſtion, " That the d ſtatute of the 31ſt of King Charles 2. and the ſeveral proviſions therein made for the imme- e awarding and returning the writ of *habeas corpus*, do not extend to the caſe of any man mpelled againſt his will, in time of peace, either into the land or ſea ſervice, without any our of legal authority; or to any caſes of impriſonment, detainer, or reſtraint whatſoever, cept caſes of commitment for criminal or ſuppoſed criminal matters."—Upon the 10th queſ- , " That the judges are not in all caſes whatſoever ſo bound by the facts ſet forth in the rn to the writ of *habeas corpus*, that they cannot diſcharge the perſon brought up before them, ough it ſhould appear moſt manifeſtly to the judges, by the cleareſt and moſt undoubted proof, that

" ſhall enter into a recognizance to the plaintiff in the inferior co
" with two ſufficient ſureties in double the ſum demanded, for the p
" ment of the debt and coſts in caſe judgment ſhall paſs againſt him."
By a proviſo in § 6. of the ſtatute of *James*, that act is limited to ſ
" courts of record only, and for ſo long time only as there is or ſhall
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that ſuch return is falſe in fact; and that the perſon ſo brought up is reſtrained of his libe by the moſt unwarrantable means, and in direct violation of law and juſtice."

Mr. Juſtice *Clive*, upon the 2d and 4th queſtions, delivered his opinion, " That, at the co mon law, and before the ſtatute of 31 Car. 2. no judge could regularly iſſue a writ of *habeas pus ad ſubjiciendum* in time of vacation; but by the law as it now ſtands, ſuch writs may iſſue the vacation, by fiat from a judge of the court of King's Bench, returnable before himſelf." Upon the 5th queſtion, " That no judge by the common law, and before the ſaid ſtatute, was bo to iſſue ſuch writs of *habeas corpus* and *ſubjiciendum* in time of vacation upon the demand of perſon under reſtraint, and the judges might refuſe to award ſuch writ."—Upon the 6th queſt

" That the judges by the common law, and before the ſaid ſtatute, were not bound to m ſuch writs ſo iſſued in time of vacation, returnable *immediate*, and they could not enforce obe ence to ſuch writ iſſued in the time of vacation, if the party ſerved therewith refuſed to o the ſame."—Upon the 7th queſtion, " That the ſubject had not any remedy, by law or oth wiſe, againſt a judge for what he did in his judicial capacity, before the ſaid ſtatute 31 Car. 2." Upon the 8th queſtion, " That at common law, the court always granted an *alias* and *plu habeas corpus* before they enforced obedience by attachment."—Upon the 9th queſtion, " That words of the ſtatute of the 31 Car. 2. and of the ſeveral proviſions therein made, for the imm diate awarding and returning the writ of *habeas corpus*, do not extend to the caſe of any m compelled againſt his will, in time of peace, either into the land or ſea ſervice, without any col of legal authority; or to any caſes of impriſonment, detainer, or reſtraint, whatſoever, exc caſes of commitment for criminal or ſuppoſed criminal matters."—Upon the 10th queſti " That the judges are not in all caſes ſo bound by the return to the writ of *habeas corpus*, t they cannot diſcharge the perſon brought before them, in caſe it manifeſtly appears to them t ſuch return is falſe, and that the perſon is reſtrained of his liberty by the moſt unwarrantable me and in direct violation of law and juſtice."

Mr. Juſtice *Denniſon*, upon the 2d queſtion, delivered his opinion, " That in caſes not wit the ſaid act, ſuch writs of *habeas corpus*, by the law as it now ſtands, may iſſue in the vacat by fiat from a judge of the court of King's Bench, returnable before himſelf."—Upon the queſtion, " That before the ſtatute of the 31ſt of King Charles the 2. the judges of the court King's Bench, by uſage, might iſſue a writ of *habeas corpus ad ſubjiciendum* in time of vacation." Upon the 5th queſtion, " That the judges of the court of King's Bench might iſſue ſuch w in time of vacation, upon probable cauſe proved by affidavits; but the uſage was not certai eſtabliſhed."—Upon the 6th queſtion, " That the judges of the court of King's Bench, bef the ſaid ſtatute, might make ſuch writs returnable either *immediate*, or in the ſubſequent ter but could not enforce obedience to ſuch writ iſſued in the vacation; but it might be done in t ſubſequent term."—Upon the 7th queſtion, " That if a judge, before the ſtatute, ſhould h refuſed to grant the ſaid writ upon demand, no action would lie againſt him."—Upon the queſtion, " That before the ſaid ſtatute, the party might ſtand out an *alias* and *pluries*, but, the ſaid ſtatute, the courſe hath been to grant an attachment without any *alias* or *pluries*." Upon the 9th queſtion, " That the ſaid ſtatute of the 31ſt of King Charles 2., and the ſeve proviſions therein made, for the immediate awarding and returning the writ of *habeas corpus*, not extend to the caſe of any man compelled againſt his will in time of peace, either into land or ſea ſervice, without any colour of legal authority; or to any caſes of impriſonme detainer, or reſtraint whatſoever, except caſes of commitment for criminal or ſuppoſed crimi matters."—Upon the 10th queſtion, " That, in all caſes whatſoever, where the return conſiſts facts juſtifying the taking and detaining by law, the judges are ſo bound by the facts ſet forth the return to the writ of *habeas corpus*, that they cannot diſcharge the perſon brought up bef them upon affidavits to be read in that proceeding, contradicting the facts contained in the retur but, if it ſhould appear moſt manifeſtly to the court, by the cleareſt and moſt undoubted pro either in action or in ſome collateral proceeding, that ſuch return is falſe in fact, and that t perſon ſo brought up is reſtrained of his liberty by unwarrantable means, and in direct violati of law and juſtice, the priſoner may be diſcharged."

Lord Chief Baron *Parker*, upon the 2d queſtion, delivered his opinion, " That in caſes within the act of the 31ſt of King Charles the 2d. writs of *habeas corpus ad ſubjiciendum*, by the

an utter barriſter of three years ſtanding at the bar of one of the new four inns of court, who ſhall be ſteward or under-ſteward, town-clerk, judge, or recorder of ſuch inferior court, or aſſiſtant to ſuch judge or judges of the ſame as ſhall not be an utter-barriſter or utter-barriſters of ſuch ſtanding, there preſent, and not of counſel in any action or ſuit there depending."

If

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it now ſtands, may iſſue in vacation, by fiat from a judge of the court of King's Bench, returnable before himſelf."—Upon the 4th queſtion, "That before the ſtatute of the 31ſt of King Charles 2., ſome of the judges of the King's Bench did, in fact, iſſue writs of *habeas corpus ad ſubjiciendum* in time of vacation; but it does not appear to his ſatisfaction, that there was any certain ſettled practice for iſſuing writs of *habeas corpus ad ſubjiciendum* in vacation, before the ſtatute of the 31ſt of King Charles 2. upon the application of a perſon under reſtraint; but it has been ſhewn that, in two inſtances before the ſaid ſtatute, the court diſapproved of ſuch practice; and he is therefore inclined to think, that the judges of the court of King's Bench could not, before the ſaid ſtatute, regularly iſſue a writ of *habeas corpus ad ſubjiciendum*, for the purpoſe of diſcharging or bailing any perſon ſo under reſtraint as aforeſaid, though he cannot poſitively ſay that they could not do ſo."—Upon the 5th queſtion, "That the judges, at the common law, and before the ſaid ſtatute, were not bound to iſſue ſuch writ of *habeas corpus ad ſubjiciendum* in time of vacation upon the demand of any perſon under reſtraint, but might refuſe to award ſuch writ, if a proper foundation was not laid for it by affidavit."—Upon the 6th queſtion, "That the judges, at the common law, and before the ſaid ſtatute, were not bound to make writs of *habeas corpus ad ſubjiciendum*, iſſued in vacation, returnable *immediatè*; nor could they in time of vacation enforce obedience to ſuch writ iſſued in time of vacation, if the party ſerved therewith ſhould neglect or refuſe to obey the ſame, by any means whatſoever."—Upon the 7th queſtion, "That a judge, before the ſaid ſtatute, ſhould have refuſed to grant the ſaid writ, upon the demand of any perſon under any reſtraint, the ſubject had not any remedy at law, by action or otherwiſe, againſt the judge for ſuch refuſal."—Upon the 8th queſtion, "That in caſe a writ of *habeas corpus ad ſubjiciendum*, at the common law, and before the ſaid ſtatute, had been directed to any perſon, returnable *immediatè*, ſuch perſon might have ſtood out an *alias* and *pluries habeas corpus*, before due obedience thereto could have been regularly enforced by the courſe of the common law; but the method of proceeding by *alias* and *pluries habeas corpus*, in caſes out of the ſaid ſtatute, has been long diſcontinued; and, in caſe a writ of *habeas corpus ad ſubjiciendum*, at the common law, be now directed to any perſon returnable *immediatè*, he thinks that the court would enforce obedience to ſuch writ by attachment."—Upon the 9th queſtion, "That the ſaid ſtatute of the 31ſt of King Charles 2., and the ſeveral proviſions therein made for the immediate awarding and returning the writ of *habeas corpus*, do not extend to the caſe of any man compelled againſt his will, in time of peace, either into the land or ſea ſervice, without any colour of legal authority; or to any caſes of impriſonment, detainer, or reſtraint whatſoever, except caſes of commitment for criminal or ſuppoſed criminal matters."—Upon the 10th queſtion, "That in no caſe whatſoever the judges are ſo bound by the facts ſet forth in the return to the writ of *habeas corpus*, that they cannot diſcharge the perſon brought up before them, if it ſhould appear moſt manifeſtly to the judges, by the cleareſt and moſt undoubted proof, that ſuch return is falſe in fact, and that the perſon ſo brought up is reſtrained of his liberty by the moſt unwarrantable means, and in direct violation of law and juſtice; but, by the cleareſt and moſt undoubted proof, he underſtands the verdict of a jury, or judgment on demurrer, or otherwiſe, in an action for a falſe return; and, in caſe the facts returned to a writ of *habeas corpus* ſhew a ſufficient ground in point of law for ſuch reſtraint, he is of opinion, that the court, or judge, before whom ſuch writ is returnable, cannot try the facts contained in ſuch return by affidavits."

Lord Chief Juſtice *Willes*, upon the 2d queſtion, delivered his opinion, "That in caſes not within the ſaid act, ſuch writs of *habeas corpus*, by the law as it now ſtands, may iſſue in the vacation, by fiat from a judge of the court of King's Bench, returnable before himſelf."—Upon the 4th queſtion, "That at the common law, and before the ſtatute of the 31ſt of King Charles 2., none of the judges could regularly iſſue an *habeas corpus ad ſubjiciendum* in time of vacation, in any caſe whatſoever."—Upon the 5th queſtion, "That the judges, at the common law, and before the ſaid ſtatute, were not bound to iſſue ſuch writs of *habeas corpus ad ſubjiciendum* in time of vacation, upon the demand of any perſon under reſtraint; but that they might refuſe to award ſuch writ, if they thought proper."—Upon the 6th queſtion, "That the judges, at the common law, before the ſaid ſtatute, were not bound to make ſuch writs, ſo iſſued in time of vacation, returnable *immediatè*; and that they could not enforce obedience to ſuch writs iſſued in time of vacation, if the party ſerved therewith ſhould neglect or refuſe to obey the ſame, by any means whatſoever,

Clapham's case, Cro. Car. 79. Anon. 3 Mod. 89.

If this proviso be not complied with, the case may be removed any time: and it is not enough that the judge is a barrister; he must actually present at the trial.

Fairley v. M'Connel, 1 Burr. 514. Tidd's Pr. 178.

Watson v. Cleike, Carth. 69. Haley's case, 1 Mod. 195.

But if the writ be disallowed by the judge of the inferior court for a of the causes above specified, it must be returned to the court above w the *special* matter.

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(*By this writ*) But this writ doth not remove the record; the return is merely a history or count of the proceedings below sent up to the superior court, to enable them to judge and termine the matter there. *Ibid.* 1 Salk. 352. 6 Mod. 177. 1 Term. Rep. 372.

Fry v. Cary, 1 Str. 527.

Where an action was brought in the court of the sheriffs of Lon against two partners, and one of them brought a *habeas corpus* and put bail for himself only, a *procedendo* was granted; for otherwise the plain would have been disabled to go on in either court.

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Heir and Ancestor.

Vol. iii. pag. 449. 8 Co. The Prince's case, 1 Vez. 294.

IT should seem from the expression used in a former part of t work, that the king's *first begotten* only is entitled to the Duchy *Cornwall*, not the *eldest son*. This, it is true, was the opinion of L *Coke*; but Lord *Hardwicke* has clearly shewn it to be erroneous.

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before the next term."—Upon the 7th question, "That if a judge, before the said statute, sh have refused to grant the said writ upon the demand of any person under any restraint, the ject had not any remedy at law, by action or otherwise, against the judge for such refusal."—U the 8th question, "That in case a *habeas corpus ad subjiciendum*, at the common law, had been rected to any person, returnable *immediate*, such person might stand out an *alias* and *pluries h corpus* before due obedience thereto could be regularly enforced by the course of the com law."—Upon the 9th question, "That the words of the statute of the 31st Car. 2, and several provisions therein made for the immediate awarding and returning the writ of *habeas co* do not extend to the case of any man compelled against his will, in time of peace, either the land or sea service, without any colour of legal authority; nor to any cases of imprisonm detainer, or restraint, except cases of commitment for criminal or supposed criminal matters. Upon the 10th question, "That the judges are not in all cases whatsoever so bound by the set forth in the return to the writ of *habeas corpus*, that they cannot discharge the person bro up before them, though it should appear most manifestly to them, by the clearest and most doubted proof, that such return is false in fact, and that the person so brought up is restrained his liberty by the most unwarrantable means, and in direct violation of law and justice."

Then it was proposed, "That the following question be put to the judges," *viz.* "W ther, if a writ of *habeas corpus ad subjiciendum* at the common law be applied for, either in ter vacation time, by the friend or agent, and on the behalf, of any person under actual confine or restraint; and if the person so applying should make an affidavit of such confinement or straint, and that he believes the same not to be by virtue of any commitment for criminal or posed criminal matter, but should declare, that he could give no other material information tive thereunto; would such an affidavit, as the law now stands, be a proper probable caus the awarding of the said writ of *habeas corpus?* and would the court, or judge, be bound im diately to award the same as a writ of right? or would the court, or judge, be bound to re the same upon such affidavit only? or is it in such case entirely left to the discretion of the co or judge, to grant the said writ of *habeas corpus* to one person upon such affidavit, and refuse another upon such affidavit, if they should so think fit?" And the same being objected to, debate, the question was put, "Whether the said question shall be put to the judges?" It resolved in the negative.

The eldeſt ſon of a king of England, ſays Lord Hardwicke, takes it as *primogenitus*; although Lord Coke at the end of the Prince's caſe, 8 Co. ſays otherwiſe. But that was not the point there, being only an obſervation of his own, and has ever ſince been held a miſtake of that great man. He was alſo miſtaken in the fact, in ſaying that Henry VIII. was not Duke of Cornwall, becauſe not *primogenitus*: for Lord Bacon in his Hiſtory of Henry VII. affirms the contrary, that the dukedom devolved to him upon the death of Arthur: and this is by a great lawyer, and who muſt have looked into it, as he was then Attorney or Solicitor General. So was Edward VI. in his father's life, without a new creation, although the king's ſecond ſon. Lord Elleſmere in his printed obſervations upon Lord Coke ſays, with ſome warmth, that Lord Coke ſplit on this rock, in reſtraining it to *primogenitus*, and not to the firſt *pro tempore*, voluntarily, without any occaſion, or the concurrence of any judge. Selden in his *Titles of Honour*, 6 vol. 776. ſays, the eldeſt ſons living are alſo Dukes of Cornwall; and that Prince Charles was Duke on the death of his brother, appears from the records, *Rym. Fœdera*, tom. 16. 792. He is ſo deſcribed in the patent creating him Prince of Wales. There is no act of parliament afterwards in the time of *James* I. creating him Duke; nor can any doubt ariſe of his right thereto under the charter of 11 Edward III. from the act of James I. enabling him to leaſe part of the duchy lands; ſeveral acts being paſſed to enable the Dukes for the time being ſo to do. Nor is it a ſatisfactory anſwer, that that caſe was founded on an act of parliament made on political views, and ſo different from the rules of common law; for the difference of that caſe from others is in the nature and form of the limitation of the kind of eſtates to be taken in the duchy, not in the perſons to take. But I own, adds my Lord Hardwicke, I ſhould not be quite ſatisfied to found my opinion on this, for political reaſons might have ſome weight. But this determination happens to be ſtrictly agreeable to the rules of law in caſes of common perſons; as appears from F. N. B 188. on the writ *de auxilio ad filium militem faciendum*, where he ſays, that *primogenitus* then alive is ſufficient; which is agreeable to Lord Elleſmere's obſervation, that *Charles* became *primogenitus* on the death of his brother without iſſue. This is an original writ, where the phraſe and language of the law is moſt critical and preciſe, and has been always conſtrued with great ſtrictneſs. I have been furniſhed with the original caſe of the *ducby* printed in 1613, which is very ſcarce, where it appears to have been by the greateſt men with full aſſent of council, and the reaſons of the reſolution at large. and *Fitzherbert's Natura Brevium* is expreſsly mentioned and relied on there. 1 Ves. 294.—*Note*, Mr. Chriſtian, in his edition of Sir *William Blackſtone's Commentaries*, ſupports Lord Coke's opinion; but takes no notice of what fell from Lord Hardwicke in the above paſſage: it is therefore that the editor has given it at length.

(B) Of the ſeveral kinds of Heirs: And herein,

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(*Here we*) There is an exception to this rule in the caſe of the Duchy of *Cornwall*, which the king's firſt-born ſon takes by hereditary right in the lifetime of his father under the 11 Ed. 3.; for without an act of parliament the courſe of deſcent could not be altered. 8 Co. 16. (*f*) He is not called heir apparent, unleſs his right of inheritance be indefeaſible, provided he outlive the anceſtor: if he be only heir in the preſent circumſtances of things, ſubject to have his right defeated by the contingency of ſome nearer heir being born, he is called only preſumptive heir. 2 Bl. Comm. 208.

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(*If a condition*) *Vide ſupra*, 364.

(*Alſo if the*) See *ſupra*, vol. 1. 105.

(*Alſo the*) 1 Ves. 184. The enrolment of decrees being now much diſuſed, it is become the practice to revive in all caſes, indiſcriminately, by bill. Mitf. Eq. Pl. 65.

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(*But this*) But ſuch a deviſee ſhall have this benefit; ſo ruled by Lord Nottingham in the above caſe of Pockley v. Pockley, and now admitted as ſettled law. Galton v. Hancock, 2 Atk. 437. Lutkins v. Leigh, Ca temp. Talb. 53,

(C) Of what Conditions, Covenants, &c. of the Anceſtor the Heir ſhall take Advantage.

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(*J. S. having iſſue*) See too *acc.* 1 P. Wms. 397.

(D) What Conditions, Covenants, &c. ſhall extend to the Heir ſo as to bind him.

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(*As where A. ſeiſed*) Whalley v. Reede, 1 Lutw. 809. S. P. Burleton v. Humphrey, Am 256. S. P.

(F) Where the Heir ſhall be ſaid to be bound to anſwer his Anceſtor's Debts and Contracts.

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(*But the body*) And if he pay his anceſtor's debts to the value of the land deſcended, ſhall hold the land diſcharged. Buckley v. Nightingale, 1 Str. 665. Ca. temp. Talb. 109.

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(*By the common*) It ſeems that before the ſtatute, he was reſponſible in equity for the value the land aliened before action brought. 1 P. Wms. 777.

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(*And for the*) So, in equity, the heir muſt be made a party with the deviſee. Gawler Wade, 1 P. Wms. 99. Warren v. Stawell, 2 Atk. 125.

(*Provided,*) If there be, therefore, a deviſe, ſubject to the payment of debts, ſimple contra creditors will be entitled to be paid *pari paſſu* with bond or other ſpecialty creditors; for in c ſcience their debts are to be equally favoured, being equally due. Woolſtencroft v. Le 1 Ch. Ca. 32. 3 Ch. Rep. 7. Hixon v. Witham, Ch. Ca. 248. Anon. 2 Ch. Ca. 54. G ling v. Lee, 1 Vern. 63. Child v. Stephens, *id.* 101. Sawley v. Gower, 2 Vern. 61. Wh v. Fielding, *id.* 763. And ſuch a deviſe will admit creditors whoſe debts are barred by the ſta of limitations. Gofton v. Mill, 2 Vern. 141. And though it hath been holden in ſome c that if the eſtate be deviſed to the executor for payment of debts, this will make it legal aſſ yet it ſeems to be now ſettled that the circumſtance of giving the real eſtate by any mean the executor, ſhall not occaſion the produce of it when ſold, to be applied, as it would in the cleſiaſtical court; but it muſt nevertheleſs be conſidered as equitable aſſets. Per Lord T lowe, Newton v. Bennet, 1 Br. Ch Rep. 135. See alſo Silk v. Prime, 1 Br Ch. Rep. Addi But a deviſe of the real eſtate to the heir, charged with the payment of debts, does not b the deſcent. Allam v. Hebor, 2 Str. 1270. Emerſon v. Inchbird, Ld. Raym. 728. Cler Smith, 1 Salk. 241. 1 Lutw. 793. Hurſt v. Earl of Winchelſea, 2 Bur. 879. 1 Bl. Rep. the eſtate, therefore, will be legal aſſets. Freemoult v. Dedire, 1 P. Wms. 429. Plunk Penſon, 2 Atk. 290.

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(*In the conſtruction*) Mr. Vernon, in referring to this caſe, in Pr. Ch. 521., obſerved, till this reſolution, he ſhould have been of another opinion, for that ſuch a diſpo had been holden fraudulent by Lord Holt, in the caſe of Templeman v Beke. And Vernon's diſſatisfaction is taken notice of by Lord Talbot, in Jones v. Marſh, Ca temp. T 46.

Gott v. Vavaſor, Barnes, 164. If a declaration againſt the heirs and deviſees under this ſtatute cloſe a deviſe for the payment of debts, it may be demurred to.

Mathews v. Lee, Barnes, 444 The plaintiff may join iſſue on the plea *riens per diſcent*, without plying, as he is impowered by the ſtatute; and in ſuch caſe the are not to ſet out the value of the lands deſcended: it is ſufficient for t to find that lands came by deſcent, ſufficient to anſwer the debt and mages.

Jeffervs v. Barrow, P. 12 Ann. Bull *Ni. Pri.* 176. To a plea of *riens per diſcent al temps del original*, the plaintiff re that the defendant had ſufficient lands before the time of the ori purchaſed, and on iſſue thereon, a verdict was given for the plai but no inquiry of the value of the land: the court awarded a repleade for iſſue ought not to have been joined on the inſufficiency of the land cended.

Winder v. Barnes, P. The heir cannot have two defences, one at common law, and one the ſtatute: therefore, if to *riens per diſcent al temps del writ*, the pl

reply, that before that time lands descended; the heir cannot rejoin that he sold them, and paid bond debts to the amount; he ought to disclose the whole in his bar at once. 15 Geo. 2. Bull. *Ni. Pri.* 176.

(G) How to be proceeded against where he is bound.

IN a declaration against the heir on a covenant that runs with the land, the plaintiff may charge him as an assignee; for evidence that the land descended to him as heir of the lessor will support such an issue. Derisley v. Custance, 4 Term Rep.

(I) What shall be Assets in his Hands.

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(*Wherever*) Robinson v. Tonge, 3 Br. P. C. 556, 3 P. Wms. 401, 2 Str. 879. Westfaling v. Westfaling, 3 Atk. 460.

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(*But a reversion*) That such a reversion is assets for the debt of the first person who was in possession, and who created the reversion, hath been expressly determined by Lord Hardwicke in Kinaston v. Clarke, 2 Atk. 204. but whether it be so for the debt of any of the intermediate takers, is a point which hath lately been much agitated, but hath received no decision. Tweedale v. Coventry, 1 Br. Ch. Rep. 240. Arundel v. Knight 1787. *Id.* 260. The case of Smith v. Parker, 2 Bl. Rep 1230. purports to have decided that such a reversion is assets. In that case, which was debt upon bond against the heirs of the obligor, Edward Perrot devised an estate to his brother Charles Perrot for life, remainder to his brother Robert Perrot for life, and his first and other sons in tail, remainder to trustees for thirty years, remainder to Edward John Perrot and his first and other sons in tail, remainder to William Perrot for life and his first and other sons in tail-male, remainder to Benjamin Perrot for life and his first and other sons in tail-male, remainder to the testator's right heirs. On the testator's death Charles entered and died without issue. Robert died without issue before the testator. Edward John entered, and whilst in possession made the bond in question, and died without issue. William entered, and died without issue. And on his death, Benjamin being dead without issue, and all the said persons having died intestate, the estate came into possession of the defendants who were heirs at law born of the testator and of Edward John the obligor, which Edward John was also, whilst in possession of the estate, the heir at law of the testator.—In this case, however, Lord Thurlow observes in Tweedale v. Coventry, the contingent uses never came into possession, so that it was not a reversion after an estate tail, but after an estate for life only. See the case of Gifford v. Barber, Vin. Abr. tit. *Charge*, A. pl. 17. where Lord Hardwicke is reported to have said, that the reversion would not be liable to a bond of an intermediate taker, unless the estate came as assets by descent to the very heir of such person; though it would be to a judgment, because that attaches on the land.

(*By the statute*) An estate *pur autre vie* limited to heirs is within the statute of fraudulent devises, 3 & 4 W. & M. c. 14., and liable to specialty debts. Westfaling v. Westfaling, 3 Atk. 460. Marwood v. Turner, 3 P. Wms. 164.

Heresy, and Offences against Religion.

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(A) Of Heresy: And herein,

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(*Heresy (a) among*) 4 Bl. Comm. 44.

3. How

3. How punished.

But it is provided, that if within four months after the first conviction, the delinquent will in open court publickly renounce his error, he is discharged for that once from all disabilities.

(C) Of Offences against Religion as punishable by the Common Law.

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(*Although offences against religion*) Fitzg. 65.
Page 38
(*Such as all*) Rex v. Woolston, 2 Str. 834. Fitzg. 64.

(*All open lewdness*) 2 Str. 791.

(D) Of Offences by Statute against Religion: And herein,

Page 39
(*Provided that this act*) It having been determined that bakers, who baked dinners on a Sunday were within the equity of this proviso, Rex v. Cox, 2 Burr. 785. Rex v. Younger, 5 Term Rep. 449; and it being found that the liberty given by this determination had been carried to a very unreasonable extent, particularly in the metropolis, it was enacted by St. 34 Geo. 3. c. 61. "that no baker in *London*, or within twelve miles thereof, shall exercise his trade on a Sunday under a penalty of ten shillings, except between nine o'clock in the forenoon, and one o'clock in the afternoon, within which time he may sell bread, and bake meat, pudding, or pies only, so as the person requiring the baking thereof carry or send the same to and from the place where they are baked."

(*Provided also*) Upon this act a person can be convicted in only one penalty upon the same day. Crepps v. Durden, Cowp. 640.

(*Also it is*) See too 5 Ann. c. 9. § 3. But in the case of a voluntary escape, the party cannot be re-taken on a *Sunday*. Featherstonehaugh v. Atkinson, Barnes, 373. Atkinson v. Jameson, 5 Term. Rep. 25.

But Comyns, Chief Baron, in abridging this case, says, that although a citation may be published on the church-door on a *Sunday*, according to the usage of the spiritual court, yet it cannot be served on the person on that day. Com. Dig. tit. "*Temps*," (B. 3.) In the case of Walgrave v. Taylor, 1 Ld. Raym. 706. 12 Mod. 606. the above decision respecting the service of a citation on a *Sunday*, is recognized as good law by Holt, C. J., and no notice is taken of the distinction made by the Chief Baron. So, a person may be arrested on a *Sunday* on the Lord Chancellor's warrant, or an order of commitment for contempt; for he is considered as in custody from the time of making the order, and the warrant is in nature of an escape warrant. Semb. 1 Atk. 55. So, a person may surrender voluntarily on a *Sunday*. *Ibid.* So, process on an indictment and an attachment for contempt may be served on a *Sunday*. *Ibid.* Bail may take the principal on a *Sunday*, for this is not under any process at all. 6 Mod. 231. 1 Atk. 239 But a person cannot be taken on a *Sunday* upon an attachment for non-performance of an award, for it is only in the nature of a civil execution. Rex v. Myers, 1 Term Rep. 265,, not for non-payment of the forfeiture under a penal statute. *Ibid.*

Nor can a writ of inquiry be executed on a *Sunday*. Forteſc. 373. 1 Str. 387.

2. Of the Offence of Swearing.

This act repeals 21 Ja. 1. c. 10., & 6 & 7 W.

By 19 *Geo.* 3. *c.* 21. "If any person shall profanely curse or swear, and be convicted on the oath of one witness, or by confession, or by the hearing of one magistrate, he shall forfeit, *1st.* Every day-labourer, "common

common ſoldier, ſailor, or ſea-man, 1*s.* 2. Every other perſon under the degree of a gentleman, 2*s.* 3. Every perſon of or above the degree of a gentleman, 5*s.* On a ſecond conviction double, and on every other treble the ſum firſt forfeited, for the uſe of the poor of the pariſh where the offence ſhall be committed; and in default of immediate payment, or giving immediate ſecurity for payment, ſhall, if not a common ſoldier, ſailor, or ſeaman, be confined to hard labour for ten days, but if a common ſoldier, ſailor, or ſeaman, in actual ſervice, ſhall be ſet in the ſtocks for one hour for any ſingle offence, and for two hours for any greater number at the ſame time. All charges of the information and conviction are to be borne by the offender; but if he be not able, or obſtinately refuſe to defray them, he is to be committed to the houſe of correction for ſix days over and above the time limited in caſe of non-payment of the penalties. The juſtice neglecting his duty forfeits 5*l.* and the conſtable 40*s.* The act is to be read quarterly in all churches, *&c.* under a penalty of 5*l.*; and all proſecutions under it are to be made within eight days next after the offence committed." By 22 *Geo.* 2. *c.* 33. All flag-officers, and perſons belonging to his Majeſty's fleet, are puniſhable for this offence at the diſcretion of a court-martial.

3. c. 11. In a conviction of this kind, the oaths and curſes muſt be ſet forth; for what is a profane oath or curſe is matter of law, and ought not to be left to the judgment of the witneſs. Rex v. Sparling, 1 Str. 497. 8 Mod. 58. But a conviction for ſwearing the ſame oath

veral times need not repeat the oath, 2 Ld. Raym. 1386. 3 Mod. 366. A conviction of a erſon as being of a higher degree, muſt negative his being of a lower degree. *Ibid.*

(*By the ſtatutes*) And by the above ſtatute of 22 *Geo.* 2. *c.* 33. this offence is puniſhable in perſons belonging to the fleet in like manner as the preceding offence. Page 40

(*By* 31 *Eliz. cap.* 1.) In regiſtering the certificate the juſtices are merely miniſterial; and if the perſons reſorting to the meeting-houſe do not bring themſelves within this act, the regiſtering will not protect them from the penalties of the law. Rex v. Juſtices of Derbyſhire, 1 T. Rep. 606. Page 45

(*Alſo by the ſtatute*) But the ſubſcription to the non-exeepted articles being alleged to preſs too hard upon ſome tender conſciences, it is now no longer required, and the benefit of this act is extended by 19 Geo 3. c. 14. to all proteſtant diſſenting miniſters upon their taking the oaths, making and ſubſcribing the declaration againſt popery, and alſo the following declaration: "I *A. B* do ſolemnly declare, in the preſence of Almighty God, that I am a Chriſtian and a Proteſtant, and as ſuch that I believe, that the Scriptures of the Old and New Teſtament as commonly received among Proteſtant churches, do contain the revealed will of God, and that I do receive the ſame as the rule of my doctrine and practice."—This act, as well as the toleration act, are declared to be publick acts: the latter had been holden to be a private act. Reg v. Larwood, 4 Mod. 274. 1 Ld. Raym. 30. (*b*) The contrary was formerly holden, *vide* Salk. 572 Page 46

(*Alſo by the ſtatute*) See 8 G. 1. c. 6. reſpecting Quakers.

If a man be a profeſſed churchman, and his conſcience will permit him ſometimes to go to meetings, inſtead of coming to church, the toleration act will not excuſe him. *Per Holt*, C. J. 6 Mod. 190.

Nor will it authoriſe a miniſter, to exerciſe his functions, without being licenſed by the biſhop in a chapel of eaſe according to the rites of the church of *England*; for the act was made to protect tender conſciences from penalties; and to extend it to thoſe of the church who act contrary to its rules and diſcipline, would introduce an endleſs confuſion. Dr. Trebec v. Keith, 2 Atk. 498.

The

Attorney-General v. Cock, 2 Ver. 273.

The law ſo far favours diſſenters upon the foundation of this act, that charities are permitted to be eſtabliſhed for the ſupport of diſſenting miniſters; and a *mandamus* (*c*) will iſſue to admit or reſtore them. And the preſent diſpoſition of the courts, proſecutions againſt diſſenters for occaſional non-compliance with all the requiſitions of the ſtatutes do not ſeem likely to meet with any great encouragement (*d*).

(*c*) Rex v. Barker, 3 Burr. 1265. But ſee Rex v. Totham, 3 Term Rep. 575., the difference between a mandamus *to admit*, and a mandamus *to reſtore*. Rex v. Hall, 1 Term Rep. 320.

The toleration act exempts diſſenting miniſters from ſerving upon juries and from county, ward, or pariſh offices; and 19 *Geo.* 3. *cap.* 4. exempts them from ſerving in the militia.

By 1 *Geo.* 1. *ſt.* 2. *c.* 5. It is felony without benefit of clergy to demoliſh any religious meeting-houſe regiſtered according to the toleration act; and the hundred is made liable to the damages.

(*It hath been*) See the marriage-act, 25 G. 2. c. 33.

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HIGHWAYS.

(A) Of the ſeveral Kinds, and what ſhall be ſaid a Highway.

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(*There are*) *Communis ſtrata* and *alta viva regia* are ſynonymous. 1 Str. 44.

(*But notwithſtanding*) So Callis compares a navigable river to a highway: but *per* Buller, no two caſes can be more diſtinct. For, in the latter caſe if the way be foundrous and out of repair, the publick have a right to go on the adjoining land: but if a river ſhould happen to be choaked up with mud, that would not give the publick a right to cut another paſſage through the adjoining lands. 3 Term Rep. 263. The publick have no common-law right to tow upon the banks of navigable rivers. Ball v. Herbert, 3 Term Rep. 253.

But a highway may be deſcribed as leading from a hamlet. 4 Burr. 2091. It is unneceſſary indeed particularly to deſcribe a highway, for, as Lord Hale ſaith, whether it be ſuch or not depends much upon reputation. 1 H. Bl. 355.

(*If paſſengers*) Dougl. 749. *acc.*

(B) To whom the Highway and Soil belong.

(*Alſo the lord*) Sir John Lade v. Shepherd, 2 Str. 1004. *acc.*

(C) Who hath a Right to a Way, and how he muſt claim it.

Page 55

(*If in bar*) And ſee Rouſe v. Bardin, 1 H. Bl. 351., that in pleading a publick highway it is not neceſſary to ſtate the *termini*.

And in an indictment for a nuiſance the *termini* need not be ſtated. Rex v. Hammond, 1 Str. 44.

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(*a trespass*) That the grantee of a road between certain limits, can only use it so as to go from one of those limits to the other. So, it hath been determined, that under a grant of a way from *A.* to *B.*, *in, through*, and *along* a particular way, the grantee cannot make a transverse road across it. Senhouse v. Christian, 1 Term Rep. 560.

A right of way may be extinguished by unity of possession, unless it be a necessary one, and then it shall not. But a right of watercourse doth not seem to be extinguished by unity of possession in any case. Latch. 153. Poph. 186. Bull. *Ni. Pri.* 74.

If *A.* have *Blackacre*, and *C.* have *Whiteacre*, and *A.* have a way over *Whiteacre* belonging to *Blackacre*, and then purchase *Whiteacre*, the way will be extinct; and if *A.* afterwards enfeoff *C.* of *Whiteacre*, without excepting the road, it is gone. 11 H. 4. 5. 21 E. 3. 2. Bull. *Ni. Pri.* 74.

J. had four closes of land together, and sold three of them, reserving the middle close, to which he had no way but through that which he sold: it was holden, that though he did not reserve the way, yet it should be reserved for him. Cro. Ja. 170. 189.

In an action for obstructing a way, the plaintiff proved that *Fowler* was seised of the plaintiff's tenement and the defendant's close, and in 1753 conveyed the tenement to the plaintiff with all ways therewith used, and that this way had been used with the tenement as far back as memory could go. The defendant produced a subsisting lease from *Fowler* for three lives made in 1723. by which *Fowler* demised the field in question in as ample manner as *Rock* a former tenant held it; and in this lease there was no exception of a way over the close. *Yates*, J. held, that by the lease without any reservation, the way was gone, and therefore could not pass under the words *all ways*, &c. But as there were thirty years intervening between the defendant's lease, and the plaintiff's conveyance, and the way had been used all the time, that was sufficient to afford a presumption of a grant or licence from the defendant so as to make a way lawfully used at the time of the plaintiff's conveyance, and then the words of reference would operate upon it, and the way would pass. Keymer v. Summers, *Hereford* Summer Assizes, 1769. Bull. *Ni. Pri.* 74.

(D) Whether a Highway may be charged.

(*An ancient*) A private act of parliament for inclosing lands, which vests a power in commissioners to set out new roads by their award, is equally binding with a writ of *ad quod damnum*. 1 Burr. 465.

(E) Of stopping a Highway, and other Nuisances therein.

Page 57

(*Also besides that all nuisances*) *Vide* 1 Str. 686.

(F) Who

(F) Who are obliged to repair a Way by the Common Law: And herein, where a Person shall be liable by reason of Inclosure, Tenure, or Prescription.

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(*Also if a parish*) In this case of roads, the whole parish shall not contribute, tho' it is otherwise in the case of bridges, because one part of a bridge cannot stand without the other. An indictment will lie against the *whole* of that part of the parish which lies in the county which the ruinous road may happen to be. 4 Burr. 1507.

(*Therefore if the*) And. 216. 5 Burr. 2700. 2 Term Rep. 111. 513.

Rex v. Inhabitants of Sheffield, 2 Term Rep. 106. 1 Ld. Raym. 725.

If part of a parish be exempted by the provisions of an act of parliament from the charge of repair, the charge must necessarily fall upon the rest of the parish.

3 Atk. 772.

Where a new road has been made on a writ of *ad quod damnum* in the same parish with the old road, the parishioners ought to keep it in repair; because being discharged from the repair of the old road, no new burthen is laid upon them; their labour is only transferred from one place to another. But if the new road lies in another parish, the person who sued out the writ, and his heirs, ought to keep it in repair; because the inhabitants of the other part gaining no benefit from the old road being taken away, it would be imposing a new charge upon them, for which they received no compensation. *Per* Lord Hardwicke.

Page 59 (G) Of the Provision for repairing the Highways and Turnpike Roads by Act of Parliament.

THE general statutes for this purpose, which were formerly very numerous, have lately been repealed, and reduced into two acts, *viz.* 13 *Geo.* 3. *cap.* 78. & *c.* 84. the former of which relates to highways, and the latter to turnpike roads. These acts branch out into such a variety of clauses, that to detail their provisions would far exceed the limits of a work of this kind: We shall therefore content ourselves merely with collecting such decisions as appear to bear upon them; among which will be found a few upon the abrogated statutes, the language of those statutes being followed, with very little variation, in these modern ones.

(*Clergymen are within*) By stat. 30 Geo. 2. c. 25. § 23. persons serving for themselves as private in the militia, are exempted from statute-work during the time of such service.

Rex v. Inhabitants of Bodenham, Cowp. 78.

Though the 13 *Geo.* 3. *c.* 78. § 24. declares, that no indictment shall be removed by *certiorari* before traverse and judgment, yet this clause does not take away the writ at the instance of the prosecutor, for the crown does not traverse, and it was calculated merely to prevent delay on the part of defendants.

e power given by § 16. of 13 *Geo.* 3. *cap.* 78. to two juſtices to or- Rex v. Balme, Cowp. 648
y highway to be widened, extends to roads repairable *ratione tenu-*
nd upon diſobedience to ſuch order, the party may either be pro-
d againſt ſummarily under the ſtatute, or by indictment as an offence
mmon law.

the defendants be acquitted on an indictment removed by *certiorari* Rex v. Inhabitants of Chadderton, 5 Term Rep. 272.
ant of proſecution, the court of King's Bench have no power to
d them coſts upon the ground of its being a vexatious proſecution un-
e 13 *Geo.* 3. *c.* 78. § 65. but the application muſt be made to the
at *niſi prius*.

hough a *certiorari* to remove a preſentment be proſecuted by another Rex v. Inhabitants of Penderryn, 2 Term Rep. 260.
the juſtice who made the preſentment, yet if it be done with his
nt, that circumſtance will be no objection to it.

a pariſh, conſiſting of two diſtricts, which are bound to repair ſe- Rex v. Townſhend, Dougl. 421.
ely, be convicted for not repairing the road in one of the diſtricts,
ther diſtrict having no notice of the indictment, it will be conſidered
ſtantially the conviction of the one diſtrict, and if the fine be levied
n inhabitant of the other, a *mandamus* will be granted for a rate to be
d on the diſtrict bound to the repair. But the *mandamus* muſt be ſpe-
ſuggeſting, that the part of the highway which was the ſubject of the
tment, lay wholly in the one townſhip, and that the two townſhips
ſeparately bound to repair their reſpective parts of the highway, in
r to give ſuch townſhip an opportunity to traverſe, by the return, ei-
of thoſe facts.

How the parties obliged to repair are to be proceeded againſt, and what Defence they may make.

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ſeems clear) And it is now ſettled that a general traverſe will lie to it. Rex v. Juſtices of
, 3 Burr. 1530. 1 Bl. Rep. 467.

That it is) See *acc.* Rex v. Inhabitants of Gamlingay, 3 Term Rep. 513. and that it
not be aided by a ſubſequent allegation that *a certain part of the ſame highway ſituate in D.*, is
of repair. The words "from" and "to" are both excluſive. Hammond v. Brewer, 1
376.

That it doth) But ſee *contr.* Rex v. Smith, Say. 96. Rex v. Brookes, *Id.* 167. Rex v.
bitants of Eaſt Lidford, *Id.* 301.

That it doth) But if it be alleged that the nuiſance is to all the king's ſubjects, it is neceſſa-
implied that the way wherein it is, is a common way to all the king's ſubjects. 1 Ventr.
Say. 168.

0. That a preſentment againſt pariſhioners for not repairing a road Rex v. Inhabitants of Hartford, Cowp. 111.
not allege it to lie in the pariſh, for they are otherwiſe not bound to
ir it.

The court of King's Bench will not grant an information to compel Rex v. Inhabitants of Steyning, Say. Rep. 92.
riſh to repair a highway, which is not much uſed, and when it appears
another highway, equally convenient to the publick, is in good repair.
ey indeed never give leave to file an information for not repairing a
hway, unleſs it appear that the grand jury have been guilty of groſs
behaviour in not finding the bill; and they refuſe it for this reaſon,
that

that the fine ſet on conviction upon an information cannot be expende
the repair of the highway; whereas on an indictment it is always ſo
pended.

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Hue and Cry.

(*Hue and cry*) Lord Coke ſaith, that hue and cry, (called in ancient records *hutcſium q* d
mean the ſame thing; for that *huer* in *French* is to hoot or ſhout, in *Engliſh* to cry. 2 Inſt.
3 Inſt. 116. But ſince it appeareth by the old books (of which alſo Lord Coke maketh obſ
tion, 2 Inſt. 173.) that hue and cry was anciently both by horn and by voice, it may ſeem
theſe two words are not ſynonymous, but that this *huteſium* or *hooting* is by the *horn*, and
by the *voice*; with which alſo accordeth the *French* word *huchet*, which ſignifieth a huntſ
horn: ſo that hue and cry in this ſenſe will properly ſignify a purſuit by horn and by
Which kind of purſuit of robbers by blowing a horn, and by making an outcry, is ſaid
practiſed alſo in *Scotland*. And this blowing of a horn, by way of notice or intelligence, in
caſes as well as in the purſuit of felons, ſeemeth to have been in uſe of very ancient time
amongſt the laws of Withred king of Kent, in the year 696, is this one; "if a ſtranger
of the road, and neither ſhout, nor blow a horn, he ſhall be taken for a thief." Burn's Juſt
"*Hue and Cry.*"

(B) Of raiſing Hue and Cry purſuant to the veral Statutes which declare in what ne the Hundred ſhall be chargeable for Rob ries.

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(*The* (*c*) *ſtatute*) In 2 Wilſ. 92., it is ſaid by Mr. J. Bathurſt, that "it was his opinion, "this ſtatute did not create damages, but only gave the party a different remedy from "which he had before, for the party robbed, before that ſtatute, might have laid an "againſt the hundred for not keeping watch and ward." But in the caſe of Jackſon v. worth, 2 Term Rep. 72. the court of King's Bench inclined to think that no ſuch action had been brought, or would have lain againſt the hundred before the ſtatute, they not be corporation.

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(*But if a*) In 2 Ld. Raym. 828. it is ſaid by Holt, C. J. that the hundred in ſuch caſe not be liable.

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(*Alſo it is not*) Though a ſpecial verdict ſhould not ſtate the robbery to have been comm in the day, yet if it do not find that it was in the night, the hundred will be liable. Raym. 819.

7. Of the Oath to be taken of the Robbery, and before whom the must be.

Lake v. Hundred of Croydon, Bull. *Ni. Pri.* 186.

Though the robbery were 20 miles from the place where the j lived, and though it were proved that there were many juſtices lived ne yet *Abney* J. held it ſufficient on a caſe reſerved, ſaying, the act was directory in that reſpect.

Per Parker C. J. at

It is ſufficient for the plaintiff to prove, that he who took the affi acts as a juſtice of the peace, and it ſhall be read upon proof that

vered by his clerk to the perſon producing it, without proving the ice's hand. *Hertford*, 1722. Bull. *Ni. Pri.* 186.

It is not neceſſary for the juſtice to take the examination in writing; if he appear at the trial, and depoſe the ſubſtance of the uſual affida- it is ſufficient. Graham v. Hundred of Becontree, *per* Wythens, J. *Eſſex*, 1683. Bull. *Ni. Pri.* 186.

But if the juſtice has taken the ſubſtance of the uſual affidavit in writ- , and that is produced in evidence, he ſhall not be permitted to give dence at the trial of any thing elſe the plaintiff ſaid on his examination, . any deſcription of the robbers or robbery different from what he ſhall e on the trial. Kemp v. Hundred of Stafford, Tr. 19 G. 2. C. B. Bull. *Ni. Pri.* 186.

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That if a) Cited by Lord Mansfield, Dougl. 465.

An action was) Upon this ground an original hath been allowed to be filed in this action, er a writ of error brought for the want of it. 1 P. Wms. 412. So, an original beſpoken hin the year, and teſted on that day, is good, though it do not paſs the great ſeal, till after e year has expired. Price v. Hundred of Chewton, *id.* 347.

The plaintiff need not prove the robbery in the place or in the pariſh eged in the declaration, if it be proved within the ſame hundred. So, e and cry need not be proved by the plaintiff though alleged in his de- aration, for it is the part of the hundred to levy it. Owen, 70. *Per* Holt, 5 Ann. at *Maidſtone*, Bull. *Ni. Pri.* 187.

. How the money is to be levied, and each Hundredor to contribute to the Charges.

Here let it be obſerved, that as the ſtatute of *Winton* incorporates the ndred ſo as to ſubject them to be ſued, it, by conſequence, gives them e capacities attaching upon the character of defendants: they may there- re ſue the plaintiff (*c*) for the coſts of a nonſuit; they may bring a *ſcire* *ias*, or an action of debt upon the judgment; or proceed againſt the eriff for an eſcape. Fitzgib. 296.

(*c*) See as to this, ſtat. 22 G. 2. *ſupr.*

Idiots and Lunaticks.

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THE bankruptcy of the committee is a ſufficient cauſe for removing him on account of the fund for maintenance: but the cuſtody of he perſon will not therefore be changed, if the Maſter finds it proper ith regard to the comfort of the lunatick that it ſhould continue. *Ex parte* Mildmay, 3 Vez. jun. 2.

(A) What Perſons are eſteemed ſuch, ſo as to come within the Protection of the Law.

(*The more*) The ſame rules of judging of inſanity prevail at law and in equity, Oſmond v. Fitzroy, 3 P. Wms. 130. Bennet v. Vade, 2 Atk. 327. though Sir Wm. Blackſtone in 1 Comm. 304.

304. ſeems to point at a difference. For if a return to an inquiſition ſtate the party to be in ble of managing himſelf and his affairs from the weakneſs of his mind, a commiſſion of l will not iſſue, the court of Chancery having never gone further from the ancient returns, were, *lunaticus vel non*, than in allowing returns of *non compos mentis*, or *inſanæ mentis*, or ſine proceedings have been in Engliſh, of unſound mind, which amounts to the ſame thing. *compos mentis* is now indeed a proper technical term, being legitimated by ſeveral acts of p ment. *Ex parte* Barneſley, 3 Atk. 168. Lord Donegal's caſe, 2 Vez. 407.

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(3. *A lunatick*) This notion of the influence of the moon hath been exploded by the founde loſophy of modern times. However, a claſſick reader will have pleaſure in an elegant treatiſe, *De imperio ſolis ac lunæ in humana corpora, et morbis inde oriundis*, by the late Dr. Me

(B) How they are to be found ſuch.

(*The trial*) Theſe latter are now moſtly in uſe. And as the authority under theſe com ons is not in the commiſſioners only, but in the jury, they cannot be executed abroad, as in of a commiſſion to appoint a guardian. Ambl 112.

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(*Alſo the party*) This traverſe is given by ſt. 2 Edw. 6. c. 8. § 6. which provides, "that if perſon ſhall be untruly founden lunatick or idiot, every perſon grieved by ſuch office or inqui ſhall and may have his or their traverſe to the ſame immediately, or after, at his or their ple and proceed to trial therein, and have like remedy and advantages, as in other caſes of tra upon untrue inquiſitions or office founden." Though the ſtatute gives the right to trave all perſons aggrieved by the inquiſition, yet the heir cannot traverſe it, but is bound upo traverſe by the lunatick, or his alienee, who may both traverſe it. *Ex parte* Roberts, 3 312. In the caſe of a lunatick, the traverſe may be by attorney, but an idiot muſt trave perſon. 3 Atk. 7. However, if there be an application to traverſe or ſuperſede the commi the lunatick muſt appear to be examined *coram rege in concilio*, which words have been confi to mean, the court of Chancery. Ambl. 112. And in the mean time, till the point of l is determined, the court will make a proviſional order as to the lunatick's effects. 3 Atk. It hath been doubted, notwithſtanding the above ſtatute, whether the party aggrieved b inquiſition muſt not apply to Chancery. Ley. 26, 27. And it is certain that he muſt appl order to ſuſpend the grant of the cuſtody of the perſon, which regularly is immediate upo return of the inqueſt. He muſt apply too for permiſſion to traverſe, which the court wi grant to a *ſecond* inquiſition clearly finding the party *non compos*, as it would ſpin out the pro ings to a very great length and infinite expence. *Ex parte* Barnſley, 3 Atk. 185. And no theſe inquiſitions are concluſive; for the parties diſſatisfied with them, may litigate the p again either by bringing actions at law, or by bill in equity. *Id. ibid.*

(C) Who hath an Intereſt in, and Juriſdicti over them: And herein of appointing them p pez Cuzators and Committees, and the Pow and Duty of ſuch Committees.

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(*It ſeems*) This branch of the prerogative is generally, but not neceſſarily, exerciſed by perſon who has the cuſtody of the great ſeal, to whom it is delegated by warrant under the manual, counterſigned by two ſecretaries of ſtate. But the warrant confers no juriſdiction, ly a power of adminiſtration, and if that power be abuſed or any erroneous orders be m under it, as it is derived under the ſign manual, the appeal is to the king in council. 2 Vez. 7. 72. 3 Atk. 635. 3 P. Wms 104. 6 Br. P. C. 329. But the court of Chancery, if it cauſe, may vary its own orders. *Ex parte* Grimſtone, Ambl. 706. This power appear have been exerciſed in the court of Chancery prior to the erection of the courts of Ward upon the diſſolution of which courts it again reverted to the Chancery, 2 Atk. 553. And court will exerciſe it where the perſon of the lunatick is ameſnable, but the property is ou the juriſdiction, *Ex parte* Marchioneſs of Annandale, Ambl. 80. and alſo where the l tick is abroad; for the jury may be ſatisfied without an inſpection. *Ex parte* Southcote, 109.

(*My Lord Coke*) It is clear that the ſtatute was not introductive of any new right of the crown; the words of it put this paſt all doubt. But whether the king had his prerogative by the common law, or by force of ſome non-exiſting ſtatute, ſeems not ſo clear. Bracton makes no mention of it; but Fleta tells us, that certain perſons, called *tutores*, uſed to have the cuſtody of the lands *idiotarum et ſtultorum*; and that this truſt having been greatly abuſed, an act was made in the reign of Edward 1. giving to the king the cuſtody of the perſons and inheritances *idiotarum et ſtultorum*, being ſuch *a nativitate*; with a reſervation to the lord of all his lawful claims for wards, relief, and the like. Fleta, pa. 6. § 10. Fleta however mentions only *naturales fatui*: but the very introductory words of the ſtat. of 17 Ed. 2. c. 10. "*habet providere*" ſhew a pre-exiſtent right in the crown to the cuſtody of the lands of lunaticks.

(*This diſtinction*) Though the king or great ſeal cannot grant a lunatick's eſtate without account; yet they may allow as great a ſalary for the maintenance of the lunatick, as the income of the eſtate amounts to. Sheldon v. Forteſcue Aland, 3 P. Wms. 110.

(*And as the*) Nor can be preſent to a vacant benefice. The right of preſentation belongs to the great ſeal, and was firſt aſſerted by Lord Talbot. 1 Wooddeſ. 409.

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(*And as to*) But the committees of the real eſtate of a lunatick, may exerciſe the ſame power over it in regard to cutting timber for repairs. as any diſcreet perſon who was the abſolute owner of the ſoil might do. *Ex parte* Ludlow, 2 Atk. 407.

It is a rule, ſtated indeed by Lord *Hardwicke* as never departed from, not to vary or change the property of a lunatick, ſo as to effect any alteration as to the ſucceſſion to it. But Lord *Apſley*, C. decreed (*a*) incumbrances paid off in the lifetime of the lunatick out of ſavings of the eſtate, to be aſſigned to attend the inheritance, and not in truſt for the next of kin, the ruling principle in the management of a lunatick's eſtate, being the doing that which is moſt beneficial to the lunatick. It is upon this principle that the court will order part of the lunatick's perſonal eſtate to be laid out in repairs (*b*), or even upon improvements of his real eſtate, if the intereſt of the lunatick requires it, and the next of kin cannot ſhew good cauſe againſt it. So, if the intereſt of the lunatick requires it (*c*), the court will order timber upon his eſtate to be cut and ſold, and the produce of it will go to his perſonal repreſentatives. The immediate intereſt of the lunatick is the only object which the court attends to; the eventual intereſts of the ſucceſſion are not regarded: There is no equity as between mere, abſolute, real, and perſonal repreſentatives; they muſt take the property as they find it; and therefore (*d*) a charge upon the eſtate falling into the lunatick as the repreſentative of the perſon for whoſe benefit the charge was made, ſhall ſink for the benefit of the heir.

Ex parte Marchioneſs of Annandale, Ambl. 81.
(*a*) *Ex parte* Grimſtone, *id.* 706.
(*b*) Sergeſon v. Sealey, 2 Atk. 414.
(*c*) *Ex parte* Bromfield, 3 Br. Ch. Rep. 510. Lord Compton v. Lord Oxenden, 4 Br. Ch. Rep. 231. 2 Vez. jun. 69.
(*d*) 4 Br. Ch. Rep. 397. 2 Vez. jun. 261.

Where the cuſtody of the lunatick's eſtate was granted to huſband and wife, the wife being next of kin to the lunatick, Lord *Talbot* held, that the huſband's right was determined by the death of the wife, it being a joint grant, and a mere authority without any intereſt. But it is not uſual to grant the cuſtody to two, it being attended with inconveniencies, nor was the huſband neceſſarily joined in this grant, for it had been holden by Lord *Parker*, in *Ex parte Kingsmill*, *Mich.* 1720, that a feme covert was capable of ſuch a grant.

Ex parte Lyne, Ca. temp. Talb. 143. 2 P. Wms. 638.

Where two perſons equally a-kin to a feme lunatick, the one a man, the other a woman, applied for the commitment, the woman was preferred, as being of the ſame ſex, and better knowing how to take care of her.

Ex parte Ludlow, 2 P. Wms. 638.

The next heir is ſeldom permitted to be committee of the perſon of the lunatick, becauſe it is his intereſt that the party ſhould die: but there lies

1 Bl. Com. 305.

lies not the ſame objection to the next of kin, for it is his intereſt to p
ſerve the lunatick's life, in order to increaſe the perſonal eſtate by ſavi
which he or his family may be entitled to enjoy. It is uſual therefore
grant the cuſtody of the perſon to the latter, and to commit the mana
ment of the eſtate to the former, it being clearly his intereſt, by g
management, to keep it in condition.

(*Alſo the care*) Or not producing them, when required. Lord Wenman's caſe, 1 P. W
701. *Ex parte* Ludlow, 2 P. Wms. 638.

Ex parte Grimſtone, Ambl. 706. *Ex parte* Armſtrong, 3 Br. Ch. Rep. 238.

Although the guardianſhip of the king may be ſaid to be determi
by the death of the lunatick, yet it hath been holden, that the chance
may make an order in the lunatick's affairs after his death.

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(*Provided that this act*) Private mad-houſes are required to be licenced, and are otherwiſe
gulated, by ſtat. 14 Geo. 3. c. 49., continued by ſtat. 19 Geo. 3. c. 15., and made perp
by ſtat. 26 G. 3. c. 91.

(D) How far their Want of Underſtanding ſh be ſaid to be prejudicial to them in Civil R pects.

Kernot v. Norman, 2 Term Rep. 390. Ibberſon v. Lord Galway, 6 Term Rep. 152.

IF a defendant become inſane after an arreſt at law, it is now ſett
that this is no reaſon for diſcharging him out of cuſtody, upon
common bail. Nor will the court interpoſe, though he be inſane at
time of the arreſt.

Mott v. Verney, 4 Term Rep. 121.

(F) How far their Acts are good, void, or voi ble: And of the late Proviſions by Statu Law.

Page 86

(*Here we*) A court of equity is indeed reported in one caſe to have relieved a remainder
againſt a fine levied by an idiot, even againſt a purchaſer. Tothill's Tranſactions, 41.
it would relieve in this caſe in the ſame manner as it relieves againſt fines levied in the p
fraud. Mr. Fonblanque thinks is inferrable from the argument in Day v. Hungat, 1 Ra
115. Eq. Tr. 48.

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(*As to acts*) *Contr.* And ſo 2 Bl. Comm. 291. Yates v. Boen, 2 Str. 1104.

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(*But every perſon*) For the rules of determining what ſhall be conſidered a lucid int
where previous lunacy hath been proved or admitted, ſee Attorney-General v. Panther, F
Eq. Tr. 65. n. x. 3 Br. Ch. Rep. 441.

Owen v. Davis, 1 Vez. 82. Fonbl. Eq. Tr. 46.

Courts of equity will not only ſuſtain contracts completed by the l
tick whilſt ſane; but, under ſome circumſtances, will enforce perf
ance of ſuch as were entered into before, but were not complete at
time of the lunacy: "for the change of the condition of a perſon e
"ing into an agreement, by becoming lunatick, will not alter the r

of the parties, which will be the ſame as before, provided they can come at the remedy; as, if the legal eſtate be veſted in truſtees, a court of equity ought to decree a performance; but if the legal eſtate be veſted in the lunatick himſelf, that may prevent the remedy in equity, and leave it at law."

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(By the 4 Geo. 2.) By ſtat. 15 Geo. 2. c. 30. the marriage of a perſon duly found a lunatick ll be null and void, unleſs he be previouſly declared ſane by the lord chancellor or his ſtees.

It is doubtful whether the words of this act include all lunaticks, well as ſuch as are at large, as thoſe of whom cuſtody hath been ken by the great ſeal. *Ex parte* Marchioneſs of Annandale, Ambl. 80.

(G) How they are to ſue and defend.

(If a treſpaſs) For this would have been to ſtultify himſelf. 1 Ch. Caſ. 113. But he may party to a ſuit to enforce an agreement entered into before his lunacy, for there that objec- doth not ariſe. 1 Ch. Ca. 153.

So, if a perſon who is in the condition of an idiot or lunatick, though found ſuch by inquiſition, is made a defendant, the court of Chance- upon proper information of his incapacity, will direct a guardian to be pointed. Mitf. Eq. Pl. 95. 3 P. Wms. 111.

Informations are ſometimes exhibited by the attorney-general, on be- of both of idiots and lunaticks, conſidering them as under the peculiar tection of the crown. 1 Ch. Ca. 112. 153. 4 Br. P. C. 559.

Indictments.

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) Of the Nature of an Indictment, and how far it is conſidered as a Proſecution at the Suit of the King.

Page 93

(But if a ſtatute) And the diſtinction taken by the court in the caſe of the King v. Robinſon, urr. 805. "that where the offence intended to be guarded againſt by a ſtatute was puniſha- *before* the making of ſuch ſtatute preſcribing a particular method of puniſhing it, there, uch particular remedy is cumulative, and does not take away the former remedy: but where e ſtatute only enacts, that the doing any act *not puniſhable before*, ſhall for the future be pu- iſha le in ſuch and ſuch a particular manner, there, ſuch particular method, by ſuch act reſcribed, muſt be ſpecifically purſued; and not the common law method of an indictment." v. Balme, Cowp. 650. S. P. Yet the doctrine in the text will hold in reſpect of a new nce created by a ſtatute, *if the penalty be annexed to it by a ſeparate and ſubſtantive clauſe*; for in caſe it is not neceſſary for the proſecutor to ſue for the penalty, but he may proceed on the clauſe on the ground of its being a miſdemeſnour, Rex v. Harris, 4 Term Rep. 202. v. Wright, 1 Burr. 543.

(B) Where it is necessary, or the Party may be tried for a capital Offence without it.

Page 94

(*But impeachments*) But in the case of commoners, impeachments are now confined to demesnours, though perhaps it was formerly otherwise. Fitzharris's case, 1681. 8 Grey's bates, 332. Seld. jud. parl.—Parl. hist temp. Rich. 2.

(C) By whom it is to be found: And herein who may and ought to be Indictors.

Page 95

(*Every indictment*) Nor ought there to be more than twenty-three, 2 Burr. 1008.

(D) Whether the Indictors, or Grand Jury, may find Part of a Bill brought before them true and Part false.

(*It seems to be*) This doctrine relates only to cases where the grand jury take upon themselves to find part of the *same* indictment true, and part false; for there they neither affirm nor deny the fact submitted to their inquiry. But where there are two distinct counts, viz. one for assault, and the other for a riot, they may find a true bill as to the one, and indorse ignoramus as to the other, for this finding leaves the indictment as to the count found, just as if there had been originally only that one count. Rex v. Fieldhouse, Cowp. 325.

(E) What Matters are indictable.

Page 96

(*Not only*) And see further Rex v. Kinnersley, 1 Str. 193. Rex v. Rispal, 3 Burr. 1320. Indictments also lie for refusing a publick office, or neglecting duties imposed by the law, Rex v. Lone, 2 Str. 920. Rex v. Jones, *Id.* 1146. Rex v. Boyall, 2 Burr. 832. Rex v. Battle, *Id.* 864; for disobeying an order of sessions, Rex v. Robinson, *Id.* 799. for words in defamation of a magistrate spoken in his presence and in the execution of his office, Rex v. Revell, 1 Str. 420. but *qu.* whether for such words spoken in his absence? and see Rex v. Pocock, 2 Burr. 1157. Rex v. Darby, 3 Mod. 139. Comb. 45, 69. Indictments have been also allowed for nuisances, in making great noises in the street, Rex v. Smith, 2 Str. 704; for carrying on offensive (though it could not be proved that they were unwholesome) manufactories, as preparing of aqua fortis, or the like, Rex v. White, 1 Burr. 333. for offences against common decency, for taking up dead bodies, though for anatomical purposes, Rex v. Lynn, 2 Term Rep. for a great immorality in publick, Rex v. Sir Charles Sedley, 1 Sid. 168. 2 Str. 790. for using false weights and measures. for producing false tokens, and for any attempts to cheat or deceive, provided they be such as people cannot by any ordinary care or prudence be guarded against; for where common prudence may guard persons from not suffering by them, the offence is not indictable. Rex v. Wheatly, 2 Burr. 1129. Indictments will not lie for an accidental injury in a publick way in the doing of a lawful act, Rex v. Gill, 1 Str. 190. nor for impeding the public intercourse by distributing hand-bills in the streets, Rex v. Sarmon, 2 Burr. 516.

(*But so*) Selling short measure, Rex v. Combrune, 1 Wils. 301. Rex v. Wheatly, 2 Burr. 1125. Rex v. Dunage, *Id.* 1130. Rex v. Osborn, 3 Burr. 1697. excluding commoners by closing, Willoughby's case, Cro. El. 90. entering a yard, erecting a shed, unthatching a house, or by numbers keeping another out of possession, if unattended with violence or riot, Rex v. Storr, 3 Burr. 1698. Rex v. Atkins, *Id.* 1706. Rex v. Blake, *Id.* 1731. disobeying a bye-law, Rex v. Sharples, 4 Term Rep. 777. all these are offences of a private nature, and of course punishable by indictment.

Also generally) Where a ſtatute forbids the doing of a thing, the doing of it wilfully, although without any corrupt motive, is indictable. Rex v. Sainſbury, 4 Term Rep. 457.

It is an indictable offence to conſpire to prevent the courſe of juſtice by producing a falſe certificate (under the hands of juſtices of the peace that a road indicted is in repair) in evidence to influence the judgment of the court. And in ſtating ſuch a crime in the indictment, it is not neceſſary to ſet forth that the defendants knew at the time of the conſpiracy that the contents of the certificate were falſe; it is ſufficient that for ſuch purpoſe they agreed to certify the fact as true, without knowing that it was ſo. Rex v. Mawbey, 6 Term Rep. 619.

) Within what Place the offence inquired of muſt ariſe.

Page 97

The grand jury) The king cannot by charter, authoriſe the trial of offences out of the county where they are committed, *ibid* Dougl. 796.

And by ſtat. 2 *Geo.* 2. *c.* 21. if the ſtroke happens in *England*, and the death out of *England*; or *vice verſâ*, an indictment thereof found by the jurors of the county in which either the death or ſtroke ſhall reſpectively happen, ſhall be as effectual againſt both principals and acceſſaries, as if the offence had been completed in that county.

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That an) So reſolved by three judges, Dy. 360. See alſo O'Rouck's caſe, 1 Anderſ. 262. In Lord Macguire's caſe, 1 St. Tr. 950. 1 H. H. P. C. 155. 284., it was ruled, that an Iriſh peer may be tried by a common jury in *England* for a treaſon committed in *Ireland*. See Holt's argument, 8 St. Tr. 341.

By the 28 *H.* 8.) And § 14. of the ſame ſtatute enacts, that the commiſſioners, *&c.* ſhall have power to try pirates in all the colonies, *&c.* in *America*, and to grant warrants, in order to their being apprehended and tried there, or ſent into *England* for trial.

By ſtat. 26. *Geo.* 2. *c.* 19. § 5. offences againſt ſhips in diſtreſs, committed in *Wales*, are triable in the next adjoining *Engliſh* county. The county of *Cheſter* is not an *Engliſh* county under this act. Parry v. Roberts, 1 Hawk. P. C. 6 Ed. 220. note.

) What ought to be the Form of the Body of an Indictment at Common Law: And herein,

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The indictment charging) Rex v. Flint, Ca. temp. Hardw. 370. Rex v. Stroughton, 2 Str.

Whether is it) Rex v. Cowper, 2 Str. 1246. *contr.* as to a ſcold.

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Alſo an indictment) Rex v. Freeman, 2 Str. 1268.

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But an indictment) So, by falſe pretences, 2 Term Rep. 581.

As is laid down) See alſo Rex v. Hollond, 5 Term Rep. 607.

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Alſo in ſome) There are only two caſes where it is neceſſary to lay a vill, viz. upon the ſtatute of additions, and in an appeal of death, upon the ſtatute of Glouceſter, c. 9. Rex v. Blower, 27. Geo. 2. B. R. cited by Denniſon, J. in 1 Burr. 337.

Rex v. Mathews, 5 Term Rep. 162.

An indictment ſtating the defendant to be late of *W.* and laying the offence to be *at the pariſh aforeſaid*, was holden not to be ſufficiently certain.

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(*Although the*) So, if ſeveral act in concert together, and one of them, in the preſence of others, uſe a falſe pretence (by words) to obtain money or goods, they may all be indicted jointly. Young v. Regem, in error, 3 Term Rep. 98.

But in the caſe of felony, if it appear before the priſoner has pleaded, or the jury are charged that he is to be tried for *ſeparate* offences, the judge in his diſcretion may quaſh the indictment; or, if the judge do not diſcover it till after the jury are charged, he may put the proſecutor to make his election on which charge he will proceed. 3 Term Rep. 106.

(H) What ought to be the Form of an Indictment upon a Statute: And herein,

3. How far it is neceſſary to bring the Offence indictable within the Words of the Statute.

Page 113

(*It is a general*) Where the words of a ſtatute are deſcriptive of the nature of the offence, the purview of the ſtatute; or are neceſſary to give a ſummary juriſdiction, there it is neceſſary to ſpecify in the particular words of ſuch ſtatute. *Per* Lord Mansfield, Rex v. Pember, 2 Burr. 1037.

(*If the ſtatute relate*) Rex v. Baxter, 5 Term Rep. 83.

Rex v. Myddleton, 6 Term Rep. 739.

An indictment on the 23 *G.* 3. *c.* 13. for enticing artificers to go out of the kingdom, *&c.* alleged that the defendant contracted with a manufacturer workman *and* artificer to go out of this kingdom of *Great Britain* into a foreign country called *America*, ſuch foreign country not then being within the dominion of or belonging to the crown of *Great Britain*, was holden good;—though it was objected, that the ſtatute was in the disjunctive, workman *or* artificer; and that the indictment charged *Ameriſ* generally to be out of the king's dominions, whereas ſome parts of it were within them.

Rex v. Gilham, 6 Term Rep. 265.

In an indictment on 17 *G.* 3. *c.* 26. § 7. for taking more than 10 in the 100*l.* for brokerage, *&c.* it is not neceſſary to prove that the defendant took the exact ſum laid in the indictment, though it be not laid under a *videlicet*. It is to be left to the jury to conſider, whether the exceſs were really taken as a fair charge, for drawing the writings, *&c.* or whether it was not ſo taken as a device to avoid the ſtatute

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(*It was formerly*) Rex v. Smith, Dougl. 445. Rex v. Mathews, 5 Term Rep. 162.

(I) What ought to be the Form of a Caption to an Indictment.

Page 116

(*Every caption muſt*) Where the caption ſtated the ſeſſions to be holden *ad feſtum Epiphaniæ* inſtead of *Epiphaniæ*, it was adjudged a fatal miſtake. Rex v. Warre, 2 Str. 698. So, where it ſtated it on an impoſſible day. Rex v. Fearnly, 1 Term Rep. 316. An indictment taken at adjourned ſeſſions, muſt ſhew when the original ſeſſions began, to bring it within the time preſcribed by the ſtatute. Rex v. Fiſher, 2 Str. 865.

A convict

conviction may be in the paſt, as well as in the preſent tenſe. Rex v. Hall, 1 Term Rep.

(K) Where an Indictment may be quaſhed.

By the common) Between quaſhing indictments and arreſting the judgment, quaſhing is the ngeſt way; becauſe they muſt be very groſsly bad to have the court to deſtroy them at once. Rep. 275.

R. will quaſh) Wherever there is a manifeſt defect of juriſdiction, the indictment will be hed. Rex v. Williams, 1 Burr. 389.

Infancy and Age.

Page 117

) Who are Infants: And herein of the ſeveral ages and Periods between which the Law diſtinguiſhes as to ſeveral Purpoſes.

Page 119

Alſo it ſeems) The opinions upon this point in the books are numerous and irreconcileable, the doctrine in the text ſeems to be the moſt to be relied upon. See *note* 6. 13 Ed. Co. Litt. b.

The age of conſent) But now the agreement after *twelve* or *fourteen* would not be binding on infant, if the marriage was without *banns*, or by *licence without conſent of parent or guardian*, the infant was not a widow or widower, for the 26 Geo. 2. c. 33. makes all ſuch marriages

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An infant at the) But before he attains ſuch age, he cannot aſſent to a legacy. Prince's caſe, 29. b.; and even then, his aſſent will not bind him, unleſs he have aſſets for debts, Chamin v. Chamberlain, 1 Ch. Caſ. 257. And though he may adminiſter at ſeventeen, it is that he cannot commit a *devaſtavit* till twenty-one. Whitmore v. Weld, 1 Vern. 326.

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That if) See the caſe of William York, a boy of ten years of age, convicted before Chief Juſtice Willes at *Bury* ſummer aſſizes 1748, for the murder of a girl of about five s of age. Foſt. Cr. Law. 70.

) How far the Law regards and takes Notice of Infants in *Ventre ſa Mere*.

Page 123

child) And the deſtruction of him is murder. 3 Inſt. 50. 1 Vez. 86.

A poſthumous child is within a proviſion in marriage articles for ſuch dren of the marriage as ſhould be living at the death of the father mother; and ſhall take under the ſtatute of diſtributions. Millar v. Turner, 1 Vez. 85. Burnet v. Mann, 1 Vez. 156.

We have already ſeen that an infant in *ventre ſa mere* is to many purs conſidered as if he were actually born. It has been alſo holden, he may be vouched; and ſhall be entitled to take under a deviſe to children Beale v. Beale, 1 P. Wms. 244.

Burdet v. Hopegood, *Id.* 342. Cooper v. Forbes, 2 Br. Ch. Rep. 63. Bennet v. Honeywood, Ambl. 708 Clarke v. Blake, 2 Br. Ch. Rep. 320.

children *living at the teſtator's death*, whether the deviſor be his parent a ſtranger: that he is within the terms of a power to charge lands the portions of younger children, living at the father's death, that he have an injunction granted on his behalf to ſtay waſte; and may hav guardian appointed for him under the ſtatute of 12 *Car.* 2. *c.* 24. where the terms of the deviſe are general, as to the teſtator's child and grandchildren, not referring to the period of his death, it has holden, that a poſthumous child cannot take under it. At the ſame it muſt be remembered, that it is laid down in a moſt reſpectable (*a*), that it is now a fixed principle, that wherever the conſideration be for his benefit, a child in *ventre ſa mere* ſhall be conſidered as act born

2 Vez. jun. 673. Northey v. Strange, 1 P. Wms. 342. Lancaſhire v. Lancaſhire, 5 Term 49. (*a*) Watkins's Law of Deſcents, 142.

(E) Of what Things an Infant is capable in lation to the Publick, and in which he ſhall ſwer for his Neglect.

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(*An infant*) Trueman v. Hurſt, 1 Term Rep. 40. adjudged.

(*So if an*) But *qu.* whether an action will not lie on a promiſſory note given by an infan neceſſaries? See Trueman v. Hurſt, 1 Term Rep. 40. In this caſe of Williams v. Harriſon, ſecurity was given in the courſe of trade.

(F) Of what Things capable, being for his o Advantage.

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(*An infant may preſent*) See *ſupra* 416.

(G) How far the Law takes Care of his Inter ſo as not to let him ſuffer by his Laches: A herein, where he muſt take Notice and perfo Conditions, &c.

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(*Therefore if a perſon deviſe*) *Supra* 456.

(I) Of the Acts of Infants as they are good, v or voidable: And herein,

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(*If an infant*) 2 Str. 1083. Whywall v. Champion, S. P.

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(*So if one lends*) But in Marlow v. Pitfield, 1 P. Wms 559., the Maſter of the Rolls held, if one lends money to an infant to pay a debt for neceſſaries, and in conſeq thereof he does pay the debt, the infant ſhall be liable in equity; for the l of the money ſtands in the place of the perſon paid, viz. creditor for neceſſaries, and ſhall in equity, as the other ſhould have done at law.

(*But it is agreed*) Trueman v. Hurſt, 1 Term Rep. 40.

If an infant) And an infant who lives with, and is properly maintained by his parents, not bind himſelf to a ſtranger, for what might otherwiſe be allowed as neceſſaries. Bainge v. Pickering, 2 Bl. Rep. 1325.

As neceſſaries for an infant's wife are neceſſaries for him, he is charge- Turner v. Triſby, 1 Str. 168.
e for them, unleſs provided before the marriage, in which caſe he is chargeable, though ſhe uſes them afterwards.

An infant is alſo liable to an action for the nurſing of his lawful child; Lord Bacon's Max. Reg. 18.
perſona conjuncta æquiparatur intereſſe proprio.

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Partition by writ) A decree in equity for the benefit of an infant, will bind him: nor ſhall executor diſpute ſuch decree, though it may be for his advantage to do ſo. 1 Atk. 631.

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And for the) It was laid down by Ld. Mansfield as a general principle, in Drury v. Drury, C. P. C. 570., *that if an agreement be for the benefit of an infant at the time, it ſhall bind him.* And rule hath been adopted in ſubſequent caſes. 2 Term Rep. 159.

Therefore if an infant) For the judgment would bind his election. 3 Burr. 1808.

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But if) Clayton v. Aſhdown, Vin. Abr. tit. *Enfants*, G. 4. pl. 1.

Anne May, and her two ſiſters were, under their father's will, ſeiſed of May v. Hook, in Canc. 1773. Co. Lit. 13th edit. 246. note 1.
conſiderable freehold eſtate, and poſſeſſed of a conſiderable leaſehold tate, as joint-tenants. Previous to the marriage of *Anne May* with the fendant *John Hook*, ſhe being then an infant, by articles of agreement ed 28th *Oct.* 1761, and made between her of the firſt part, *John Hook* ſecond part, and truſtees of the third part, it was covenanted and reed, that the leaſehold eſtates ſhould be aſſigned to *John Hook* for his n uſe and benefit, and that the freehold eſtates ſhould be ſettled on n for life; and then on her for life; remainder to their firſt and other es ſucceſſively in tail-male; remainder to their daughters as tenants in mmon in tail; remainder to *John Hook* in fee. And *John Hook* covenanted to pay 100*l.* to the truſtees, upon truſt, to pay *Anne May* if ſhe rvived him, the intereſt of it for her life, and after her death to divide among the children.—*Anne May* died under age. The queſtion was, hether theſe articles were in equity a ſeverance of the joint-tenancy? ord Chancellor *Bathurſt*, when he made his decree in this cauſe, obrved, that the firſt point attempted to be eſtabliſhed by the counſel was, at had *Anne May* been of full age, when ſhe entered into the articles, ey would have amounted to a ſeverance; but that no determination to at effect had ever been made: that the co-joint-tenants were not, in this ſe, to be conſidered as volunteers, as they claimed by title paramount; d that their ſituation approached nearer to that of iſſue in tail, who aimed *per formam doni*, than to that of an heir at law, who claims only der his anceſtor: that the utmoſt which an infant could do, would be n avoidable act; and that, of courſe, it would be in the diſcretion of e court either to give or refuſe their aſſiſtance to it, and, by a parity of aſon, it muſt be in their power to model his contracts at their pleaſure: at the contract in the preſent caſe was not ſuch as the court would upold. Had the infant lived to come of age, and a bill been filed againſt er for performance of the articles, the court would have ſet them aſide, d referred it to the maſter to draw new propoſals for a proper ſettlent: that the contract was not ſuch as would have bound the infant, fortiori it ſhould not bind the co-joint-tenants: that it would be a ſtrange doctrine

doctrine that any act of an infant, which by its nature is voidable, sho
ſever the joint-tenancy, as, if that were allowed, it would always be
the power of the infant to ſay, whether the joint-tenancy ſhould be ſeve
or not; then, if any of the co-joint-tenants ſhould die under age, the
fant might avoid his own act by pleading *infra ætatem*, and reſort to hi
tle of ſurvivorſhip, which would be a great injuſtice and hardſhip
the ſurvivor. On theſe grounds his lordſhip was of opinion, that
articles did not in equity amount to a ſeverance of the joint-tenancy.

Earl of Buckinghamſhire v. Drury, 5 Br. P. C. 570.

It is now ſettled that a female infant may bar her dower by conſen
to a jointure in lieu thereof, agreeably to the 27 *H.* 8. *cap.* 10. But how far the competency of the ſettlement, or the leaving of iſſue are
terial to bind the rights of the female infant to a real eſtate, ſee Cannel v. Buckle, 2 P. W
245. Harvey v. Aſhley, 3 Atk. 612. Durnford v. Lane, 1 Br. Ch. Rep. 106. Williams
Williams, *id.* 152. It ſeems to be abſolutely neceſſary, in order to ſupport ſuch a ſettlem
that it be made before marriage, Lucy v. Moore, 3 Br. P. C. 514. Seamer v. Bingha
Atk. 56.

Harvey v. Aſhley, Atk. 613.

It alſo ſeems, that the intereſt of a female infant in a money portio
may be bound by an agreement before marriage; for if a parent or gu
dian cannot contract for the infant ſo as to bind this property, the h
band, as it is a perſonal thing, would be entitled to it abſolutely on
marriage.

Holingſhead v. Holingſhead, Gilb. Eq Rep. 137., cited in 2 P. Wms. 229., and 1 Str. 604.

Whether a male infant may make a ſettlement of his real eſtate, i
point which doth not yet ſeem to have been determined. It hath inde
been holden, that an infant tenant in tail, with a power to ſettle land
way of jointure to a given amount, was bound by a covenant to mak
ſettlement within the limits of the power.

Hearle v. Greenbank, 3 Atk. 696. 1 Vez. 298. See 1 Fonbl Eq. Tr. 78.

But in a later caſe Lord *Hardwicke* declared in broad terms, tha
power coupled with an intereſt over real eſtate, could not be exerciſed
an infant. The above deciſion evidently eſcaped his lordſhip's recolle
on, for he is made to ſay, that "there is no precedent either in a court
law or of equity, where it has been holden a power over real eſtate, c
cuted by an infant, is good."

Slocombe, v. Glubb, 2 Br. Ch Rep. 545.

It hath been determined, that where a male infant married an ad
who by ſettlement on the marriage covenanted that her eſtate ſhould
ſettled to certain uſes, he was bound by her covenant.

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(*If an infant*) But an infant was holden bound by an award made upon a reference with
conſent of his guardian. Biſhop of Bath and Wells v. Hippeſley, cited by Lord Hardwicke
Atk. 614.—Indeed, wherever an infant, with the advice of his friends, enters into a contr
which appears to be beneficial to his intereſts, equity will ſupport it. Therefore, where J.
mortgaged his eſtate to the plaintiff, and died, leaving the defendant his daughter and heir,
was an infant, and had nothing to ſubſiſt upon but the rents of the mortgaged eſtate, and
intereſt being ſuffered to run in arrear three years and a half, the plaintiff grew uneaſy at it,
threatened to enter on the eſtate unleſs his intereſt was made principal; upon which, the
fendant's mother, with the privity of her neareſt relations, ſtated the account, and the defe
dant, who was then near of age, ſigned it; and the account was admitted to be fair; the L
Chancellor held, that though, regularly, intereſt ſhall not carry intereſt, yet, that in
caſes in ſome circumſtances, it would be injuſtice, if intereſt were not made princip l; m
the rather, in this caſe, becauſe it was for the infant's benefit, who, without this agreem
would have been deſtitute of ſubſiſtence. Earl of Cheſterfield v. Lady Cromwell, 1 Eq. C
Abr. 287.

(*But if an infant*) The words of Perkins in the paſſage referred to are, that "that all
gifts, grants, or deeds made by infants, by matter in deed or writing, as do take effect by

y of his hand, are voidable by himself, by his heirs, and by those who have his estate." on which Lord Mansfield observes, in 3 Burr. 1804., that the words "which do take effect," an essential part of the definition, and exclude letters of attorney or deeds which delegate a re power, and convey no interest; a power to receive seisin is indeed an exception to this rule.

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(*Also it seems*) It can thus exert itself only where the act done by the infant is *voidable*; if it absolutely *void*, as, in the case of a warrant of attorney given by an infant, it cannot make it od, though there appear circumstances of fraud on the part of the infant. Saunderson v. ur, 1 H. Bl. 75.

(*Also notwithstanding*) The infant may be directed to convey, though the estate be in the plan- ions. *Ex parte* Prosser, 2 Br. Ch. Rep. 325. He may convey by recovery, *ex parte* Johnson, Atk. 559. *Ex parte* Smith, Ambl. 624., or if the infant be a feme covert, she may be direct- by the court to convey by fine. *Ex parte* Maire, 3 Atk. 479. Com. Rep. 615. But the fant must be a clear, undoubted, express trustee, and the trust must be in writing, not by con- ruction of equity. *Ex parte* Vernon, 2 P. Wms. 549. Godwyn v. Lister, 3 P. Wms. 387. awkins v. Obeen, 2 Vez. 559.

4. Where voidable, as to the Infant, shall yet bind others.

Upon a bill for a partition between an adult and an infant, as the lat- r cannot convey till he comes of age, the court will therefore respite e conveyances on the part of the adult; and this, it seems, whether e infant be plaintiff or defendant.

Lord Brook v. Lord and Lady Hertford, 2 P. Wms. 518.

Tuckfield v. Buller, Ambl. 197.

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(*&if an infant*) But the reason that infancy must be pleaded specially to avoid the deed, is, t because it has the *form* of a deed, but because it has an operation from the *delivery*. *Per* ord Mansfield. 3 Burr. 1805.

A mother, as guardian to her children, who were all infants, granted building lease of a part of their estate for 41 years; her eldest son, who as about 19 years of age, joined with her in making the lease, and co- enanted that the lessee should have quiet enjoyment, and that the rest of e children, when of age, should confirm the lease: the children all ar- ved at age, and accepted the rent under this lease for above ten years ter the youngest came of age: after such acceptance they brought their ectment against the lessee, who thereupon filed his bill in the court of hancery, to have the lease established, which Lord *Hardwicke* decreed, incipally upon the ground of the acceptance of the rent for so long a me; and as it was against conscience to bring the ejectment, he ordered at the plaintiff should have costs at law and in equity.

Smith v. Law, 1 Atk. 489. In this case Ld. Hardwicke said, that, in a court of equity, a woman is bound by a marriage contract made during her minority, if she accepts pin-money, or a jointure under it. 1 Atk. 490.

In debt for rent, the defendant pleaded infancy at the time of the ase made; and, upon demurrer, the court held the lease voidable only the election of the infant, by waving the land before the rent-day came: t the defendant not having so done, and being of age before the rent- y came, the plaintiff had judgment.

Ketsey's case, Cro. Ja. 320. 1 Roll. Abr. tit. *Enfants*, (K) S. C. by the name of Kettle v. Eliot.

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(*If an infant enters*) *Vide etiam contr.* Capper v. Davenant, Tr. 29 Car. 2. B. R. Bull. Ni. r. 153.

(*Also it is said*) So, if goods not necessaries, be delivered to an infant, and after he comes of ge he ratify the contract by a promise to pay, he is bound. Southerton v. Willock, 2 Str. 690. r Holt, C. J. in Hylling v. Hastings, 1 Ld. Raym. 389. S. P. *Per* Ashhurst, J. in Cockshott . Bennet, 2 Term Rep. 648., and if in an action in such case the defendant deny the ratification the contract after his age of majority, the proof of infancy lies upon him. Borthwick v. Carru- ers, 1 Term Rep. 648. However, if the original transaction be not perfectly fair, and the infant

infant be entrapped into a ratification of it immediately upon his coming of age, equity will gi relief. Brooke v. Gally, 2 Atk. 34.

(K) Of the Privileges of Infants in Suits an Actions by and against them: And herein,

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(*The interest of*) It may make an order of maintenance for an infant, though no cause be de pending. *Ex parte* Whitfield, 3 Atk. 315. *Ex pa te* Kent, 3 Br. Ch. Rep. 88. It may chang too the nature of the infant's estate; Lord Winchelsea v. Norcliff, 1 Vern. 435. Inwood v Twyne, Ambl. 417. and so, it seems, may guardians and trustees, where it is manifestly for th benefit of the infant. See the last case. The question, as to the power of a trustee to chang the infant's estate, arising in Vernon v. Vernon, Ch. November 1789, Lord Thurlow stated it t be a general rule, that a trustee should not *ad libitum* change the nature of an infant's estate; bu held, that the trustees having, in that case, applied the personal estate of the infant in perform ance or satisfaction of a condition, upon which the infant was entitled to a real estate, that w not a ground for raising a trust against the heir, in favour of the personal representative of th infant. 1 Fonbl. Eq. Tr. 82. *note* (*f*).

(*Therefore if a*) Fountain v. Cain, 1 P Wms. 504. Napier v. Lady Effingham, 2 P. Wm 401. Wrottesley v. Bendish, 3 P. Wms. 237. Bennett v. Lee, 2 Atk. 531. And exception cannot be taken to an infant's answer. Strudwick v. Pargiter, Bunb. 338. Copeland v Wheel er, 4 Br. P. C. 256. And in a suit against an infant, the service of *subpœna* to hear judgme must be on the guardian, not on the infant. Taylor v. Atwood, 2 P. Wms. 643.

(*But it seems*) It is said by the court in Whitechurch v. Whitechurch, 9 Mod. 128. that "i cases of trusts, infants are always bound by decrees of this court; and so they are, where the w of the ancestor is contested, and it is either set aside or confirmed in equity after trial on a issue *devisavit vel non*, or where it is otherwise set aside without a trial at law; and there is scarce any case where an infant hath time to shew cause against a decree, but where it is necessary fo him to join in a conveyance to complete the estate, and where such conveyance is of the inher tance, as in decrees of foreclosure of mortgagers, &c." And even in the case of foreclosure, is not permitted to him to ravel into the accounts, nor is he entitled to redeem: he is merel entitled to shew error in the decree. Mallack v. Galton, 3 P. Wms. 352. Lyne v. Willi Rolls, 13th May, 1750. *ibid.*—An infant may file a bill of review to reverse a decree, notwith standing it hath been enrolled upwards of twenty years. Lytton v. Lytton, 4 Br. Ch. Re 441.

Lord Brook v. Lord and Lady Hertford, 2 P. Wms. 518. Gregory v. Molesworth, 3 Atk. 626.

It hath been holden, that an infant, when plaintiff, is as much bound and as little privileged, as one of full age; unless gross laches, or fra and collusion appear in the *prochein amy*; in which case the infant ma open the decree by a new bill.

See an exception to this rule in the case of Lady Effingham v. Nap er, 3 Br. P. C. 301. where the House of Lords gave Sir John Napier leave to shew ca when he came of age, against his own decree. And an infant's neglect to put in a replicatio shall not be taken as an admission of the truth of the answer, for an infant can admit nothin Legard v. Sheffield, 2 Atk. 377. *Vide contr.* Thurston v. Nutton, Tr. 1733 3 P. Wms. 23 —If the court detect an incautious submission in the bill of an infant to any thing that will prejudicial to his interests, they will direct an amendment. Serle v. St. Eloy, 2 P. Wms. 39

Da Costa v. Da Costa, 3 P. Wms. 142. Mitf. Eq. Pl. 27.

If it be represented to the court, that a suit instituted on the beha of an infant is not for his benefit, an inquiry into the fact will be directe to be made by one of the masters, and if he reports that the suit is not fo the benefit of the infant, the court will stay the proceedings. So, if tw suits for the same purpose, are instituted in the name of an infant, by di ferent persons acting as his next friends, the court will direct an in quiry to be made in the same manner, which suit is most for his bene fit, and when that point is ascertained, will stay proceedings in the othe suit.

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(*If it a writ*) In Chancery the courſe ſeems to be, to proceed in ſuch caſe without any change. Pr. Reg. 195.

(*The reſpective courts*) But it is ſaid by Lord King C. that no one can have a teſtamentary guardian for this purpoſe. 2 Str. 709.

The admiſſion of the *prochein amy* or guardian may be either *ſpecial*, to proſecute or defend a particular action; or *general*, to proſecute or defend *all* actions whatſoever; Archer v. Frowde, 1 Str. 304. though it is ſaid, that by the practice of the court of King's Bench, a ſpecial admiſſion of a guardian, to appear in one cauſe, will ſerve for others. *Id.* 305. For the manner in which a guardian or *prochein amy* is appointed in B. R. See Tidd's Pr. 117. (*c*) For if an infant defendant appear by attorney, it is error: 8 Co. 58. b. 9 Co. 30. b. but if an attorney undertake to appear for the infant, the court will oblige him to do it properly. Straton v. Burgis, 1 Str. 114.—The order for the admiſſion of a *prochein amy* ſhould be obtained before declaration, and a copy thereof annexed to it; elſe the defendant is not compellable to plead: Sty. Pr. Reg. 264. and the plaintiff's attorney, if required, muſt give notice to the defendant's attorney, of the place of abode of the *prochein amy*. Tomlin v. Brookes, 1 Wilſ. 246. So, the rule or order for the admiſſion of a guardian ſhould be obtained before plea, and a copy of it annexed thereto; for if an infant defendant appear by attorney, though it be in conſequence of common proceſs, with a notice requiring him to appear in that manner, the plaintiff may obtain an order for ſtriking out the appearance, and that the defendant may appear by guardian within a certain time, uſually four or ſix days: or in default thereof, that the plaintiff may be allowed to name a guardian, to appear and defend for him. Kerry v. Cade, Barnes 413. Gladman v. Bateman, *Id.* 418. And a ſimilar order may be obtained, where the defendant neglects to appear at all. Stone v. Atwoll, 2 Str. 1076. Shipman v. Stephens, 2 Wilſ. 50. Tidd's Pr. 117, 118.

An infant is not liable to coſts, but only his *prochein amy*; and if he refuſe to pay them, on demand, the court will grant an attachment againſt him (*b*). Yet, where an infant plaintiff was taken in execution for the coſts, the court refuſed to diſcharge him on motion (*c*). And it hath been adjudged, that coſts are payable by an infant defendant (*d*).

Grave v. Grave, Cro. El. 33. Turner v. Turner, 2 P. Wms. 297. 2 Str. 708.

The *prochein amy* being liable to the coſts, he cannot of courſe be examined for the infant. Hopkins v. Neil, 2 Str. 1026., though his declarations may be received againſt the infant. James v. Hatfield, 1 Str. 548 (*b*) Slaughter v. Talbot, Barnes, 128. (*c*) Gardiner v. Holt, 2 Str. 1217. (*d*) Dy. 104. 1 Bulſtr. 189. 2 Str. 1217.

When an infant ſues, it is the practice with the courts of law, to ſtay the proceedings till the *prochein amy*, guardian, or attorney hath given ſecurity for the coſts; and where he has appeared to be in low circumſtances, or incompetent to diſcharge the coſts, they have, on motion, appointed a new *prochein amy*, or guardian of ſufficient ability (*e*). It hath been ſaid (*f*) that a ſimilar practice obtains in the court of Chancery, and that if the *prochein amy* be inſolvent, the defendant may apply in order to have a ſolvent *amy* named. But in *Squirrel* v. *Squirrel* (*g*), in *Lincoln's Inn Hall*, 17 *Dec.* 1791, a bill having been filed by a feme covert by her next friend againſt her huſband, it was moved on the part of the defendant, that all proceedings in the cauſe might be ſtayed, until the *prochein amy* ſhould give ſecurity for coſts, or another *prochein amy* be named, which application was ſupported by an affidavit of the bad circumſtances of the *prochein amy*. But Lord *Thurlow* refuſed to make any order; and ſaid, he did not conceive the court could inquire into the circumſtances of any *prochein amy*, more than thoſe of any common plaintiff, in which caſe, though the plaintiff ſhould be inſolvent, the defendant cannot help himſelf; that in the caſes of an infant or feme-covert they were obliged to ſue by their next friend, in order that there might be ſome

Doe v. Alſton, 1 Term Rep. 490.

(*e*) 2 Str. 708.
(*f*) Turner v. Turner, 2 P. Wms. 297.
(*g*) 2 Cox's P. Wms. 297. note.

ſome perſon *ſueable* for the coſts: (which the infant and feme cove themſelves are *not*;) but that the court contented itſelf with making ſom body *ameſnable* in this reſpect, without going into an inquiry concerni his ability.—There was in this caſe indeed a circumſtance upon which h lordſhip in ſome degree relied, *viz.* that this application was ma after the defendant had *anſwered*, which might be conſidered as a waver any application of this nature, though it was alleged on his part th he had not diſcovered the circumſtances of the *prochein amy* until af anſwer.

(L) Of the Privilege of Infancy as to the Parol demurring: And herein,

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(*If a man binds*) But it ſeems, that in error, where the tenant pleads infancy, and is by deſcent, he ſhall have his age. Herbert v. Binion, 1 Roll. Rep. 251. 323. Cro. Jac. 39 S. C. Moor, 847. pl. 1148. S. C. 3 Bulſtr. 138. S. C. Aland v. Maſon, 2 Str. 861.

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INFORMATIONS.

(E) Information Quo Warranto.

(A) Of the Nature and ſeveral Kinds of Infor mations.

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(*This difference*) And in the very ſame act of parliament, which aboliſhed the court of ſt chamber, viz. 16 Car. 1. c. 10. § 6, a conviction by information is expreſsly reckoned up, as o of the legal modes of convincing ſuch perſons as ſhould offend a third time againſt the proviſion of that ſtatute.

(1*ſt*, *For a*s) It may be exhibited by the ſolicitor-general during the vacancy of the office attorney-general; and that, without ſuggeſting ſuch vacancy on the record. Rex v. Wilkes, Burr. 2555.

(3*dly*, *Where*) But if a ſtatute be merely prohibitory, it will be no ground for an informa on, though in ſuch caſe an indictment may lie. Croſton's caſe, 1 Ventr. 63.

(B) In what Caſes an Information will lie.

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(*Here we ſhall*) 2 Str. 1107. Andr. 310. 2 Str. 1162.

An information will lie for attempting to bribe a ſervant of the crown to procure an offi under government, Rex v. Vaughan, 4 Burr. 2494.; for publiſhing an obſcene book, Rex v. Curl, 2 Str. 788.; for blaſphemy, Rex v. Woolſton; for procuring a man to marry a pauper i order to exonerate a pariſh, Rex v. Watſon, 1 Wilſ. 41.; Rex v. Tarrant, 4 Burr. 2106; for an undue diſcharge of a debtor by judges of an inferior court, Moravia's caſe, Ca. temp. Hardw. 135.; for a refuſal by a captain of a ſhip to let the coroner come on board, Rex v. Solgard 2 Str. 1074. Andr. 231.; for keeping great quantities of gun-powder as for a nuiſance, Rex v. Taylor, 2 Str. 1167.; for maliciouſly impreſſing a captain, as a common ſeaman, Rex v. Wel 1 Bl. Rep. 19.; for printing a ludicrous account of a marriage between an actreſs and a marri man, Rex v. Kinnerſley, *Id.* 294.; for an impoſture and conſpiracy, *Id.* 292.; for procuring a fe male

le apprentice to be aſſigned, though with her own conſent, for the purpoſe of proſtitution, v. Delaval, *Id.* 439. 3 Burr. 1434.; for ſeducing a woman, habituated to drinking, to ke her will, Rex v. Wright, 2 Burr. 1099.; for bribing perſons to vote at a corporation electi- Rex v. Plympton, 2 Ld. Raym. 1377. It will lie againſt a juſtice for any improper official duct, as for demanding a ſhilling of a perſon brought before him for diſcharging his warrant, committing the party for refuſing to pay it, Rex v. Jones, 1 Will. 7.; for voluntarily ab- ting himſelf from a ſeſſions which could not be holden without him, Rex v. Fox, 1 Str. 21.; corruptly diſcharging a perſon committed in execution by another magiſtrate, Rex v. Brooke, Term Rep. 190.; for improperly granting as well as refuſing a licence, Rex v. Holland, 1 rm Rep. 692. But the court will not proceed in this extraordinary way againſt a magiſtrate a mere error of judgment, or a miſtake of the law; if he has acted honeſtly and without bad intention, Rex v. Palmer, 2 Burr. 1162. Rex v. Jackſon, 1 Term Rep. 655; and will general, in ſuch caſe diſcharge the rule with coſts. Rex v. Palmer, 2 Burr. 1162. Rex v. lding, *Id.* 654. See alſo Rex v. Bundem, *Id.* 722. And where application is made for an mation againſt him for having improperly convicted a perſon, the party complaining muſt ke an exculpatory affidavit, fully denying the charge. Rex v. Webſter, 3 Term Rep. 388.

(D) Of filing an Information, the Proceedings thereon, and the Proviſions made herein by Statute.

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(*It ſeems to be*) And the court will require the ſame evidence in ſupport of ſuch a motion, as uld be neceſſary in ſupport of an indictment. Rex v. Willett, 6 Term Rep. 294.—A joint rmation againſt ſeveral defendants cannot iſſue upon diſtinct rules for one or more infor- tions againſt each, 3 Burr. 1270. (*b*) Rex v. Badouin, 2 Str. 1044. Ca. temp. Hardw. 271.

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(*But if be*) The diſcretion of the court in granting informations is guided by the merits of perſon applying, Rex v Bickerton, 1 Str. 498. Rex v. Miles, Dougl 283. Rex v. Haſ- ll, *Id.* 387. Rex v. Webſter, 3 Term Rep. 388. Rex v. Hankey, 1 Burr. 316. Rex v. ach, *Id.* 548. Rex v. Symonds, Ca. temp. Hardw. 240. Rex v. Robinſon, 1 Bl. Rep. 541.; the time of the application, Rex v. Robinſon, 1 Bl. Rep. 541.; by the nature of the caſe, x v. Spriggins, 1 Bl. Rep. 2. Rex v. the Inhabitants of Wigan, *Id.* 47. Rex v. Groſvenor, Str. 1193. 1 Wils. 18. Rex v. Robinſon, 1 Bl. Rep. 541. and by the conſequences that may ſibly reſult from it. 1 Bl. Rep. 541.—The court will never grant an information on a penal tute, where the penalty veſts in the crown only; in that caſe the attorney-general muſt file Rex v. Hendricks, 2 Str. 1234. Nor will they interfere upon the application of the attor- y-general, in caſes proſecuted by the crown, for he may exhibit an information himſelf. x v. Philips, 3 Burr. 1564.

6. That to whatever ſum the coſts of the defendant may amount, he annot, on this ſtatute, have more than the amount of the recognizance; r, on the application for the information (*a*), will the court compel the oſecutor to give ſecurity for the coſts over and above the 20*l.*

Rex v. Howell, Ca. temp. Hardw. 247. Rex v. Morgan, 2 Str. 1042. Rex v. Filewood, 2 Term Rep. 145. (*a*) Rex v. Brook, *Id.* 197.

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(*By the* 9 *Anne*) Theſe words, it is now ſettled, apply only to offices in corporations, not to ces in boroughs and other places not corporate. Rex v. Wallis, 5 Term Rep. 375. Nor do y extend to *all* offices within corporations. Rex v. Williams, 1 Burr. 407.
There is no neceſſity to ſtate this leave on the record. Symmers v. Regem, Cowp. 489.

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(*And it is further enacted*, " *That the ſtatute*) This does not enable the defendant to plead more n one plea, even with the leave of the court. Say. Rep. 56. 4 Burr. 2146. He may in- d plead the ſtatute of limitations of 32 Geo. 3. c. 58, either ſingly or together with ſuch as he might have lawfully pleaded before the paſſing of that act, or *ſuch ſeveral pleas as the rt on motion ſhall allow.* And where he is charged with the uſurpation of ſeveral franchiſes, may plead diſtinct pleas to the ſeveral charges. Rex v. Francis, 2 Term Rep. 484.

This act extends only to individuals uſurping offices or franchiſes in a rporation; and not to the corporation itſelf as a body: if a corporation, as

Rex v. Corporation of Carmar-

then, 2 Burr. 869. 1 Bl. Rep. 187.

as a corporation, uſurp upon the crown, the information muſt be by the name of the attorney general, on behalf of the crown. 1 Term Rep. 2.

(b) Rex v. Latham, 3 Burr. 1485. 1 Bl. Rep. 468. (c) Rex v. Carter, Cowp. 58. Rex v. Godwin, Dougl. 397. (a) Bull *Ni. Pri.* 212. (b) 2 Hawk. P. C. c. 26. §9. (c) The time, within which a title to a corporate office might be impeached by a *quo warranto*, was, by the common law, indefinite; it varied with the circumſtances of each particular caſe:

The granting of an information is not now a mere matter of courſe, as it was formerly conſidered, but depends upon the ſound diſcretion of the court according to the particular circumſtances of the reſpective caſes that may be brought before them. Where the right, or the fact on which the right depends, is diſputed (*b*); or where the right turns upon a point of new or doubtful law (*c*), or where there is no other remedy (*a*), it is uſually granted. But if the defendant can ſhew, that his right to the franchiſe in queſtion hath been already determined on a *mandamus* (*b*), or that it hath been acquieſced in for a length of time (*c*), or that it depends on the right of thoſe who voted for him, which hath not yet been tried; or that the perſon upon whoſe right the defendant's title depends hath enjoyed his franchiſe ſo long, that the court would not permit it to be impeached in this mode of proceeding (*d*): or it ſeems, that ſuch perſon is dead (*e*); or that great a number of derivative titles would be affected by a judgment againſt the defendant, that it would tend to diſſolve the corporation (*f*); or that the franchiſe no way concerns the publick, (as all those which relate to the government of a corporation, or the election of members of parliament (*g*), and fairs and markets (*h*), &c. are ſaid to do,) or that it is wholly of a private nature, as a coney-warrant, (*i*) &c.; or that the election, by which he claims, is agreeable to charter; or that he hath never acted under it, that there hath been no uſer of the franchiſe (*k*); the court will not grant the information unleſs there be ſome particular or extraordinary circumſtances in the caſe; the determination whereof being wholly left to the diſcretion of the court, cannot well come under any certain ſtated rules.

Rex v. Powell, 8 Mod. 165. Rex v. Pyke, *id.* 286. cited 1 Term Rep. 4 n. 3 Term Rep. 3[illegible] Rex v. Williams, 2 Str. 677. and it was for ſome time thought better that it ſhould be unſettled. Rex v. Latham, 3 Burr. 1485. At length however the court ſet a limit to their diſcretionary power in granting informations of this kind, and confined it, in analogy to other caſes of limitation, within a period of twenty years. Winchelſea cauſes, 4 Burr. 1962. 2022. 2120. Rex v. Rogers, *Id* 2523, which limitation was afterwards ſtill farther narrowed, and reduced to a period of ſix years. Rex v. Dickin, 4 Term Rep. 282. This laſt period hath been confirmed by the legiſlature, viz. by ſtat. 32 Geo. 3. c. 58. and is extended as well to informations filed by the attorney-general, on behalf of the crown, as to thoſe promoted at the inſtance of any private perſon. (*d*) Rex v. Stephens, 1 Burr. 433. Rex v. Peacock, 4 Term Rep. 684. (*e*) Rex v. Spearing, 1 Term Rep. 4 n. But it does not ſeem to be a reaſon for refuſing an information, that the objection to the defendant's title ariſeth from a defect in the title of ſome other perſon through whom he claims, provided the application be made within proper time. 8 Mod. 216. For it is admitted, that where judgment of ouſter hath been given againſt a perſon through whom a title is claimed, that may be a reaſon for granting an information to impeach the derivative title. 2 Str. 1109. Andr. 389. 5 Burr. 2601. Cowp. 500. It is alſo admitted that the title of a defendant to an information may be impeached by an iſſue introduced on the record, reſpecting the title of the perſon under whom he claims, though the latter hath not been ouſted on an information filed againſt him. *Ibid.* It may, or it may not be poſſible to impeach the original right on which the derivative title depends, by an information filed against the perſon who claimed to exerciſe that right. Whatever may be the caſe, where that may be done, but in fact has not been done; it has been lately decided, that where it cannot be done the original right may be impeached in an information againſt the perſon whoſe derivative title depends upon it. Rex v. Mein, 3 Term Rep. 596. 2 Kyd. 435, 6. (*f*) Rex v. Varlo, Cowp. 59. *Secus*, if it be admitted that elections may ſtill be made. Rex v. Bond, 2 Term Rep. 767. (*g*) Caſe of the borough of Horſham, Hil. 30 G. 3. 3 Term Rep. 599. n. Rex v. Mein, *ibid.* (*h*) *Qu. et vide* Rex v. Marſden, 3 Burr. 1812. 1 Bl. Rep. 579. Ibbotſon's caſe, Ca. temp. Hardw. 261. Hardr. 162. *arguendo*. Rex v. Sir William Lowther, 2 Ld. Raym. 1[illegible]

29. 1 Str. 637. Ibbotſon's caſe, Ca. temp. Hardw. 261. Rex v. Cann, Andr. 15. Rex Dawbeny, 2 Str. 1196. 1 Bott. pl. 326. Rex v. Shepherd, 4 Term Rep. 381. (k) Rex Ponſonby, Say. Rep. 245. Rex v. Whitwell, 5 Term Rep. 85.

So, the conduct and ſituation of the relator, will weigh much with the (l) Rex v. Waldroper, 4 Burr. 2024. (m) Rex v. Mortlock, 3 Term Rep. 300. But a previous knowledge of the fact in the perſon on whoſe
urt, in ſome inſtances, in granting or refuſing an information. Thus, here the perſons on whoſe affidavits the motion is grounded, have lain by, ithout recently proſecuting, though with a full knowledge of the fact (l); here they have concurred with the reſt of the corporation in a reſolution ot to take advantage of the flaw in the defendant's title (m); where the roſecutor ſtands in the ſame circumſtances with the defendant (a); where e perſons, in whoſe names the application is made, are wholly uncon- ected with the corporation (b)—in all theſe caſes, the court will, in gene- l, refuſe the information.

idavit the motion is made, will not be a ground for refuſing the information, if he had no wer of remonſtrating againſt the proceedings; if he were in fact merely a witneſs, as in the ſe of an application on the affidavit of the town clerk. Rex v. Binſted, Cowp. 75. Nor will e relator's concurrence in the election of the defendant be any ground for refuſal, if the ob- ction to his eligibility were at that time unknown. Rex v. Smith, 3 Term Rep. 573. And here the application is made on the affidavit of ſeveral perſons, all of whom, but one, concur- d in the election of the defendant; if that one will avow himſelf the relator, and ren- r himſelf reſponſible for the coſts, his being joined with the others who con- ted in the election, will be no reaſon for refuſing the information. Rex v. Sym- ons, 4 Term Rep. 223. (a) Rex v. Bond, 2 Term Rep. 771. (b) Rex v. Stacey, 1 Term ep. 3. But where the application is made for the purpoſe of enforcing a general act of par- ment, which intereſts all the corporations in the kingdom; it is no objection, that the party plying is not a member of the corporation. Rex v. Brown. P. 29 Geo. 3. 3 Term Rep. 574.

The abandonment of a former information for the ſame cauſe, is of itſelf, no reaſon for refuſing an information, as that may have been by colluſion. Rex v. Bond, 2 Term Rep. 770. here the application is manifeſtly frivolous and vexatious, the rule will be diſcharged with oſts. 2 Str. 1039. 2 Burr. 780. 3 Term Rep. 301.

Where the affidavit of the relator omits a material fact, as the mode of Rex v. Newling, 3 Term Rep. 310.
ection; but that fact is afterwards ſtated in the defendant's affidavit, the ourt may uſe the latter affidavit in ſupport of the application.

It ſeems, that the court will not grant a rule for an information of this Rex v. Davies, Say. Rep. 241.
ind on the laſt day of term.

Where a defendant ſuffers the rule to be made abſolute without ſhewing 4 Burr. 2523.
auſe; or, ſuffers judgment to go againſt him by default; the court will 3 Term
ermit other corporators, whoſe title may be affected by judgment of *ouſter* Rep. 310.
eing pronounced againſt him, to defend his title, on their undertaking to o ſo at their own expence, and indemnifying him againſt all coſts.

The proceſs uſually iſſued to bring the defendant into court is a writ of 1 Sid. 86.
ubpœna, and if that be diſobeyed, an attachment: but if the defendant 2 Kyd. 438.
annot be ſerved with a ſubpœna, it is ſaid, the proceſs is *venire facias* It hath been
nd *diſtringas*. ſaid, that proceſs of
utlawry will not lie upon informations in nature of *quo warranto*, and therefore that the de- endant cannot plead a miſnomer. Rex v. Mayor of Hedon, 1 Wils. 245. But *qu.* and ſee 2 Kyd. 438-9.

The plea in bar muſt ſet out the defendant's title at length, and con- Rex v. Blagden, Gilb. Rep. 145.
lude with a general traverſe, "without this, that he uſurped, *&c.*" and iſſue ſhould not be taken on the part of the crown, on the general traverſe, ut the replication ſhould be to the ſpecial matter, that the defendant may now how to apply his defence.

Where ſeveral things are neceſſary to conſtitute a complete title in the Rex v. Hearle,
efendant, the crown may take iſſue on each, and if any one of the iſſues on

1 Str. 627. 2 Ld. Raym. 1447. Rex v. Downes, 1 Term. Rep. 453.

on a fact material to the title be found againſt the defendant, there ſh be judgment of ouſter, and the defendant ſhall pay the coſts on all t iſſues.

Rex v. Philips, 1 Str. 394. cited 1 Burr. 302. 305.

Where the defendant ſets forth a bad title to the office, and confe the uſurpation, that amounts to a confeſſion of the uſurpation, and if immaterial iſſue is joined, and a verdict found on which the court cann give judgment, yet they will not grant a repleader, but will give judgme on the plea.

Rex v. Biddle, 2 Ld. Raym. 952. 2 Kyd. 442.

But where the defendant, in his plea, confeſſes an uſurpation duri part of the time laid in the information, but inſiſts upon an election afte wards under which he continued to hold the office, judgment of *ouſter*, to the time confeſſed, ought not to be given againſt him, but only a jud ment of "*capiatur pro fine*," as a puniſhment for his uſurpation; fo if judgment of ouſter were entered, it would follow, that, wh a perſon has once exerciſed an office without authority, he becomes, ſo lo as he does ſo, incapable of being rightfully elected. And, if in ſuch ca a judgment of ouſter be actually entered, the court will order the whole be expunged, but that part which relates to the fine.

Rex v. Hebden, 2 Str. 1109. Andr. 389. Rex v. Grimes, 5 Burr. 2598.

If a defendant make title to a corporation office, as being elected und the mayoralty of a particular perſon; on iſſue joined whether that perſ were mayor or not, a record of ouſter againſt him may be read in eviden to ſhew that he was not mayor, which will be concluſive, if it be n ſhewn that the judgment was obtained by fraud or colluſion.

Rex v. Spearing, 1 Term Rep. 4. n.

But if the perſon under whom the defendant claims be dead at the tim when the iſſue "whether he were mayor or not," is tried, the only ev dence that will be admitted, will be to prove whether he were mayor not in point of fact.

Symmers v. Regem, Cowp. 507. And now by ſt. 32 G. 3. c. 58. § 3.

Where the perſons, on whoſe right to vote the validity of the defendant title depends, were at the time of his election in the actual poſſeſſion of th franchiſe in virtue of which they voted; at the trial, no inquiry can b made into their right, unleſs an iſſue has been taken upon it.

no title derived under an election ſhall be affected on account of a defect in the title of th elector, if he were in exerciſe *de facto* of his franchiſe ſix years at leaſt previous to the filing the information againſt the perſon deriving title, and his title ſhould not have been queſtion by any legal proceeding carried on with effect.

Rex v. Francis 2 Term Rep 484.

As an information of this kind is now conſidered merely as a civil pro ceeding, a new trial may be granted as well where there has been a verdi in favour of the defendant, as where it has been given in favour of th crown.

Rex v. Edgar, 4 Burr. 2297.

The information cannot be quaſhed, even with the conſent of parties though with ſuch conſent, the court will permit the recognizance to be d charged.

Rex v. Foſter, 1 Burr. 573.

After rules have been made abſolute for ſeveral informations, the cou will give leave to conſolidate them at the inſtance of the defendants.

Informatio

(E) Information quo Warranto.

If it be doubtful whether a reſidence in a borough previous to an election which required reſidence as a qualification were *bonâ fide* or not, the court will grant an information in nature of a *quo warranto*. Rex v. Sargent, 5 Term Rep. 466. Rex v. Duke of Richmond, 6 Term Rep. 560.

INJUNCTION.

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(A) Of the ſeveral Kinds of Injunctions, and when to be granted.

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Injunctions iſſue) So, where the plaintiffs claimed a ſole, and the defendant a concurrent, of fiſhery, and a bill and croſs-bill were brought to eſtabliſh ſuch ſeveral claims, which a ſubmiſſion of their reſpective rights to the court, and the plaintiffs afterwards cauſed the ndant's agents to be indicted for a breach of the peace, in fiſhing in their liberty, the court Chancery inhibited the proſecutors from proceeding on the indictment till the hearing of the y ſuit and farther order, though it could not ſtrictly grant an injunction. Mayor and Corion of York v. Pilkington, 2 Atk. 302. For originally and regularly that court cannot an injunction to ſtay criminal proceedings. But where the matter in diſpute, and made ſubject of an indictment, is a mere civil right, and may be redreſſed by an action of treſ, the proper courſe is to apply to the attorney-general for a *nolle proſequi*. *Ibid.* Lord Mone v. Dudman, 2 Vez. 396.

hough an injunction in the Exchequer, regularly, ſuſpends all the proceedings at law, yet court will, upon motion, permit the plaintiff in the action to give notice of trial, upon his rtaking not to ſue out execution. For though it may be argued, that ſuch notice of trial ot have its proper effect, becauſe the party ſerved with it cannot prepare for his defence out the diſcovery ſought by the bill, yet, in effect, he receives no injury by the practice. if the anſwer be full, he has gained the deſired diſcovery: if it be exceptionable for inciency, or if the injunction be continued on the merits, the notice of trial is a nullity. Legg Da Coſta, in the Exchequer, Hil. 13 Geo. 3. 3 Wooddeſ. 410. n. y.

Where an eſtate was ſettled on a jointreſs without impeachment of waſte pt in pulling down houſes and felling timber, remainder to her ſon for without impeachment of waſte generally, remainders over; the ſon, leave of the jointreſs, felled a quantity of timber, and died; after e death, a daughter entitled to the next remainder in tail ſued her her at law, to recover treble damages, and the place waſted; there g evidence of an expreſs conſent, or a general tacit conſent or encoument to the felling of the timber given by the daughter, ſhe was reined by injunction from proceeding in her action at law. Aſton v. Aſton, 1 Vez. 396

f a mortgagor bring a bill to redeem, it is at law accounted a breach of covenant for quiet enjoyment. But if an action of covenant be in ſuch brought, equity will grant an injunction. Pr. Reg. Ch. 211.

f a lord of a manor bring ejectments againſt his cuſtomary tenants on ence of forfeiture, ſome of whom file a bill, praying he may ſhew Pr. Reg. Ch. 216.

what breaches of the cuſtom he deſigns to inſiſt upon at the trial, upon
general iſſue in ejectment, and he is in contempt for not putting in an
ſwer, or the like, the court will order an injunction.

Martin v. Martin, 1 Vez. 211. When a court of equity hath, in any caſe, once taken the fund into its own hands, it will not ſuffer any proc
If bond-creditors of the anceſtor have obtained a decree for ſale aga
the heir, an injunction will be granted againſt other bond-creditors proc
ing at law, unleſs they get judgment before the decree.

ings at law. *Id. ibid.* Morrice v. Bank of England, Ca. temp. Talb. 217. Brooke v.
nolds, 1 Br. Ch. Rep. 183. Douglas v. Clay, cited *ibid.* Hardcaſtle v. Chettle, 4 Br. Ch.
163. Aſkew v. Poulterers' Company, 2 Vez. 90.

Kempe v. Antill, 2 Br. Ch. Rep. 11.
Under the forfeiture act in *America*, the eſtates of loyaliſts were direc
to be ſold for the payment of debts; this was holden to be no ground fo
injunction to reſtrain an action brought in this country on a bond give
America.

Tooke v. Hartley, 2 Br. Ch. Rep. 125.
The repreſentatives of a mortgagee, after foreclоſure, ſold the eſt
and the amount not being ſufficient to pay their debt, they brought an a
upon the bond: the defendant at law filed his bill praying an injunc
and that the bond might be delivered up to be cancelled, inſiſting, tha
the mortgagee had foreclоſed the equity of redemption, and taken the ple
he had made his election, and relinquiſhed his right to a perſonal rem
Lord *Thurlowe* ſaid, as it was a new caſe, he would grant the injunctio
condition of the plaintiff's bringing the money into court; but his opi
was, that the defendant had a right to proceed at law; and the pla
refuſing to bring the money into court, the injunction was therefore di

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(*Alſo it is*) In caſes of nuiſance, the court will not interfere before anſwer, unleſs the p
tiff ſtate a preſcriptive right, or an agreement, and ſupport it by affidavit. Morris v. L
of Lord Berkley, 2 Vez. 452. Attorney-General v. Doughty, *id.* 453. An agreement,
ported by affidavit, will indeed be ſufficient to give the court juriſdiction in the firſt inſt
Martin v. Nutkin, 2 P. Wms. 266. *Secùs*, if it be a ſpecial caſe founded on a particular r
2 Vez. 453.

(*So injunctions*) In theſe caſes, the right muſt appear by the bill, and be admitted by th
ſwer, elſe an injunction will not be granted till after the right has been determined at
Anon. 1 Vern. 120. Hills v. Univerſity of Oxford, *id.* 275. Jefferys v. Baldwin, A
164. And *qu.* whether in a bill to reſtrain the publication of a print or engraving under
Geo. 2. c. 13. it be not neceſſary to ſtate that the requiſition of the ſtatute was com
with reſpecting the inſertion on the plate and prints of the date of publication, and nam
the proprietor? Blackwell v. Harper, 2 Atk. 93. 3 Barnard. 210 Harriſon v. Hogg, 2
jun. 323. Thompſon v. Symonds, 5 Term Rep. 41.—If a plaintiff fail in eſtabliſhing his
to the *whole* of a publication, he may nevertheleſs have an injunction as to part. Carn
Bowles, 2 Br. Ch. Rep. 80. And if an author has ſold *all his intereſt in the copy-right*, h
no reſulting right at the end of the firſt fourteen years, as againſt his own aſſignee, and w
injoined from re-publiſhing. *Id. ibid.*

Pope v. Curl, 2 Atk. 342. Thomſon v. Stanhope, Ambl. 737.
So, injunctions have been granted to reſtrain the receiver of letters f
publiſhing them without the conſent of the writer, or of his perſonal
preſentatives.

Gyles v. Wylcox, 2 Atk. 141. Loffi's Rep. 775.
But the court will not interpoſe in this manner to reſtrain the publica
of a real and fair abridgment of a new book: *ſecùs* if the work be
colourably ſhortened.

2 Ch. Ca. 165. 1 Vern. 127.
Injunctions may be granted occaſionally even for the purpoſe of reſt
ing matters of general utility, as, the carrying on of a particular trade,

orking of a colliery, or the navigating of a ſhip; in theſe caſes, however, the court will require a ſtrict proof of the plaintiff's right to ſuch relief. An injunction too, it ſeems, will go to inhibit defendants from diſſolving a commercial partnerſhip. 2 Vez. 212. Ambl. 209. Chavany v. Van Sommer, in Canc. M. 11 Geo. 3. 3 Wooddeſ. 416. note p.

So, *(b)* to reſtrain a partner from receiving the partnerſhip funds, he being in contempt. (b) Read v. Bowers, 4 Br. Ch. Rep. 441.

Injunctions will alſo be granted to reſtrain the negotiation of bills of exchange, or promiſſory notes, obtained by fraud; and in this caſe, if the plaintiff ſupport his motion by an affidavit of the truth of the facts ſtated in his bill, the injunction will be allowed immediately upon the bill being filed, leſt the defendant ſhould, upon intimation of the ſuit, by negociating the ſecurity, defeat its object. Patrick v. Harriſon, 4 Br. Ch. Rep. 476. Fonbl. Eq. Tr. 38. note (x). Where a motion was made to reſtrain a defendant either from bringing an action on a promiſſory note, ſuggeſted to have been given for undertaking to bring about a marriage, or to prevent him from aſſigning it over, the court made an order upon the defendant to keep the note in his own poſſeſſion, and not to aſſign or indorſe it over, but would not extend the injunction ſo far as to inhibit the payee himſelf from proceeding at law. Smith v. Aykwell, 3 Atk. 566. Ambl. 436. S. C. Where the acceptance of a bill of exchange had been declared void by the law of a foreign country, an injunction was granted to reſtrain the holders from ſuing the acceptor upon it in this country. Burroughs v. Jamineau, Moſ. 1 Sel. Caſ. in Ch. 69. S. C.

An injunction to ſtay trial may be granted before appearance: but an injunction to ſtay trial and alſo execution cannot be moved for at one and the ſame time. *Wright*, an executor, being defendant in a ſuit in Chancery, wherein creditors were the plaintiffs, was afterwards ſued at law by *Braine*, another creditor, who gave notice of trial in his action. *Wright* now filed his bill againſt *Braine*, and before appearance, moved for an injunction to ſtay execution, and that it ſhould alſo ſtay trial, the notice of trial being for *Thurſday* then next. Lord *Thurlowe* ſaid, that they could not be granted as one motion, and therefore granted the firſt part only. Wright v. Braine MSS.—— 3 Br. Ch. Rep. 87. S. C. The regular courſe is, firſt to get the common injunction, for want of appearance, and then to move, that it may be extended to ſtay trial.

(*There is an injunction called*) There is one inſtance of an injunction to be quieted in poſſeſſion being granted, though the title at law was not eſtabliſhed. Buſh v. Weſtern, Pre. Ch. 530. But in later caſes, it hath been refuſed. Birch v. Holt, 3 Atk. 726. Anon. 2 Vez. 414.

(*Alſo it has*) But in this caſe Lord Cowper's decree was reverſed in the Houſe of Lords, and a perpetual injunction granted. 1 Br. P. C. 266. And in later times, theſe injunctions have been granted with leſs reſerve. Leighton v. Leighton, 1 P Wms. 671. 1 Str. 404. 2 Br. P. C. 217. Barefoot v. Fry, Bunb. 158. It is ſaid alſo, that where a bill in equity is taken *pro confeſſo*, by reaſon of the defendant's contempt in diſobeying all proceſs, if the ſuit be to quiet a poſſeſſion, or to ſtay proceedings at law, the court will decree a perpetual injunction. Pr. Reg. c. 197. So, where an iſſue was directed out of Chancery, to try the validity of a will of perſonalty, and the verdict was given againſt it, the court granted a perpetual injunction againſt proving it before the eccleſiaſtical judge. Beverſham v. Springhold, 1 Ch. Ca. 80. See Montgomery v. Clark, 2 Atk. 379. So, where the party concerned in intereſt *admitted* the probate of a will, he was injoined from conteſting it in the eccleſiaſtical court, for facts are as properly concluded by admiſſion as by a trial. Sheffield v. Ducheſs of Buckingham, 1 Atk. 628.

(*A truſtee having*) The injunction in this caſe is drawn from the equity of the ſtatutes upon forcible entries. 2 Vez. 415.

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(*Where two courts*) 3 Atk. 629. Pr. Ch. 548. 2 Atk. 420. In the caſe of Montgomery v. Clark, 2 Atk. 378., where a will conſiſting of real and perſonal eſtate, which had been ſet aſide

at law for the insanity of the testator, was litigated in the ecclesiastical court, Lord Hardwicke is reported to have holden, that the court of Chancery had no power to interpose, so as to stop the proceedings in the spiritual court. But see Sheffield v. Duchess of Buckingham, 1 Atk. 628. *supr.*—In the case of legacies, where the ecclesiastical court have clearly an original jurisdiction, if there be a trust, or any thing in the nature of a trust, the court of Chancery will grant an injunction, trusts being proper only for the cognizance of that court. 1 Atk. 491. On a bill to establish a *modus*, the court of Exchequer will inhibit the spiritual court, though the plaintiff in equity have not pleaded to the libel, as that court is not competent to try the *modus*. Blackett v. Finney, Bunb. 176. Salmon v. Rake, *ibid.* But courts of equity do not grant an injunction where the ecclesiastical court proceeds without jurisdiction, but where there are some equitable circumstances between the parties. An injunction supposes the ecclesiastical court to have jurisdiction: a want of jurisdiction is a ground for a prohibition. 1 Atk. 630. 3 Barnard 29.

(*Where a mortgagee*) See 4 Ann. c. 16. § 22.

Anon. 2 Vez. 630. Where a bill by a principal debtor for an injunction is dismissed, the bail cannot bring another upon the same equity. If indeed there is collusion, or a charge of collusion in the bill between the principal and the plaintiff at law, and the injunction is dissolved by collusion in order to charge the bail at law, the bail might take up the equity: but it would be then a new equity; for fraud and collusion affect every thing, and would give a right to resort to the original equity.

Stone v. Tuffin, Ambl. 32. An injunction to stay proceedings against the principal extends to proceedings against the bail; and where bail is only put in below, to proceedings on the bail-bond.

Savory v. Dyer, Ambl. 70. Davila v. Peacock, 3 Barnard. 27. Regularly, it seems, a proper writ of injunction cannot be granted unless expressly prayed by the bill; for the prayer of general relief will not extend to an injunction. If however the injunction issue upon such a general prayer, and the defendant put in his answer, and move in the common form, that upon the coming in of the answer, the injunction may be dissolved, this is a submission to the regularity of the injunction, and will cure the original defect.

In special cases an injunction hath been granted, though no bill hath been filed. Amhurst v. Dawling, 2 Vern. 401.

Anon. 3 Atk. 694. Travers v. Lord Stafford, Ambl. 104. 2 Vez. 19. When an injunction is dissolved on the merits, and the plaintiff amends his bill, or files a supplemental bill for the same matter, he cannot of course move for an injunction till answer; though upon special motion he may obtain it, without any affidavit in support of the amendment or equity of the bill.

Edwards v. Jenkins, 3 Br. Ch. Rep. 425.

Codd v. Woden, 3 Br. Ch. Rep. 73. The practice of a court of law in compelling a plaintiff on a bond not to take out execution beyond his real debt, does not oust the jurisdiction of courts of equity in awarding an injunction.

Neale v. Wadeson, 1 Br. Ch. Rep. 574. Where a bill is referred for impertinence before the time for answering is out, the plaintiff is not, upon the expiration of the time, entitled to the injunction as of course, but must move it upon notice and affidavit of circumstances.

Revet v. Braham, 2 Br. Ch. Rep. 640. An ejectment was brought by a person abroad to recover an estate against devisee against the heir at law; the heir thereupon filed a bill, charging fraud in the manner of obtaining the will, by the devisee and other defendants in the cause; and moved for an injunction to stay proceedings in the ejectment till the coming in of the answer upon an affidavit charging fraud in the defendants generally, but not particularizing the plaintiff

w, who was abroad. The Lord Chancellor was of opinion, that when e defendant was here, and could not put in his anſwer eaſily, the gene- l form was ſufficient: but when the defendant was abroad, there ould be a ſpecial ground to ſhew that the diſcovery from him was mate- ial.

Where the plaintiff at law is abroad, it is the practice of the Exche- uer to inſiſt upon an affidavit of merits upon moving that ſervice of e ſubpœna upon the attorney ſhall be good ſervice; and a ſimilar ractice ſeems at one time to have been admitted in the court of Chan- ery. Delancy v. Wallis, 3 Br. Ch. Rep. 12. But ſee Burke v. Vickars, *id.* 24.

In common caſes, affidavits cannot be read againſt the defendant's an- wer in order to obtain an injunction. But this rule does not hold here irreparable miſchief would follow from the delay of entering o the plaintiff's caſe till the hearing, as in caſes of waſte, patents, raud, *&c.* Iſaacs v. Humpage, 3 Br. Ch. Rep. 463. and the caſes there cited.

In injunctions to inhibit the commiſſion of waſte, or to ſtay proceedings law, the ſtatute for the amendment of the law allows the ſubpœna to iſ- e before the bill is filed. 4 Ann. c. 16. § 22.

The defendant had contracted with the plaintiffs to ſupply them with uſical inſtruments for a ſtipulated time, and not to ſell any on his own ccount, but the plaintiffs becoming bankrupts, the defendant conceived hat he was diſcharged from the contract, and ſold them for himſelf. On bill being filed, the plaintiffs moved before anſwer for the injunction. But the motion was refuſed, as an attempt to anticipate by an interlocuto- y order the deciſion of the court upon the effect of the contract, and ſo o obtain in that ſhape a ſpecifick performance of it. Beſides, the court ever interfere in this ſtage of the cauſe, but in thoſe caſes where the de- endant is committing a treſpaſs, by which immediate injury may be ſuſ- ained; as in the motion to ſtay waſte. In matters of contract it is never one. Longman and another v. Calliford, Anſtr. 645.

An injunction has been granted by the court of Chancery before ap- earance to reſtrain the defendants, who had gotten a bill of ſale from he plaintiff of all his effects, from removing fixtures and manure. But has in ſuch caſe been refuſed by the court of Exchequer to reſtrain a te- ant from ploughing up land, and carrying away manure and compoſt, contrary to the terms of his leaſe; conſidering it merely as a breach of contract, not a caſe of irreparable waſte. Graſt v. Lord Belfaſt, in Ch. Feb. 1796. Johnſon v. Goldſwaine, Anſtr. 749.

On a truſt to ſell, a ſuggeſtion in the bill of improper conduct in the ruſtees, in not giving ſufficient notice of the ſale, is not a ground for an njunction to ſtop the ſale; it is not one of theſe caſes in which, on ac- ount of irreparable injury to the plaintiff, this ſummary proceeding is ad- itted. Pechel v. Fowler, Anſtr. 549.

After an injunction on an original bill diſſolved on the coming in of he anſwer, the plaintiff cannot have an injunction on the amended bill, hough ſupported by affidavits, unleſs the defendant be in contempt; and ot after an injunction diſſolved on the merits, if the defendant be in con- empt, without ſpecial affidavit of merits. Gadd v. Worrall, Anſtr. 553. Lingham v. Toule, *Id.* 188.

Though, in general, an injunction cannot be extended (*a*) to protect ne, who is not a party to the ſuit in equity; yet an injunction to ſtay roceedings at law will prevent a ſuit againſt the ſheriff (*b*) for not paying over (*a*) Gadd v. Worrall, *ubi ſupra.* (*b*) Bolt v.

Stanway, Anſtr. 556. 569. over money levied by him in the original action before the injunction iſ ed, provided he comply with the terms of it, by bringing the money i court.

——— v. Blackwood, Scac. Hil. 37 G. 3. An injunction will be granted upon affidavit before ſervice of ſubp to prevent the negotiating of a note unfairly obtained. Such an injun on is in the nature of an injunction to ſtay waſte.

(B) What ſhall be a Breach thereof, and ho puniſhed.

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(*A. obtained*) So, notwithſtanding the injunction, the plaintiff at law is allowed to proc ſo far, as that he may be at liberty *eo inſtante* that the injunction is diſſolved, to take out exe tion: if therefore the defendant be in execution, and plead *plene adminiſtravit*, and the plain at law enter judgment *de bonis teſtatoris cum acciderint*, he may proceed to a *ſcire facias* to inqu of aſſets, and enter judgment thereupon. Morrice v. Hankey, 3 P. Wms. 146. See alſo S ney v. Etherington, *ibid.*

Anon. 3 Atk. 567. It is no excuſe for proceeding at law after an injunction, that it is n ſealed: for where a defendant, or his attorney, have been preſent up an order for an injunction, and they have proceeded at law before it h been ſealed, the court has conſidered it as a contempt, and commit the parties.

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(C) How diſſolved.

(*The plaintiff*) If no exceptions are filed, the court, upon the maſter's report, will diſſolve injunction, and ſometimes will commit the clerk in court to the Fleet for taking out ſuch junction, and alſo make him pay all coſts, and ſometimes the damages the injured party h ſuſtained, by reaſon of ſuch irregular injunction. 2 Harriſon's Pr. 264. (*b*) The ſecuring fund is an uſual condition annexed to injunctions. Culley v. Hickling, 2 Br. Ch. Rep. 181 In interpleading bill, it ſeems to be neceſſary that the money ſhould be actually brought i court before the motion for an injunction; though the practice hath been, to bring it in u ſhewing cauſe againſt the motion to diſſolve the injunction. Dungey v. Angove, 3 Br. C Rep. 36.

2 Harriſon's Pr. 262. When a plea or demurrer is argued by counſel, and allowed, there generally, though not always, an end of the injunction; for it may ha pen that ſome equity may be ſhewn for continuing it, ariſing out of the d fendant's anſwer put in with ſuch plea or demurrer; and upon a plea demurrer being allowed, or on the coming in of the anſwer, the co will not abſolutely diſſolve the injunction on the firſt motion, though u on affidavit of notice, but only *niſi*: ſo, if the maſter's report is not p cured in a reaſonable time, after exceptions filed, or if the anſwer i ported inſufficient, the injunction will be diſſolved *niſi*, though ſometim abſolutely on the firſt motion.

2 Kel. 43. An injunction for want of an anſwer was diſſolved, becauſe not ſerv till ſeveral months after the anſwer came in. On croſs bills, if when t firſt is anſwered, the ſecond is not anſwered in eight days, the injunctio will be diſſolved on motion: but the court will not diſſolve an injunctio continued on exceptions, if they have not been filed a reaſonable time b fore motion made.

Pr. Reg. 200. If there be two defendants, the court will not ordinarily diſſolve the i junction till both have anſwered.

If the defendant do not ſign his anſwer, regularly, the injunction will be continued; though if the plaintiff take a copy of the anſwer, this may amount to a waver of the informality. Anon. Bunb. 251.

If exceptions, which are put in only to continue an injunction, are over-ruled, the injunction is diſſolved of courſe without motion. Walter v. Ruſſel, Bunb. 30.

If an injunction be granted for want of an anſwer, and the defendant afterwards demur, and his demurrer be allowed, yet by the courſe of the court of Exchequer, the injunction cannot be diſſolved without a previous order for that purpoſe. Hurſt v. Thomas, Anſtr. 585.

An unreaſonable delay on the part of the plaintiff is a ſufficient ground to diſſolve an injunction; as, where a commiſſion to examine witneſſes was not returned in two years. Penney v. Edgar, Anſtr. 276.

A reference of the anſwer for impertinence is a good cauſe for continuing the injunction. Hunt v. Thomas, Anſtr. 591.

Inns and Innkeepers.

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(B) Who ſhall be ſaid a common Innkeeper: And therein of the Privileges allowed him by Law.

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(*It hath been*) Nor will the privilege of a common inn extend to a livery-ſtable, ſo as to protect a carriage ſtanding at livery there. Francis v. Wyatt. 3 Burr. 1498. 4 Term Rep. 567.

(C) Of the Duties injoined Innkeepers by Law: And herein,

1. Of the Offence of ſelling corrupt commodities, or at exorbitant Prices.

By 2 *Geo.* 3. *cap.* 14. "No brewer, innkeeper, victualler, or other "retailer of ſtrong beer or ale ſhall be ſued, empleaded, or moleſted by "indictment, information, popular action, or otherwiſe, for advancing "the price of ſtrong beer or ale in a reaſonable degree." But it is alſo enacted, "That if any brewer, innkeeper, victualler, or retailer of beer "or ale, ſhall mix, or cauſe or ſuffer to be mixed in any veſſel, &c. "any ſtrong beer, ale, or ſtrong worts with any ſmall beer, or ſmall "worts, or with water, after the gauge of ſuch ſtrong beer, ale, or "ſtrong worts ſhall have been taken by an officer of exciſe, he ſhall "forfeit fifty pounds."

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(*Alſo an inn-keeper*) But *qu.* as to a livery ſtable keeper? Francis v. Wyatt, 3 Burr. 1498. 1 Bl. Rep. 483.

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(*But if a perſon*) But where an inn-keeper refuſed to take charge of goods till a future day, becauſe his houſe was full of parcels, and the owner afterwards ſtayed in the inn as a gueſt, and

and the goods were ſtolen during his ſtay, it was holden, that the innkeeper was bound to make good the loſs. Bennett v. Mellor, 5 Term Rep. 273.

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(*If a man comes*) 2 Ld. Raym. 867. *Secùs*, of goods left in an inn, becauſe the innkeeper has no advantage by them.

(D) Of the Innkeeper's Remedies againſt his Gueſts.

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(*If an horſe*) If a horſe be once parted with by the innkeeper, he cannot, upon his coming in again, detain him for what was due before. Jones v. Pearle, 1 Str. 557.

Page 187 Joint-tenants and Tenants in common.

(D) How a Joint-tenancy is created.

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(*But in caſe*) The unity of time, or neceſſity that the eſtate of each joint-tenant ſhould be veſted at the ſame period, which is inſiſted upon by Sir Wm. Blackſtone, 2 Comm. 180., is, if not contradicted, rendered doubtful by ſeveral authorities. Aylor v. Chep, Cro. Ja. 25[illegible] Earl of Suſſex v. Temple, 1 Ld. Raym 311-2. Stratton v. Beſt, 2 Br. Ch. Rep. 240.

(F) What Words create a Joint-tenancy, and not a Tenancy in common, *& e converſo.*

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(*As to the words*) But Lord Hardwicke ſays in Rigden v. Vallier, 2 Vez. 256., that upon ſearch, he could not find that this judgment was reverſed, or that a writ of error was brought. And in caſes of ſurrenders of copyholds, it ſeems to be an acknowledged authority. Rigden v. Vallier, *ubi ſupr.* Goodtitle v. Stokes, 1 Wilſ. 341. Denn v. Gaſkin, Cowp. 660.

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(*But if a man*) For if the context of the will manifeſts a contrary intention, theſe words will not have that effect. As, where a teſtator deviſed the reſidue of his eſtate to truſtees, in truſt to pay the intereſt and profits thereof to his four grand-daughters, equally between them ſhare and ſhare alike, for and during their reſpective natural lives; and after the deceaſe of the ſurvivor of them, in truſt to pay the principal money to and among the children of his ſaid grand-daughters, equally to be divided between them, ſhare and ſhare alike; and two of the grand-daughters died, leaving children: it was holden, that the two living grand-daughters took the whole intereſt by ſurviorſhip, for that notwithſtanding the words "equally to be divided, ſhare and ſhare alike," the context ſhewed that a joint-tenancy was intended, as the intereſt was to be divided amongſt four whilſt four were alive; amongſt three, whilſt three were alive; and nothing was to go to the children whilſt any of their mothers was living. Armſtrong v. Eldridge, 3 Br. Ch. Rep. 215.—But it is not only in wills, that the words "equally to be divided," import a tenancy in common: they admit of the ſame conſtruction in deeds, which receive their operation from the ſtatutes of uſes. Fiſher v. Wigg, 1 P. Wms. 14. Rigden v. Vallier, 2 Vez. 252. & 3 Atk. 371. Goodtitle v. Stokes, 1 Wilſ. 341. Denn v. Gaſkin, Cowp. 660. It is otherwiſe in common law conveyances, Stones v. Hartley, 1 Vez. 165.; for although deeds to uſes muſt be conſtrued like common law conveyances, as to words of *limitation*, yet Lord Hardwicke ſaid, that as to words of *regulation or modification of the eſtate*, he ſaw no harm in conſtruing them differently. Rigden v. Vallier, 2 Vez. 257. But this doctrine, that deeds of uſes are to receive a different conſtruction from common law conveyances, hath been impugned

…gned by a late deciſion. Stratton v. Beſt, 2 Br. Ch. Rep. 233. See too Staples v. Maurice, …. P. C. 48.

(*As a deviſe to two equally.*) 2 Vez. 256. Cowp. 657.

(*So if a man*) The opinion of the three judges, hath been confirmed by Lord Hardwicke in …nes v. Heartly, 1 Vez. 165. But where a teſtator deviſed lands to truſtees and their aſſigns, …*A.* and *B.* attain twenty-one, to receive the rents, and apply them to their maintenance; …then to *A.* and *B.* for their lives without waſte, and from and after their deceaſes to the uſe of …heirs of *A.* and *B.* as tenants in common, and not as joint-tenants; it was holden, that *A.* …*B.* were joint-tenants for life. Trodd v. Downs, 2 Atk. 304.

So, a deviſe to and amongſt all the children *reſpectively*, male or fe- …le, of the teſtator's brother and ſiſter, hath been holden to make a te- …ncy in common by reaſon of the word *reſpectively*: it appears indeed …n a later caſe (*b*), that the word "amongſt" would of itſelf ſever the …reſt. Heathe v. Heathe, 2 Atk. 121. (*b*) Trundell v. Eames, before Lord Bathurſt, 11 Feb. 773, cited in 4 Br. Ch. Rep. 17.

So, where a teſtator deviſed an eſtate in truſt for his three ſiſters, and *they ſhould ſeverally die, he gave the premiſes to their ſeveral heirs*; Lord *…rdwicke* held, that the words, *as they ſeverally die*, &c. imported a te- …ncy in common. Sheppard v. Gibbons, 2 Atk. 441.

So, where there was a deviſe of the profits of freehold and leaſe- …ld eſtates, in truſt for the teſtator's ſix younger children, to be diſtri- …ted among them *in joint and equal proportions*: it was holden, that the …ildren took as tenants in common; that the word "joint" was not to …conſidered as giving a joint intereſt; but the ſame as if the teſtator had …d, "to my children *all together*." Ettricke v. Ettricke, Ambl. 656.

So, where a ſum of money was bequeathed to two perſons, *jointly and …ween them*; the words "between them" were adjudged to ſever the …ereſts, and prevent a ſurvivorſhip. Perkins v. Baynton, 1 Br. Ch. Rep. 118.

But where a teſtator gave two thirds of a reſidue *unto and amongſt* the …ildren of *A.* and *B.* and the remaining third *to* the children of *C.* it …s holden, that though the children of *A.* and *B.* took as tenants in …mmon, yet that from the omiſſion of the words of ſeverance in the be- …eſt to the children of *C.* they took as joint-tenants. Campbell v. Campbell, 4 Br. Ch. Rep. 15.

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(*One deviſed* 100*l.*) The words of the decree in this caſe are theſe: "His honour declared, …that the deviſe of the ſaid 100*l.*, after the death of the ſaid teſtator's ſiſters *Lucy* and *Kathe- …ine*, unto the ſaid *Margaret Wiſhey*, *Mary Harris*, *Elizabeth Tucker*, *Mary Parker*, and *Alice …tringer*, to be equally divided between them, and the ſurvivors, and ſurvivor of them is a te- …ancy in common, and not a joint-tenancy, and that the words *ſurvivors and ſurvivor of …em*, are to be underſtood of ſuch of them as ſhall be living at the teſtator's death." Reg. …1730. fol. 177. In wills, the courts have been aſtute to conſtrue *ſurvivorſhip* into ſome other …aning than a joint-tenancy, and have therefore laid hold of ſome particular time. In Lord …ndon v. Earl of Suffolk, 1 P. Wms. 96., Lord Cowper referred it to the death of the teſtator, …in the above caſe of Stringer v. Philips: but the Houſe of Lords reverſed his decree, refer- …g it, from the nature of the debt which was the ſubject of the bequeſt, to the time of pay- …nt; concurring with him, however, in the propriety of ſome particular time. 1 Vez. 14. In …ws v. Haws, 3 Atk. 524., and 1 Vez. 14., Lord Hardwicke fixed the time to the deviſees dy- …g under twenty-one, there being a precedent clauſe in the will in which the teſtator had made …imilar diſpoſition of his perſonal eſtate, and given the benefit of ſurvivorſhip at that period. …that caſe, Lord Hardwicke is made to ſay, that the conſtruction of Lord Cowper in Bindon …Suffolk was too nice, though if no other reaſonable conſtruction could be put on the words, the …rt ought to reſort to it. That conſtruction, however, hath been adopted in a later caſe, …ere the words "ſurvivors and ſurvivor" were holden to relate to the death of the teſtator.

Roſe

Roſe v. Hill, 3 Burr. 1881. See further as to this point, Earl of Saliſbury, v. Lambe, Ambl. 383. Wilſon v. Bayly, 5 Br. P. C. 388.

(*It ſeems to be*) Rigden v. Vallier, 3 Atk. 731. 2 Vez. 258. S. C. Partridge v. Pawlett, 1 Atk. 467. 2 Atk. 55. S. C. Hall v. Digby, 4 Br. P. C. 224.

Lord Bindon v. Earl of Suffolk. 1 P. Wms. 96. 1 Br. P. C. 189.

The Earl of *Suffolk* bequeathed 20,000*l.* to his brothers *George Howard* and *Henry Howard*, and to the four children of *Henry*, equally to be divided between them, ſhare and ſhare alike; and if either of them die, to the ſurvivors or ſurvivor of them. *George* ſurvived the teſtator but died before any part of the money was paid; and a queſtion was made, Whether his ſhare ſhould go to his repreſentatives, or be divided between the ſurvivors? Lord *Cowper* held, that the intereſt in this ſhare was veſted in *George* by his ſurviving the teſtator, and of courſe tranſmiſſible to his repreſentatives. He ſaid, by the firſt words, "ſhare and "ſhare alike," it was plain the legatees were tenants in common; and by the ſubſequent words, "that if any of them die, his ſhare ſhall go "the ſurvivor," it muſt be intended, if any of them ſhould die in the lifetime of the teſtator; for by that conſtruction every word of the will would have its effect and operation. But this decree was reverſed upon an appeal to the Lords, their lordſhips being of opinion, that the time of ſurvivorſhip related to the time when the debt ſhould be paid, not to the death of the teſtator, and that *George* not having lived to that time, the ſurviving legatees were entitled to his ſhare. This deciſion of the Lords (*a*) ſeems to have been impeached in the caſe of *Stringer* v. *Philips* (*a*) which was ſoon afterwards determined at the Rolls, and later judges have expreſſed a doubt of the ground upon which their lordſhips proceeded. However, the circumſtances of the caſe, it ſhould ſeem, would bear out the decree of the Lords. The ſum bequeathed was an old debt from the crown ſecured upon the hearth-money revenue, which was taken away by ſtatute. It was an unproductive fund till payment, and could be of no uſe to any one. That was an event depending upon intereſt and ſolicitation, and was extremely retarded by the conſideration of its going to repreſentatives. From theſe circumſtances, therefore, the words ſhould ſeem to relate to the time when the debt ſhould be paid. But the conſtruction put on the words of ſurvivorſhip by Lord *Cowper*, and recognized by Sir *Joſeph Jekyll* in *Stringer* v. *Philips*, has generally obtained unleſs it has been manifeſt from the tenor of the will that they pointed to the diſtribution of the fund.

(*a*) *Supra*, vol. iii. pag. 684. 2 Vez. jun. 638.

Roebuck v. Dean, 2 Vez jun. 265. 4 Br. Ch. Rep. 403. S. C.

A teſtatrix gave ſtock to truſtees upon truſt to pay the dividends to her niece for life, and after deceaſe that the ſtock ſhould be equally divided between the brother and four ſiſters of the teſtatrix, "and in like "manner between the ſurvivors or ſurvivor of them." Lord *Loughborough* adopting Lord *Cowper*'s idea in *Bindon* v. *Suffolk*, held that the words "ſurvivors or ſurvivor" related to the time of the teſtatrix's death in order to prevent the lapſe of a ſhare by the death of a legatee in her lifetime: that therefore this was a tenancy in common between thoſe who were alive at the death of the niece, and the repreſentatives of thoſe who died in her lifetime.

Perry v. Woods, 3 Vez. jun. 204.

A teſtator bequeathed ſtock to truſtees upon truſt to pay the intereſt to *A.* for life, and after her deceaſe to her children; but in caſe ſhe ſhould die leaving no children, to *B.* and *C.*, ſhare and ſhare alike, or to the ſurvivor of them. *B.* died in the lifetime of *A.*, and then *A.* died without

ithout iſſue. The intereſt veſted in *B.* and *C.* upon the death of the ſtator, as tenants in common, and upon the death of *A.* became diviſible moieties between *C.* and the repreſentatives of *B.*

A teſtator deviſed a real eſtate to his heir at law and his iſſue male in rict ſettlement; remainder in truſt to be ſold, and the money ariſing om the ſale to be equally diſtributed among the three ſons and daughters f the teſtator's niece, or *the ſurvivors or ſurvivor of them.* Lord Chanellour admitted it to be in general perfectly true, that theſe words of ſurvorſhip will not prevent the intereſt from veſting at the death of the teſtar: but in this caſe he was of opinion, that it was clearly the ſenſe of e will that the produce of the ſale was to be perſonal eſtate, that the ildren were to take it in money: there was to be no gift till diſtribution, the death of the tenant for life without iſſue: the object of the diſibution was pointed out to be among the perſons named, or the ſurvivors ſurvivor; ſo that that excluded the poſſibility of taking in perſons who ere then dead. Brograve v. Winder, 2 Vez. jun. 634.

A teſtator directed by his will, that "in caſe both his ſons *M.* and *I.*" whom he had deviſed his eſtates, "ſhould happen to die unmarried, and that neither of them ſhould have any iſſue lawfully begotten, then his daughters *M.*, *S.* and *C.* and the ſurvivors and ſurvivor of them, and their aſſigns, be permitted to receive all the rents, iſſues, and profits of all the ſaid leaſes, lands, and premiſes, as tenants in common, and not as joint-tenants." The teſtator then gave legacies to his daughers, and added, "in caſe his ſaid daughters *M.*, *S.*, and *C.*, or any or either of them, ſhould happen to die before their reſpective days of marriage, his will was, that the ſaid fortunes to them reſpectively bequeathed as aforeſaid ſhould go to and be divided between his ſaid ſons, and the ſurvivor of them, and to and among the ſurvivors and ſurvivor of them the ſaid *M.*, *S.*, and *C*, ſhare and ſhare alike." All the deviſees ſurvived the teſtator. *M.* the eldeſt ſon died unmarried, leaving is brother *I.*, who upon his death became entitled to the whole intereſt the teſtator's leaſehold eſtates. *M.* and *S.* both married after the teſtar's death, and both died in the lifetime of their brother *I.* Upon the eath of *I.*, *C.* the ſurviving daughter claimed *all* the teſtator's leaſeold eſtates and intereſts, which were accordingly decreed to her by the ourt of Chancery in *Ireland*; but upon appeal to the Lords in this coun-y, that decree was reverſed; and it was declared that the eſtates, by irtue of the will, upon the contingencies which had happened, were well eviſed to the teſtator's daughters *M.*, *S.*, and *C.*, as tenants in comon; and that therefore they were to be equally divided between he ſurviving daughter and the repreſentatives of the two, who were ead. Wilſon v. Bayly, 5 Br. P.C. 388.

A teſtator bequeathed 30,000*l.* to his executors in truſt for the equal nd ſeparate uſe of his five daughters, equally among them and their reſective children, being 6000*l.* a-piece for each of his ſaid daughters and eir reſpective children, to be placed out at intereſt with the approbaon of each of his ſaid daughters reſpectively, as to her ſhare. And if ny of his ſaid daughters ſhould die, then the 6000*l.* given for the benet of ſuch daughter and her children ſhould be in truſt for her daughters nd younger ſons, in ſuch manner, proportion, and to be payable at ſuch ime, as ſuch his daughter ſo dying ſhould by deed or will appoint; and Earl of Salisbury v. Lambe, Ambl. 383.

for

for want of appointment, in truſt for the daughters and younger ſo equally between them, and to the ſurvivors and ſurvivor of them: and caſe there ſhould be no ſuch daughter, or younger ſon, or all ſhould before 21 or marriage, then in truſt that his daughter ſo dying ſhould poſe of the 6000*l.* and intereſt to ſuch of her ſiſters and younger ch dren, and in ſuch proportions, as ſhe ſhould then judge would have n occaſion for the ſame: and for want of appointment, then in truſt for and every the daughters and younger ſons of her ſiſters that ſhould be ing at her death, equally to be divided between them. *J. S.*, one of daughters, made her will, and appointed the 6000*l.* among her childr Her children died in her lifetime, having reſpectively attained 21. T 6000*l.* veſted in theſe children, on their attaining 21, ſo as to be tranſm ſible to their repreſentatives. The words "ſurvivors and ſurvivor" o meant to give croſs remainders to the children before the deviſe o could take place.

Frewen v. Relfe, 2 Br. Ch. Rep. 220.

A teſtatrix, after making ſeveral deviſes and bequeſts to differ perſons, (among whom were *A.*, *B.*, and *C.*, her executrixes,) dec ed it to be her will, that if any of her legatees ſhould die in her lifeti or before their legacies became due and payable to them or any of th ſo dying, the ſame ſhould go and deſcend *equally* between her executri By codicils the teſtatrix ſubſtituted *D.* and *E.* as executors in the ſtead *A.*, and *F.* inſtead of *B.*, with the ſame power, authority, and ſhare her eſtate, as *A.* and *B.* would have had with the other executors. O of the executrixes died ſoon after the teſtatrix, and one queſtion w Whether her ſhare in the reſidue ſurvived to the others, or went to perſonal repreſentatives, which depended upon, whether they took as nants in common under the will, or as joint-tenants? The queſtion occaſioned by the introduction of the word *equally* into the will. Lord *Thurlow*—The firſt clauſe in the will is certainly not ſufficient make the executors tenants in common; I never knew any conſtructi carried ſo far. In giving the lapſed legacies the teſtatrix has uſed word *equally*. Certainly the word *equally* has been held to give a tena in common, but that is always with reference to the other parts of t gift. The general intent of the teſtator will over-rule the word equa rather than the word *equally* ſhall over-rule the general intent of t teſtator. From the whole of the words, I think the teſtatrix mea them all to be executors, with equal authorities and equal ſhares, a that they being now reduced to three, thoſe three muſt take in equ ſhares.

Mackell v. Winter, 3 Vez jun. 236.

A teſtatrix bequeathed the reſidue of her perſonal eſtate to two gra ſons and a grand-daughter, to be equally divided between them, ſhare a ſhare alike; the ſhares of the two former to be paid at twenty-one, and t ſhare of the latter to be paid at the like age or marriage: and ſhe direc ed, that if the grand-daughter died before the time of payment, h ſhare ſhould be equally divided between the grandſons; and in caſe of th death of either of them, the whole ſhould be paid to the ſurvivor: an if either of the grandſons ſhould die under twenty-one, his ſhare ſhou go to the ſurviving grandſon; and if they all three died before the tim appointed for the payment, the whole ſhould go over. Both the gran ſons died under twenty-one; but the grand-daughter attained that ag It was decreed, that ſhe was entitled to one third; and the repreſentati of the ſurviving grandſon to the other two.

(G) Of the Duration and Continuance of the eſtate, whether given jointly, or in common: And therein where the Inheritance ſhall be ſaid to be joint or ſeveral.

F lands be given to two men and the ſurvivor of them, and their heirs, equally to be divided between them, ſhare and ſhare alike; y are joint-tenants for life with ſeveral inheritances. Barker v. Giles, 2 P. Wms. 280. 3 Br. P. C. 297.

If an eſtate be given to two and the ſurvivor of them, and the heirs the ſurvivor, they are not joint-tenants in fee, but have only an eſ- of freehold during their lives, with a contingent remainder in fee to ſurvivor. Vick v. Edwards, 3 P. Wms. 372. See Fearne's Contingent Remainders 4th ed. 522. Co. Lit. 13th ed. 191. note 1.

But where there was a deviſe to three perſons, to have and to hold them as *joint-tenants*, and the ſurvivors and ſurvivor of them *and the ir and aſſigns of ſuch ſurvivor for ever*, it was holden to be a joint- ancy in fee. Goodtitle v. Layman, K. B. Tr. 12 G. 3. *ub. ſup.*

(H) Of the joint and diſtinct Intereſts of Joint-tenants and Tenants in common, as to Acts done by or to them: And herein,

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(*It hath been*) So, in the caſe of tenants in common. In order to enable the ſtatute of limi- ions to run, there muſt be an adverſe poſſeſſion; a diſſeiſin, and a diſſeiſin ſtrictly proved. the re taking of the profits by the one is not an actual diſſeiſin. Reading v. Rawſterne, 2 Ld. aym. 830. Fairclaim v. Shackleton, 5 Burr. 2604. But the perception of rents and profits, ough not of itſelf an actual ouſter, ſeems to be evidence of an ouſter; and therefore Lord ardwicke ſaid, that a fine and non-claim by one tenant in common will bar his companion, if do not call the perſon levying it to an account of the profits. Story v. Lord Windſor, 2 tk. 632. Earl of Suſſex v. Temple, 1 Ld Raym. 312. And in the caſe of Doe v. Proſſer, owp. 217., it was adjudged, that an uninterrupted poſſeſſion for thirty-ſix years by one tenant common of the rents and profits without any account to, demand made, or claim ſet up by s companion, was ſufficient ground for a jury to preſume an actual ouſter of ſuch companion; d it was ſaid, that in the above caſe of Fairclaim v. Shackleton, a poſſeſſion of twenty-ſix ars by receipt of rents and profits, was holden not to be an actual ouſter of the co-tenant, be- uſe it was a fact which the jury had not found, which it had not been left to them to pre- me, and which, therefore, the court could not preſume.

An advowſon belonging to joint-tenants or tenants in common is, it ould ſeem, one entire thing, nor is it in its nature ſeverable but by par- tion: therefore, as we have ſeen before, if one joint-tenant or tenant in mmon preſent, or if they prevent ſeverally, the ordinary may admit or fuſe ſuch a preſentee, and unleſs they will join in the preſentation, may, ter the ſix months, preſent himſelf, as by lapſe. But if the ordinary hooſe to admit the preſentee of one of them, the preſentation of that e will be a preſentation in the right of all. But this is to be under- ood of mere joint-tenants or tenants in common; for in the caſe of co- arceners the law is different. For upon their not agreeing to preſent, e law conſiders their right of preſenting as ſevered by a partition to preſent Vol. iii. 687. 1 H. Bl. 417. 5 H. 7. 8. pl. 17. 2 Ro. Abr. 346. pl. 1, 2, 3. Co. Lit. 166 b. Moore, 225. (*a*) It hath been queſtioned, whether it goes to the

grantee. See Hargr. Co. Litt. 166. b. n. 2. The affirmative however is maintained by a great living authority.

preſent by turns, as much as if they had actually made ſuch a compoſition: therefore though tenants in common muſt join in a *quare impedit*, coparceners need not. If they cannot agree, it is of common right that the eldeſt ſhall preſent on the firſt avoidance; the ſecond on the ſecond, the third on the third, and ſo on. This privilege goes to the iſſue or aſſignee in law, or in fact, ſuch as the grantee (*a*), or tenant by the curteſy.

See 21 H. Bl. 412.

2 Inſt. 124. 2 Ro. Abr. *Preſent.* 372. pl. 112. 373. pl. 12. Barker v. Biſhop of London, 1 H. Bl. 412.

If two tenants in common be ſued in a *quare impedit*, one make default, and the other appear, if he have judgment, he ſhall have a writ to the biſhop, though on default the plaintiff is entitled to a writ to the biſhop againſt him who made default. And where one ſuffers judgment by default, and the other dies pending the writ, this judgment will be a bar to another *quare impedit* brought by the one who ſuffered judgment by default and the repreſentative of the other (in which the former is ſummoned and ſevered) to recover the *ſame* preſentation; though it is no bar to the right of ſuch repreſentative to recover on the next avoidance in his turn, where they have agreed to preſent by turns.

Bro. *Preſent.* pl. 26.

If a lapſe incurs, where perſons have a right to preſent by turns, it is holden, that the right only of the perſon who had then a right to preſent ſhall be loſt.

Bro. Qua. Imp. pl. 118.

So, if there are four co-parceners, the eldeſt and ſecond preſent, a ſtranger uſurps on the third; this uſurpation will only affect that turn, and the fourth may preſent when his turn comes, and if diſturbed may have a *quare impedit*; for the uſurpation only diſturbed the turn of the third.

Pyke, widow, executrix, v. Biſhop of Bath and Wells, and Lindſey, clerk, C. R. Hil. 27 G. 3.

A *quare impedit* was brought againſt the biſhop of *Bath* and *Wells* and *Theophilus Lindſey* clerk, for the vicarage of *Chew Magna* with the chapel of *Dundrey* annexed, in *Somerſetſhire*. The declaration ſtated that the advowſon belonged to one *Richard Roberts* in the time of Queen *Elizabeth*, upon whoſe death it deſcended to his four daughters in coparcenary. It then ſtated the ſeveral alternate preſentations by them and their aſſignees, till the 7th avoidance thereof, after the death of the ſaid *Richard Roberts*, by the death of *John Hatch* clerk. It then ſtated that upon that avoidance one *Silvanus Bond*, claiming title under *Prudence Amory*, one of the daughters of the ſaid *Richard Roberts*, preſented *William Smith* his clerk, who was thereupon admitted. It then ſtated the preſentation of one *Robert Pyke* on the death of *Smith*, and the death of *Pyke*, which made the preſent avoidance, and the plaintiff claiming title under *Mary Weſtcot*, the eldeſt daughter of *Richard Roberts*, ſaid, that it belonged to her now to preſent in this the ninth avoidance after the death of the ſaid *Richard Roberts*, and that the defendants diſturbed her.

To this the Biſhop pleaded, that he claims only as ordinary, &c.

The defendant *Lindſey* in his plea admitted the whole of the declaration down to the ſeventh avoidance by the death of *Hatch*, but derived a title under *Prudence Amory* to one *Thomas Gibbon*, who upon the avoidance preſented one *Robert Rogers* his clerk, who was thereupon admitted, &c. and that the ſaid *Robert Rogers* died incumbent thereof; that his death made the eighth avoidance after the death of the ſaid *Richard Roberts*. It then ſtated that *Bond* afterwards, upon the death of *Rogers* uſurping on the right of one *Elizabeth Pyke*, who claimed under the

fourth daughter of *Richard Roberts*, preſented *Smith*; it ſtated alſo the death of *Smith*, and preſentation and death of *Pyke*, and that it now belongs to the defendant claiming title under *Elizabeth Squire*, the ſecond daughter of *Richard Roberts*, to preſent a clerk on this avoidance, being the tenth avoidance ſince the death of the ſaid *Richard Roberts*.

The plaintiff in his replication, after ſtating the title of *Silvanus Bond* to preſent upon the ſeventh avoidance by the death of *Hatch*, ſaid, that *Thomas Gibbon*, attempting to uſurp upon the ſaid *Silvanus Bond*, obſtructed him in his preſentation, and brought a *quare impedit* againſt him and the then Biſhop of *Bath* and *Wells*. He then ſtated the whole proceedings on that *quare impedit*, and that judgment was given for the ſaid *Silvanus Bond*, and a writ awarded to the biſhop to admit his clerk. It then ſtated the ſeveral continuances of the writs to the biſhop for near two years, when *Smith* was admitted at the preſentation of *Bond* in purſuance of that recovery. The plaintiff then ſaid, that pending this *quare impedit* between *Gibbon* and *Bond*, the biſhop, at the inſtance and preſentation of *Gibbon*, admitted the ſaid *Robert Rogers*, which ſaid admiſſion, *&c.* being made pending the ſaid writ, by virtue of the ſaid judgment, became wholly void in law; but that before the ſaid *Silvanus* could obtain the admiſſion of his clerk, the ſaid *Robert Rogers* died ſo incumbering the ſaid vicarage, *&c.*

The defendant in his rejoinder, after proteſting againſt the title of the ſaid *Silvanus*, and proteſting that the ſaid *Robert Rogers* did not die before the ſaid *Silvanus* could have obtained the admiſſion, *&c.* of his clerk, ſaid, that the ſaid *Robert Rogers* lived a year three months and ten days after the giving of the ſaid judgment, and was during all that time incumbent of the ſaid vicarage; and that the ſaid *Silvanus* did not at any time during his lifetime deliver any writ to the biſhop to admit his clerk, but neglected to do it till after the death of the ſaid *Robert Rogers*, and ſuffered him to continue incumbent till the time of his death.

To this there was a general demurrer, and joinder in demurrer.

Lawrence, Serjeant, for the plaintiff.

The queſtion in this caſe is, Whether the inſtitution and induction of *Rogers* pending the *quare impedit* brought by *Gibbon* againſt *Silvanus Bond* be not wholly void? Whether the inſtitution and induction of a clerk at that time can be conſidered aa a plenarty? The effect of this inſtitution and induction being to defeat the object of the ſuit, it is fraudulent, and therefore void. For any act done by fraud to defeat the law, is void. In *Dyer*, 295. *b. p.* 16. it was held, that if the anceſtor a few days before his death, with intent to diſcharge the heir of aſſets, enfeoff him of the ſame land by fraud, the heir ſhall not take advantage of this fraud. In 3 *Co.* 78. *b.* a preſentation obtained by colluſion is void. *Co. Litt.* 102. *a. b.* If an action of debt be brought againſt the heir, and he alien, hanging the writ, yet ſhall the land which he had at the time of the original purchaſe be charged; for that the action was brought againſt the heir in reſpect of the land. Again, in *Co. Litt.* 344. *b.* At the common law, if hanging the *quare impedit* againſt the ordinary for refuſing of his clerk, and before the church was full, the patron brought a *quare impedit* againſt the biſhop, and hanging the ſuit, the biſhop admit and inſtitute a clerk at the preſentation of another, in this caſe, if judgment by given for the patron againſt the biſhop, the patron ſhall have a writ to the biſhop, and remove the incumbent that came in *pendente lite* by uſurpation, for *pendente lite nihil innovetur*.

In

In the case of *Elvis*, Knight, *v.* Archbishop of *York* and others, *Hob.* 320. Lord *Hobart* says, "I hold it clear that the bishop cannot refuse to admit the clerk of the party that recovers, and return a plenarty upon another's presentation and right:" and again, "It is clear that the clerk that came in hanging the suit, by the presentation of those that have no right, shall be removed." In 3 *Leon.* 138. *Moore* Bishop of *Norwich*, Lord *Anderson* has these words, "What person soever is presented and admitted after the action brought, and unless it be that the title of the patron be paramount the title of the plaintiff upon such recovery, he shall be removed."

In *Hob.* 193. *Winchcombe* v. *Pulleston*, the defendant in a *quare impedit* pleaded that the plaintiff had filled the church hanging the writ, whereupon the plaintiff demurred, which confessed as much, and yet judgment was given of a writ to the bishop; and *F. N. B.* 35. *c.* agrees that a presentment hanging the writ, shall not abate the writ; and 7 *H.* 4. 34. and 36. This shews that there is no plenarty in contemplation of law by presentation and institution during the suit, for if there were, this writ to the bishop of *ad admittendum clericum* would be totally useless. All these cases are where the judgment was in favour of the plaintiff; but that makes no difference, for in *quare impedit* both plaintiff and defendant are actors. *Booth*, 121. 230. Besides, in *F. N. B.* 35. *c.* it is laid down, that if the plaintiff's clerk be instituted and inducted pendant the writ, it shall not abate the plaintiff's writ; but in that case, if the defendant recover against the plaintiff, he shall avoid the plaintiff's clerk: and so, if the defendant's clerk be admitted pendant the writ against him, if the plaintiff recover, he shall avoid the defendant's clerk.

There can be no doubt then, from these cases, but that the admission of *Rogers* pending the suit was merely void, and that during his lifetime *Bond* might have removed him. The question, then, arises, Whether *Bond*'s suffering him to continue incumbent till his death will make any difference? whether it makes that a plenarty which would otherwise have been wholly void? It certainly does not; for no length of time can give effect and validity to a void act. *Quod ab initio non valet, tractu temporis non convalescit.* The moment the judgment was given, *Rogers* was as to *Bond* amoved. In 2 *Roll. Abr.* 350. *pl.* 6. if a man recovers in a *quare impedit* against the incumbent, the incumbent is so removed by the judgment, that the recoveror may present to the church without any other amoval of the incumbent, though the incumbent continue incumbent *de facto* until the presentment by the recoveror. And in *pl.* 7. By after such recovery in a *quare impedit*, a stranger to the recovery cannot present to the church; for, notwithstanding the recovery, still the incumbent continues incumbent *de facto* as to strangers. This last authority shews the distinction between the effect of the recovery on the parties to the suit, and on strangers; that as to the one, there is a plenarty; as to the other, the church is merely void. In the first case, in *Rolle*, it may be said that the *quare impedit* was against the incumbent himself, but that in this case it was not, but only against the patron: but by analogy the rule will hold in either case, for at the time the suit was instituted the church was void, *Rogers* was not presented; he could not be made a party to the suit. It would be absurd to say that the judgment can remove parties to the suit, but not those introduced pending the suit. If, then, the effect of a judgment on a stranger admitted pending the suit be the same as on the incumbent himself where he is a party to the suit

as to remove him from the time of the judgment being given, I conceive it can make no difference that the writ was not ſued out earlier. For I know of no limitation in law for ſuing out a writ of *ad admittendum clericum*. In *F. N. B.* 38. *f.* If a man do recover an advowſon, and the ſix months paſs, yet if the church be void, the patron may pray a writ unto the biſhop, and ſhall have it; and if the church be void when the writ cometh to the biſhop, the biſhop is bound to admit his clerk. And in reaſon the ſame law is, if the patron after the ſix months preſent to the biſhop, if the church be then void, the biſhop is bound to admit the clerk. This ſhews that there is no time of limitation for ſuing out the writ, but that it may be ſued out at any time whilſt the church is void. If the death of the party can make no difference. In *Hob.* 166. *Winchcombe* v. *Pulleſton*, the ſame thing may be void as to one perſon and not as to another, *&c.* Again, "this preſentation, *&c.* made upon ſimony, is utterly void againſt the king, and the church in no ſort filled by it: which being ſo, it is repugnant in itſelf to ſay, that it ſhould be both void and not void at once againſt the king. Now it is confeſſed that it is utterly void againſt the king during the life of *Say*, ſo that the king might preſent as to a void church, which being granted, it is abſurd to ſay that his death ſhould alter the caſe; for the king cannot be diſpoſſeſſed or barred but by an act, and the death is a privation but no act."—This authority clearly ſhews, that if the church were void as to *Bond*, the death of *Rogers* could make no difference. It is clear, then, that *Bond* was entitled to a writ to the biſhop to admit his clerk; if therefore, the court ſhould give judgment in favour of the preſent defendant, they muſt decide that a clerk coming in under a writ of *ad admittendum clericum* is an uſurper; and ſuch a deciſion would be arraigning the juſtice of the former judgment.

The queſtion in this caſe is, Whether the preſentation now in queſtion is the ninth or tenth turn of the perſon claiming under the laſt common anceſtor who was ſeiſed of the entirety? The declaration ſtates it to be only the ninth turn, and omits for that purpoſe the preſentation of *Rogers*. The defendant in his plea has introduced this preſentation. The replication ſtates that this preſentation was made by one *Gibbon*, pending a ſuit in a *quare impedit* brought by *Gibbon* againſt one *S. Bond*, wherein there was a judgment for *Bond*; but that before *Bond*'s clerk could be admitted, *Rogers* died incumbent. The rejoinder admits this judgment, ſtates the particular time of the death of *Rogers*, which was long after the judgment recovered; and that *Bond* ſued out no writ in the lifetime of *Rogers* to remove him. I admit that the preſentation of *Gibbon*'s clerk pending the ſuit was covinous, and that he might have been removed by writ. But *Bond*'s conduct in not removing him was fraudulent; for if he who was firſt defrauded ſits by, and ſuffers that fraud to continue, when he might have prevented it, to the prejudice of a third perſon, he makes himſelf guilty of fraud. And where an advowſon deſcends to coparceners, the law is exceedingly preciſe in obliging them to due diligence, leſt they may not by any laches on their parts affect the rights of thoſe who are to come in ſucceſſion after them. All the caſes which have been cited on the other ſide prove, that *Rogers* was incumbent as to all the parties to the ſuit. If he had ſued his pariſhioners for tythes, they could not have pleaded this judgment in bar to that action; they could not have impeached his title on that ground to recover as againſt them. He was in full perception of the profits, and enjoyed all the benefits of

Hill, Serj. for the defendant.

the church. *Watſ. Co. In.* ed. folio, 414.; octavo, 749. As to *Bond*, the church was ſo vacant by this judgment that he might have preſented his clerk. The plaintiff has in ſome manner affirmed that a writ was delivered to the biſhop for that purpoſe. This fact, if true, would have been ſome excuſe; but it is falſe: here is in fact no averment of delivery, the plaintiff only ſays, "although he informed the court he had delivered "it." The biſhop is the officer of the court, and if he had been properly ſerved with it, there can be no doubt but he would have executed it. If he had not, this court would have compelled him to have done it. In *F. N. B.* 38 *c.* it is ſaid, that the party recovering ſhall have an *alias* and a *pluries*, if the biſhop do not execute the writ, and attachment againſt the biſhop, if need be. So, in the caſe of *Moore* v. Biſhop of *Norwich*, cited from 3 *Leon.*, the biſhop was fined 10*l.* for not executing the writ, and a *ſicut alias* under a penalty of 100*l.* was awarded. Or he might have had a writ of *quare non admiſit*, as in *F. N. B.* 47. *c.* If a man do recover an advowſon, and hath a writ unto the biſhop to admit his clerk, and he will not admit him, then the party may ſue an *alias* and a *pluries*, or attachment, *&c.* or may ſue a writ out of the Chancery or out of the Common Pleas at his election, *de quare non admiſit, &c.* This fine on the biſhop for a contempt of the court in not obeying the writ was introduced by 25 *Ed.* 3. *c.* 6., which directs that the temporalties ſhall not as before be ſeized into the king's hands for a contempt, but that the court ſhall take a reaſonable fine. Why did not *Bond* then, armed with this proceſs, deliver this writ to the biſhop, or compel him to execute it? Or *Bond* might have had a *quare incumbravit*, for though *ne admittas* was not ſued out to the biſhop, that was unneceſſary, the biſhop being a party to the ſuit. I admit, that there is no difference between the plaintiff and defendant in a *quare impedit*, where the defendant makes title. But it is manifeſt that there would be the greateſt injuſtice done to the other parties in coparcenary, if a party who had recovered in judgment were to lie by, and not take advantage of ſuch recovery till the living became void; he would by this means get two turns. Now this very thing is confeſſed on this record, and not the ſlighteſt excuſe offered for it. Though I may not be able to produce a caſe directly in point, yet there are many that apply upon principle. If an incumbent be deprived or reſign to the ordinary, it is the duty of the ordinary to give notice to the patron, otherwiſe there can be no lapſe; or if he collates or inſtitutes on the preſentation of a falſe patron, the true patron may preſent. But if the true patron do not preſent, and the collatee or preſentee die incumbent, the true patron, if he have only an alternate right of preſentation, has loſt his turn. This was determined in the caſe of *Leak* v. Biſhop of *Coventry* and another, in *Cro. Eliz.* 811. In that caſe there was an alternate preſentation in two perſons, and the clerk of the one patron had been deprived—the biſhop, without giving notice of that deprivation to the other, collated his clerk, which collatee died incumbent. The court ſaid that this collation by the biſhop is good againſt all but the very patron, and this only through defect of notice, ſo as he might have removed the incumbent by a *quare impedit*. But where he doth not remove him, ſo as he dies incumbent, this is a ſerving of his turn, and as a preſentment in his turn, ſo as that the other patron ſhall not be now prejudiced by his negligence, but ſhall have it now as in his turn. And it is a plenarty and incumbency as againſt him, ſo as he now may preſent, and well ſay, that the turn of the other was ſerved. Theſe caſes ſhew the great attention

Bro. Abr. Qu. Incumb. p. 3.

law requires where the patron has only a turn, and the care it takes Ld. that the intereſt of another patron ſhall not be affected by his negligence. Suppoſe the church had been totally void, and *Bond* had ſat ſtill, and ſuffered a lapſe to the biſhop, and the biſhop had preſented, that would have ſatisfied his turn. And as in that caſe the other parceners could not interfere to prevent the lapſe to the biſhop, ſo in this caſe there was no poſſible way for them to make *Bond* take any ſteps to remove *Rogers*. Here *Rogers* lived a conſiderable time after the judgment was recovered; but ſuppoſing he had lived a much ſhorter time, ſtill if he had not been removed, *Bond*'s turn would have been ſatisfied. In the great *commendam* caſe of the King and Queen *v.* Biſhop of *London* and others, in 4 *Mod.* 212. and 1 Lord *Raym.* 26., it was held that if the incumbent die during the continuance of the diſpenſation, the king will loſe his title to preſent. This being determined againſt the crown, holds *à fortiori* againſt a ſubject.

The preſent caſe is grounded on wilful laches, which is not denied by the plaintiff himſelf. Had the diſpute been only between *Gibbon* and *Bond*, and *Bond* had, after the recovery, permitted *Gibbon*'s clerk to continue incumbent, his acquieſcence would have prejudiced no one. But where other perſons have an intereſt, his acquieſcence ſhall not be allowed to prejudice their rights. For in law and in equity, where there is an omiſſion, of which a party may take advantage, and neglects to do it, and ſuch neglect works prejudice to a third perſon, there, the rule of *vigilantibus lite nihil innovetur* does not hold.

There is a great difference where the vacancy is cauſed by the death of the incumbent, and where it is cauſed by his reſignation. It was held in the caſe of the Queen *v.* Biſhop of *Lincoln* and *Ligh*, *Cro. Eliz.* 119. that by an avoidance by reſignation or deprivation, the queen ſhould not loſe her preſentment; but, if the incumbent had died, it were otherwiſe, and ſo in *Goldſ* 66. 86. The reaſon is that an avoidance made by reſignation may be covinous, and therefore ſhall not paſs for a turn; but not in caſe of death, there can be no ground for preſuming covin.

Lord *Loughborough*, after ſtating the pleadings and the arguments that had been uſed by the counſel on each ſide, ſaid—It is material upon theſe pleadings to inquire at what time *Smith* was preſented by *Bond*. Neither the replication nor the rejoinder have ſtated any given time when the preſentation was made. But the plea has ſtated expreſsly that *Rogers* was incumbent, and that *Smith* was not preſented by *Bond* till after the death of *Rogers* in the eighth turn, after the death of *Richard Roberts*. That preſentation muſt therefore have been an uſurpation upon the right of the perſon then entitled to preſent; and as the replication has neither avoided nor denied this fact in the plea, of courſe it ſtands admitted. There muſt therefore be judgment for the defendant.

) Of Severance and Survivorſhip: And herein,

What Diſpoſition will work a Severance, and defeat the Right of Survivorſhip: And herein,

1. *What Diſpoſition with a Stranger will work a Severance.*

Patrick v. Powlett, 2 Atk. 54.

A recital in a marriage settlement to which one only of two joint-tenants was party that she should enjoy her moiety of personal estate to her separate use, and a covenant on the part of her husband that she should enjoy it quietly, &c. and that *for want of issue of her own body*, it should go to the next of kin of her own family, was holden by Lord *Hardwicke* not to sever the jointure; for where there is no agreement for that purpose there must be an actual alienation to make it amount to a severance; and in this case there was nothing more than a declaration of one of the parties.

2. *What Disposition or Conveyance by one Joint-tenant or Tenant in common with his Companion, will work a Severance.*

Hinton v. Hinton, 2 Vez. 634.

If two joint-tenants enter into articles to make partition, and such articles amount in enquiry to a severance of the joint-tenancy, they will be enforced against the survivor.

Hall v. Digby, 4 Br. P. C. 224.

If a bequest of the residue of personal estate, which is a joint-tenancy, be employed by mutual consent *in trade*, this shall not amount to a severance, or defeat the right of survivorship.

Baldwin v. Johnson, in Ch. 7th Feb. 1792.

So, where two executors, joint-tenants of the residue of their testator's personal estate, divided the same, except a sum of 500*l.* 4 per cent. bank annuities, which they set apart to answer a life annuity of 20*l.* bequeathed by the will, and then one died, making the plaintiffs his executors; it was in vain attempted to be argued, that this amounted to evidence of an intended severance of the whole property, for the lord-chancellor determined, that in respect of the bank annuities, the claim of survivorship must prevail.

The prayer of the bill being, that the bank annuities should be transferred in trust to answer the annuity, in order to be forthcoming at the annuitant's death, and these divided in moieties, or to that effect, the bill was dismissed with costs. Wooddes. 132.

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(*By the* (*a*) 8 & 9 *W.* 3 *cap.* 31) [Where a bill is brought in equity, to have a partition between two joint-tenants or tenants in common, the plaintiff must shew a title in himself to a moiety, and not all ge generally that he is in possession of a moiety; and this is stricter than partition at law, where seisin is sufficient, the statute of 8 & 9 W. 3. was made for that reason. *Per* Ld. Hardwicke, 2 Atk. 380.]

2 Br. Ch. Rep. 224.

The joint-tenancy may be served by any contract; therefore a note will do it. And if the joint-tenants should say in an answer in Chancery that they had agreed to sever, this, it seems, would be considered as a sufficient act to effect a severance. But their merely saying in an answer that it was a tenancy in common, will not have the operation of a severance.

Abel v. Heathcote, 2 Vez. jun. 98.

Where trustees under a settlement of an undivided part of an estate holden in common have power given them to sell or exchange, they may within the limits of that power make a partition. Indeed there is no occasion to give trustees an express power to make partition; since an estate holden in common cannot be so settled upon the marriage of one of the tenants as to prevent the right of the others to make partition.

2 Vez. jun. 124. 570. Ambl. 236. 2 Atk. 380.

Partition is, regularly, a proceeding at common law: but the court of Chancery now entertains suits for it, though it has no original jurisdiction, nor is any express authority given to it by statute, we mean, as to joint-tenants, for as to tenants in common, its jurisdiction originates in the statute, which makes tenants in common accountable to one another. The jurisdiction of the Chancery probably obtained from a principle of convenience

convenience; for the party chooſing to have a partition has the law open to him; there is no equity for it: but the commiſſion is far more convenient than the writ: the valuation of the proportions is much more conſidered, and the intereſts of all the parties are much better attended to. But, be the origin of this juriſdiction what it may, a bill for a partition is now conſidered as a matter of right, provided the party applying for it can ſhew a title.

A court of equity will decree a partition as well where one of the parties is an infant, as where they are both adult: but it will reſpite the conveyance in each caſe till the infant comes of age. It is clear, that the infant will be bound by ſuch a decree where he is plaintiff; but *quære*, whether he will be ſo, where he is defendant. 2 P. Wms. 518. Ambl. 197. 3 Atk. 627.

A partition was decreed of an eſtate, two thirds whereof belonged to *A.*, and one third to *B.* The eſtate conſiſted (*inter al.*) of a great houſe and park, and of a farm and lands about it of 1000*l. per annum*. *B.* inſiſted to have a third of the houſe and park aſſigned to him by the commiſſioners, who were to make the partition; but Lord Chancellour *Parker* held, that though *B.* muſt have a third part in value of this eſtate, yet there was no colour of reaſon that any part thereof ſhould be leſſened in value, in order that he might have a third part of it; that if *B.* ſhould have one third of the houſe and of the park, this would very much leſſen the value of both. He recommended therefore that the ſeat and park ſhould be allowed to *A.*, ſhe having two thirds, and that a liberal allowance out of the reſt of the eſtate ſhould be made to *B.* in lieu of his ſhare of the houſe and park. His lordſhip ſaid, if there were three houſes of different value to be divided among three, it would not be right to divide every houſe; for that would be to ſpoil every houſe; but ſome recompence is to be made, either by a ſum of money, or rent for owelty of partition, to thoſe that have the houſes of leſs value. It is true, if there were but one houſe, or mill, or advowſon to be divided, then this entire thing muſt be divided in manner as the other ſide contended; *ſecùs*, where there are other lands which may equalize the ſhares. By this reaſon, every farm-houſe upon the eſtate muſt be divided which would depreciate the eſtate, and occaſion perpetual contention; and it may be the intent of the defendant, when this partition is made, to compel the plaintiff to give him forty years purchaſe for his third of the houſe and park. Earl of Clarendon v. Bligh, 1 P. Wms. 446.

There are no coſts upon a writ of partition at law; therefore he who procures the partition muſt be at the whole expence, unleſs the other will be at the expence for his own convenience. But a court of equity allows coſts to the iſſuing and executing of the commiſſion, though not farther; and directs them to be paid by parts in proportion to their intereſts in the eſtate. 2 Vez. jun. 570.

(K) Joint-tenants and Tenants in common how to ſue and be ſued; And herein of Summons and Severance.

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(*But though tenants*) And wherever one entire injury is done to tenants in common, they ſhall have one entire remedy. 2 Bl. Rep. 1077.

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(*Tenants in common*) If a terre-tenant pay the whole rent to one tenant in common contrary to the expreſs notice of the other, the latter may diſtrain for his ſhare. Harriſon v. Barney, 5 Term Rep. 246.

(*And as in*) And where the injury is separate, they may have several actions: and there fore, one tenant in common may sue for the double value of his moiety of the rent under th statute of 4 Geo. 2. c. 28. Cutting v. Darby, 2 Bl. Rep. 1077.

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(*Wherever tenants*) But it is said, that in *assumpsit*, advantage may be taken of this at the tri for then it would not be the same contract. Legliſe v. Champante, 2 Str. 820.

(L) Of the Remedies which Joint-tenants and Te nants in common have againſt each other.

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(*But if one*) And one tenant in common may maintain an action for meſne profits againſt h companion. Goodtitle v. Tombs, 3 Wilſ. 1118.

JOINTURE.

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(B) Of its becoming a Bar of Dower: And herei of the 27 *H.* 8. *cap.* 10., and the Rules to be ob ſerved in making a good Jointure, and ſuch one as will be an effectual bar of Dower.

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(*So where one*) This caſe, as here reported, is not warranted by the report in Moor. For b that it appears, that ſuch a deviſe was holden to be a bar of dower by two judges, Weſton an Benlows, againſt Dyer.

(*On this diſtinction*) Lawrence v. Lawrence. *infra.* Lemon v. Lemon, Vin. Abr. tit. *Dower*, T. pl. 45. Hitchin v. Hitchin, Pr. Ch. 133. Galton v. Hancock, 2. Atk. 427. Tinney v. Tinney, Atk. 8. Ineledon v. Northcote, *id.* 436. Ayres v. Willis, 1 Vez. 230. Charles v. Andrew 9 Mod. 152. Broughton v. Errington, 7 Br. P C. 12. Pitt v. Snowden, 1 Br. Ch. Rep. 29 Pearſon v. Pearſon; *id. ibid.* But it is not abſolutely neceſſary that a teſtator ſhould expreſs declare that the deviſe ſhould be a ſatisfaction of dower; it is ſufficient that it appears from ci cumſtances, as where allowing the double proviſion would diſappoint or materially affect the wi Arnold v. Kempſtead, Ambl. 466., and 1 Br. Ch Rep. 292. Villa Real v. Lord Galway, Amb 682., and 1 Br. Ch. Rep. *ubi ſupr.* Jones v. Collier, Ambl. 730. Wake v. Wake, 3 Br. C Rep. 235. In ſuch caſe the widow muſt make her election. The accepting of an annuity f three years under a will, the widow during that time claiming both, is not concluſive upon he but ſhe may ſtill make her election. Wake v. Wake, *ubi ſupr.*

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(*J. S. ſeiſed of*) *Vide ſupr.* 603 3 Atk. 8. S. C. by the name of Vivard v. Longdale.

Meredith v. Jones, 1 Vern. 463.

A. in conſideration of a portion, articled to ſettle a jointure, but die before the portion was paid, or the ſettlement was made. The widow took out adminiſtration, and ſo entitled herſelf to the portion: ſhe then filed a bill againſt the heir of the huſband to have her jointure ſettled. But the court ſaid, the plaintiff ſhall not have the money as adminiſtratrix and the jointure too, which was agreed to be made in conſideration of the money, and in expectation that the huſband ſhould have received it; and therefore diſmiſſed the bill with coſts. But the reporter adds a quere *de hoc*; for ſhe is entitled to theſe two demands in diſtinct capacities; and the debts may appear hereafter to exhauſt the aſſets; and in caſe the huſband had actually received the portion, and it had been in his poſſeſſion ſhe would have had it as his adminiſtratrix.

6. The

6. That it must not be made during the Coverture.

(*If lands are given*) Yet it seemeth, saith *Perkins*, that she may disagree Page 227
by bringing a writ of dower, notwithstanding that the estate were deter-
mined; for otherwise by such means, the wife may be ousted of her
dower in every purchase made by her husband; and yet during the mar-
riage she is always by law under the government of the husband in such
manner and form, as that she cannot give away any manner of profit ari-
sing out of the lands, without the leave of her husband; and she cannot
disagree to the same estate during the marriage.

JURIES. Page 231

(A) Of the several Kinds of Juries and Inquests: And herein of the Number such Jury must consist of.

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(*Juries are distinguished*) 2 Burr. 1088.

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(*It is said*) To what amount the qualification should be, is uncertain, and seems to be *casus omissus*, and proper to be supplied by the legislature. 4 Bl. Com. 302.

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(*Also it hath*) See Cro. Car. 259. 1 Sid. 233. and 3 Geo. 2. c. 25. § 9.

(B) Of the Jury Process, and Manner of convening the Jury: And herein,

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(*Upon the surmise*) But such a surmise with respect to the under-sheriff will not authorise the awarding of the venire to the coroners. Cro. Ja. 547. Symonds v. Walsh. But see 2 Lill. Pr. Reg 155.

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(*If a venire*) But notwithstanding the statute, if after a special jury has been struck, the cause set off for defect of jurors, no new jury can be struck; but the cause must be tried by the jury first appointed. Rex v. Perry, 5 Term Rep. 453. And the same jury shall serve for the trial of the cause, notwithstanding an intermediate change of sheriffs. Rex v. Hart, Cowp. 412.

(C) In what Cases, and in what Manner a *Tales* is grantable.

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(*If all the jury*) This is still necessary on trials at bar. 5 Term. Rep. 456, 7. 462. The plaintiff may avoid a nonsuit by refusing to pray a tales. Jenkins v. Purtel, 2 Str. 707.

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(*The statutes*) Such warrant not necessary where the prosecutor hath an interest. 1 Lev. 223.

A juror who has been challenged on the principal panel, ought not to be sworn as a *talesman*. Parker v. Thoroton, 1 Str. 649

Ld. Raym. 1410.

(D) In

(D) In what Cases, and in what Manner Special Juries are appointed.

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(*By the* 3 *Geo.* 2.) But in such case, the plaintiff may move the court for a rule to have a [special] jury, which is a better sort of *common* jury. Imp. K. B. 407. 5 Term Rep. 460. And before the introduction of special juries, this rule appears to have been frequently granted for the trial of causes at *nisi prius*. Rex v. Smith, 1 Str. 265.

But in common causes between assizes and assizes, the practice is different. Cross v. Skipwith, Barnes, 449. Dobson v. Stevens, *id.* 461. Special jury struck and returned by elizors of the court. Holland v. Heron, Barnes, 465. Motion for special jury too late after *ven. fa.* and [re]turn filed. Clark v. Sheppard, Barnes, 488.

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(*And by sect.* 16.) Soon after the passing of this act, it was determined that all the costs of a special jury, except those of striking, must be paid by the party losing. Wilks v. Eames, Andr. 5. 2 Str. 1080. S. C. Eyles v. Smart. Suppl. to Lill. Pr. Reg. 7. But this giving occasion to applications for special juries in trivial causes, the legislature interposed, and by stat. 24 Geo. 2. c. [23] enacts, that the party applying shall, besides the costs of striking, pay all the expences occasioned by such special jury, and be allowed only what he would be entitled to, if the trial had been by a common jury; unless the judge shall immediately after the trial certify in open court, under his hand upon the back of the record, that it was a cause proper to be tried by a special jury.

(E) Who are to be returned: And herein of the Qualifications and several Causes for which they may be challenged: And,

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(*If the Sheriff*) Action of debt to recover the penalty of a bye-law calculated to exclude strangers from trafficking in the city of *Chester*. The bye-law limited the cause to be tried before the local jurisdiction there; one third of the penalty was allotted to poor prisoners; one third to the informer; and the remaining third was not subject to any particular disposition. The [defendant] was challenged because the local sheriffs who impanelled it, were citizens and freemen of *Chester*, and the polls were challenged, because the jurors were also freemen. Both these objections were over-ruled by the portmote court of that city, but that judgment was reversed in the court Great Sessions, and the reversal affirmed in the King's Bench. Hesketh v. Braddock, 3 Burr. 1847. See the form of the challenge. 3 Wooddes. 340.

(*Consanguinity*) In the case of Mounson v. West, 1 Leon. 88. it was argued, that affinity was a challenge to the *favour* only; and to this two judges inclined at first; but after time taken to consider the point, it was adjudged to be a *principal* challenge by three judges, the fourth (Periam J.) hesitating. From this case these two positions may be inferred: that having issue living by the wife, though she is dead, is sufficient to continue the husband's affinity: that it is not necessary that the issue should be inheritable to the land, where land is the subject of the action. Co Lit. 158. n. 2. 13th edit.

(*It has been*) 2 Br. P. C. 114. tit. *Trial*, (H. c.) p. 8.

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(*Also, infamy*) But *qu.* whether outlawry in a *personal* action be sufficient to disqualify. Cro. Car. 134. W. Jon. 198. S. C. (*d*) According to modern cases it is not the infamy of the punishment, but of the crime, which incapacitates. 2 Wils. 18.

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(*By the* 2 *H.* 5.) This seems extended to *all* by 27 El. c. 6.

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(*So, if an action*) In such case, the trial shall be in the next county. 2 Burr. 859, 60.

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(*Either party*) *A fortiori* then, no cause to set aside a verdict. 1 Str. 643. Com. Rep. 501.

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(*This peremptory*) *Charles Radcliffe* had been convicted of high-treason; and upon a collateral issue that he was not the person, a peremptory challenge was insisted upon, which was refused by Lee, C. J. 1 Bl. Rep. 4. 6. Fost. Cr. Law. 40.

(G) How to be kept and discharged.

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(*It seems to have*) Fost. 29. 39. 76 Stevenson's case. Leach's cases, 443.

(H) In what Cases and in what Manner to have a View.

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(*And to this purpose*) Upon this ſtatute, it had become the practice to grant a view of courſe upon the motion of either party: and a notion having prevailed, that ſix of the firſt twelve upon the panel, muſt attend upon the view, and that if they did not appear at the trial, the cauſe muſt be put off, the court of King's Bench thought it their duty to interfere, and to take care that their ordering a view ſhould not obſtruct the courſe of juſtice, and prevent the cauſe from being tried; and they thought it better that a cauſe ſhould be tried upon a view had by any ſix, or by fewer than ſix, or even without any view at all, than that the trial ſhould be delayed for a great length of time. Accordingly they reſolved not to order a view any more, without a full examination into the propriety and neceſſity of it, unleſs the party applying would come into ſuch terms, as might prevent an unfair uſe from being made of it. Agreeably to this reſolution, they required a conſent, which has ever ſince been made a part of the rule, that in caſe no view be had, or if a view be had of any of the jurors, though not ſix of the firſt twelve, yet the trial ſhall proceed, and no objection be made on either ſide, on account thereof, or for want of a proper return to the writ. 1 Burr. 252. Tidd's Pr. 521.

(I) What Irregularities and Defects in convening, or in the Qualifications of the Jurors, are amendable, and aided after Verdict.

It is no objection that the jury were not ſummoned on the *venire*, or attached on the *diſtringas*, for there can be but one general return ſince the balloting act, 3 *Geo.* 2. *c.* 25: and beſides, the want of a return is cured by the appearance of, and trial by a proper jury. Phillips v. Phillips, Andr. 248.

Of the Judgment in attaint.

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(*Alſo, where the Jury*) 2 Salk. 645. 1 Str. 642.

Juſtices of Peace.

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(F) Their Indemnity and Protection by the Law in the right Execution of their Office; and their Puniſhment for the omiſſion of it.

(A) Of the ancient Officers, called Conſervators of the Peace.

(*As to the*) But neither privy-counſellors nor ſecretaries of the ſtate are, as ſuch, conſervators of the peace. 11 St. Tr. 320.

(B) Of

(B) Of the firſt Inſtitution, and general Statutes which give Juſtices of Peace a Juriſdiction.

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(*And it is further enacted by* 34 *E.* 3.) As the general ſtanding authority to hear and determine was not given till this ſtatute, it was not, probably, till then, that they were commonly reputed and called *juſtices*, as we find they are by the ſtatute of 36 Edw. 3. ſt. 1. c. 12. which directs their ſeſſions to be holden four times in the year. 2 Reeves' Hiſt. 472.

(C) Of their Commiſſion, and Manner of appointing them.

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(*Juſtices of the*) Juſtices of the peace may likewiſe be by act of parliament; as the Biſhop of *Ely* and his temporal ſteward, the Biſhop of *Durham* and his temporal chancellour, and the Archbiſhop of *York* and his temporal chancellour of the liberty of *Hexam*, by ſtat. 27 H. 8. c. 23. § 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41,

And if the defendant intends to inſiſt upon any lands not contained in ſuch oath, he ſhall at or before the time of pleading deliver to the plaintiff or his attorney a notice in writing ſpecifying ſuch lands, and the pariſh and county where they are ſituate (offices and benefices excepted, which ſhall be ſufficient to aſcertain by their uſual names): And if the plaintiff in ſuch ſuit ſhall think fit thereon not to proceed further, he may with leave of the court diſcontinue his ſuit, on payment of coſts to the defendant as the court ſhall award.

Upon the trial, no eſtate, but what is contained in the oath and notice, ſhall be admitted as any part of the qualification.

Provided, that where the qualification or any part thereof conſiſts of rent, it ſhall be ſufficient to ſpecify in ſuch oath or notice, ſo much of the lands, out of which ſuch rent is iſſuing as ſhall be of ſufficient value to anſwer the rent.

And if the plaintiff or informer ſhall diſcontinue (otherwiſe than as aforeſaid) or be nonſuit, or judgment be given againſt him, he ſhall pay treble coſts.

But this ſhall not extend to any city, town, or liberty, having juſtices of their own; nor to any peer, lord of the privy council, judge, attorney or ſolicitor general, or to the juſtices of the great ſeſſions of *Cheſhire* and *Wales*, or to the eldeſt ſon or heir apparent of a peer, or of any perſon qualified to ſerve as a knight of the ſhire; nor to the officers of the board of green cloth or principal officers of the navy, or the two under-ſecretaries in each of the offices of the principal ſecretary of ſtate, or to the ſecretary of *Chelſea* college, in their reſpective liberties; or to the heads of colleges or halls, or vice-chancellour of either of the univerſities, or to the mayor of *Oxford* or *Cambridge*.

And by 1 *Geo.* 3. *c.* 13. and 7 *Geo.* 3. *c* 9. All perſons who were juſtices at the demiſe of his late majeſty, or who have been or ſhall be appointed juſtices by any commiſſion granted or to be granted by his preſent majeſty, or any of his ſucceſſors, and have taken and ſubſcribed, or ſhall after the iſſuing of the firſt commiſſion whereby they ſhall be appointed juſtices take and ſubſcribe the oath of office before the clerk of the peace or his deputy, and alſo the oath required by 18 *Geo.* 2. *c.* 20. ſhall not be obliged during the reign of his preſent majeſty, or during any future reign in which ſuch oaths ſhall have been ſo taken and ſubſcribed, to take and ſubſcribe the ſame again. And generally there is an indemnifying clauſe in ſome act almoſt every ſeſſion of parliament, provided they qualify according to 18 *Geo.* 2. *c.* 20. within a time in ſuch act limited.

Although a man be a *mayor*, yet it doth not follow that he is a juſtice of the peace, for that muſt be by a particular grant in the charter. *Per* Hob, C. J. But although he be not a juſtice of the peace by the charter, yet there are many caſes, ſaith Dr. *Burn*, wherein he hath the ſame power as a juſtice of the peace given unto him by particular ſtatutes; as for inſtance, with regard to the cuſtoms, ale-houſes, Lord's day, ſwearing, gaming, weights, ſervants, fuel, leather, orchards, ſoldiers, and divers others. 2. Ld. Raym. 1030. 3 Inſt. 12.

(E) Of

(E) Of their Authority and Jurisdiction pursuant to their Commission, and the general Statutes relating to them: And herein,

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(*Every single*) And by 7 Geo. 3. c. 21., in cities, boroughs, towns corporate, franchises, and liberties, which have only one justice of the *quorum*; all acts, orders, adjudications, warrants, indentures of apprenticeship, or other instruments, done or executed by two or more justices qualified to act therein, shall be valid, although neither of the said justices shall be of the *quorum*.

(*So if a thing*) Where the act to be done is of a *judicial* nature, the justices must both be present at it, as in the instances put in the text, and in making orders of removal, Rex v. Wyke, Andr. 238.; appointing overseers, Rex v. Forrest, 3 Term Rep. 38.; assenting to the binding of parish apprentices, Rex v. Inhabitants of Hamstall Ridware, *id.* 38.; but where the act to be done is merely *ministerial*, the concurrence of the justices together is not requisite; as, it seems, in the allowance of a poor-rate. Rex v. Justices of Dorchester, 1 Str. 393.

Rex v. Brooke, 2 Term Rep. 190.

One magistrate cannot supersede the warrant of commitment of another magistrate without a legal inquiry and examination of the matter.

Rex v. Loxdale, 1 Burr. 447.

So, the statute of 43 *Eliz. c.* 2 § 1. for the appointment of overseers, which makes mention of *justices in or near the parish or division*, Lord *Mansfield* said, was only directory.

Rex v. Price, Cald. 305.

So, where a statute directs an act to be done by justices *acting for the division*, any justice within the county, acting within the division, is for this purpose a justice of the division.

Rex v. Stevens, Cald. 302

So, the authority given by the stat. of 43 *Eliz. c.* 7. to convict before any justice, *&c. of the county, city, or town corporate, where the offence shall be committed*, is constructively given to any justice, *&c.* of any *place, district, or liberty*, in any county where, *&c.* as to a magistrate of the *Isle of Ely* in the county of *Cambridge*.

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(*Justices of the Peace*) For without express words, without a *ne intromittant* clause in the commission or charter, the county justices shall not be excluded. Blankley v. Winstanley, 3 Term Rep. 279. Talbot v. Hubble, 2 Str. 1154. Rex v. Sainsbury, 4 Term Rep. 456.

Also, by 9 *Geo.* 1. *c.* 7. a justice dwelling in the city or precinct that is a county of itself, within the county at large, may act at his own dwelling-house for such county at large.

And by 24 *Geo.* 2. *c.* 55. if any person against whom a warrant shall be issued, shall escape, go into, reside, or be in any place out of the jurisdiction of the justice granting the warrant, any justice of the peace where such person shall be, upon proof on oath of the hand-writing of the justice granting such warrant, shall indorse his name thereon, which shall be a sufficient authority to execute the warrant within such other jurisdiction.

And the justice may further order (if he thinks fit) the party, according as he shall appear bailable or not bailable upon the face of the warrant, to be brought before himself or some other justice or justices of that county, or to be carried back into the county from which the warrant did issue.

Rex v. Morgan, Cald. 156.

Under the statute 11 *Geo.* 2. *c.* 19. for the more effectual securing of the payment of rents and preventing of frauds by tenants, justices either of the county from which tenants fraudulently remove goods, or of that in which they are concealed, may convict the offenders in their respective counties.

Rex v. Sainsbury, 4 Term Rep. 451

Where two sets of magistrates have a co-ordinate jurisdiction within a district, they may all act together; but if the jurisdiction previously attach

in the one ſet, any attempt in the other ſet to wreſt it from them, is illegal, and the ſubject of an indictment.

The juriſdiction of juſtices of the peace and of commiſſioners of exciſe, is, as to the exciſe laws, exactly the ſame, within their reſpective juriſdictions. Rex v. Whitbread, Doug. 551. n.

The juriſdiction of juſtices of the peace and of commiſſioners under the hackney-coach ſtatutes is co-extenſive, and therefore, a juſtice of the peace after convicting a coachman for refuſing to go with his coach, may immediately commit him to the houſe of correction, if he do not pay the penalty. 9 Ann. c. 23. 1 Geo. 1. ſt. 2. c. 57. 7 Geo. 3. c. 44. 10 Geo. 3. c 44. Duck v. Addington, 4 Term Rep. 447

Regularly, a juſtice of the peace ought not to execute his office in his own caſe; but cauſe the offenders to be convened or carried before ſome other juſtice, or deſire the aid of ſome other juſtice being preſent. And therefore, the mayor of *Hereford* was laid by the heels for ſitting in judgment where he himſelf was leſſor of the plaintiff in ejectment, though he by the charter was ſole judge of the court. Dalt. c. 173. *Per* Holt, C J. 1 Salk. 396.

So, where a juſtice of the peace who was ſurveyor of the high-ways, joined in making an order at the ſeſſions in a matter which concerned his office, and his name was put in the caption, the order was for this reaſon quaſhed. Caſe of Foxham Tithing in Wilts. 2 Salk. 607.

So, an order of removal of a poor perſon from *Great Chart* to *Kennington* was quaſhed, becauſe one of the juſtices who made the order was an inhabitant of *Great Chart* at the time, and charged to the poor rate there. Burr. Settl. Ca. 194.

This laſt determination ſeemeth to have given occaſion to the ſtat. 16 *Geo.* 2. *c.* 18. which enacts, that the juſtices may do all things appertaining to their office, ſo far as the ſame relates to the laws for the relief, maintenance, and ſettlement of the poor; for paſſing and puniſhing vagrants; for repair of the highways; or to any other laws concerning parochial taxes, levies, or rates, notwithſtanding that they are rated, or chargeable with the rates within any place affected by ſuch their acts. Provided, that this act ſhall not empower any juſtice for any county at large, to act in the determination of any appeal to the quarter ſeſſions of ſuch county, from any order, matter, or thing relating to any ſuch pariſh, townſhip, or place, where ſuch juſtice is ſo charged or chargeable.

And in ſome caſes, if the juſtice ſhall act in his own cauſe, it ſeemeth to be juſtifiable, as, when a juſtice ſhall be aſſaulted; or, (in the execution of his office eſpecially, ſhall be abuſed to his face, and no other juſtice preſent with him; then, it ſeemeth, he may commit ſuch offender until he ſhall find ſureties for the peace for his good behaviour, as the caſe ſhall require: but if any other juſtice were preſent, it were fitting to deſire his aid. Dalt. c. 173. Rex v. Revel, 1 Str. 420.

Juſtices of the peace, it ſeemeth, may ſuperſede their own order *quia improvidè emanavit*, if it have not been acted upon. Pariſhes of Pancras and Rumbald in Suſſex, 1 Str. 6. 1 Seſſ. Ca. 106. No. 98. S. C.

Lord *Hale* ſaith, (contrary to the opinion of Lord *Coke*,) that the juſtices out of ſeſſions may iſſue their warrant for apprehending perſons charged with crimes within the cognizance of the ſeſſions, and bind them over to appear at the ſeſſions, although the offender be not yet indicted. But in another place he ſaith, this ſeemeth doubtful; and one thing which ſeemeth to make againſt it is, that in moſt caſes of this nature, though the 1 H. H. P. C. 579. *Id.* 2 H. H. P. C. 113.

the party were indicted, or an information preferred, yet a *capias* was not the firſt proceſs, but a *venire facias* and *diſtringas*. And Serjeant *Hawkins* on this point ſaith thus: It ſeems that anciently no one juſtice could legally make out a warrant for an offence againſt a penal ſtatute or any other miſdemeanor, cognizable only by a ſeſſions of two or more juſtices; for that one ſingle juſtice hath no juriſdiction of ſuch offence, and regularly, thoſe only who have juriſdiction over a cauſe can award proceſs concerning it; yet the long, conſtant, univerſal, and uncontrouled practice of juſtices of the peace ſeems to have altered the law in this particular, and to have given them an authority in relation to ſuch arreſts, not now to be diſputed. However, as Dr. *Burn* very well obſerves, the authority of juſtices of the peace being by the ſtatute law, and no ſtatute having expreſsly given to them ſuch power, (unleſs in ſpecial caſes; which operate againſt, rather than eſtabliſh a general power,) it ſeemeth beſt in ordinary caſes, and more conſonant to the practice of the ſuperior courts, to iſſue a ſummons againſt the offender, and not a warrant, in the firſt inſtance; unleſs in caſes of felony, or where the offender in other reſpects is to ſuffer corporal puniſhment.

2 Hawk. P. C. c. 13. § 16.

Vol. 3 tit. *Juſtices*, &c. 31.

By the act of 18 *Geo.* 3, *c.* 19. juſtices of the peace are enabled to give coſts upon complaints determined before them out of ſeſſions; and by the 33 *Geo.* 3. *c.* 55. to impoſe fines upon conſtables, overſeers of the poor, and other peace or pariſh officers for neglect of duty, and on maſters of apprentices, for any ill ill uſage of their apprentices, whether bound by any pariſh or townſhip or otherwiſe, provided that not more than the ſum of ten pounds be paid upon the binding of them.

(F) Their Indemnity and Protection by the Law in the right Execution of their Office; and their Puniſhment for the Omiſſion of it.

A Juſtice of the peace is ſtrongly protected by the law, in the juſt execution of his office. He is not to be ſlandered or abuſed: if he is ſlandered in his preſence, he may commit, or indict the party: if in his abſence, he is entitled to redreſs himſelf by action.

Aſton v. Blegreve, 1 Str. 617. Kent v. Pocock, 2 Str. 1168. Rex v. Revel, 1 Str. 420. Rex v. Pocock, 2 Str. 1157.

He is not puniſhable at the ſuit of the party, but only at the ſuit of the king, for what he doth as judge, in matters which he hath power by law to hear and determine without the concurrence of any other; for, regularly, no man is liable to an action for what he doth as judge: but in caſes wherein he proceeds miniſterially, rather than judicially, if he acts corruptly, he is liable to an action at the ſuit of the party, as well as to an information at the ſuit of the king. But he muſt have acted *corruptly* to ſubject himſelf to puniſhment by information: for though he ſhould even act illegally, yet if he has acted honeſtly and candidly, without oppreſſion, malice, revenge, or any bad view or intention, an information will not be granted againſt him, but the party complaining will be left to his ordinary legal remedy, by action or indictment.

2 Hawk. P. C. c. 13. § 20. Rex v. Young, 1 Burr. 556. Rex v. Cox, 2 Burr. 1785. Rex v. Palmer, 2 Burr. 1162. Rex v. Jackſon, 1 Term Rep. 653.

Nor will the court grant an information againſt him for an improper conviction, unleſs the party complaining make a full exculpatory affidavit.

Rex v. Webſter, 3 Term Rep. 388.

Not

Nor ſhall he be liable to be puniſhed both ways, that is, both criminally and civilly: but before the court will grant an information, they will require the party to relinquiſh his civil action, if any ſuch is commenced. And even in the caſe of an indictment, and though the indictment is actually found, yet, the attorney-general, (on application made to him,) will grant a *noli proſequi* upon ſuch indictment, if it appear to him that the proſecutor is determined to carry on a civil action at the ſame time. Rex v. Fielding. 2 Burr. 719

He is enabled to plead the general iſſue in any action that may be brought againſt him for any thing done by virtue of his office; and to give the ſpecial matter in evidence; and if he has a verdict in his favour, is entitled to double coſts. And ſuch action ſhall not be laid but in the county where the fact was committed. 7 Ja. 1. c. 5. 21 Ja. 1. c. 12.

And by ſtat. 24 *Geo.* 2. *c.* 44. it is enacted, that no writ ſhall be ſued out againſt, or copy of any proceſs at the ſuit of a ſubject ſhall be ſerved on any juſtice for any thing done by him in the execution of his office; until notice in writing ſhall have been given to him or left at his uſual place of abode by the attorney for the party, one month before the ſuing out, or ſerving of the ſame; containing the cauſe of action, and indorſed with the attorney's name and place of abode; for which he ſhall be entitled to a fee of 20*s.* and no more. And unleſs it is proved on the trial that ſuch notice was given, the juſtice ſhall have a verdict and coſts. Nor ſhall any evidence be permitted to be given by the plaintiff on the trial, of any cauſe of action, except ſuch as is contained in the notice. And the action muſt be commenced within ſix months after the act committed. § 3. § 5. § 8.

But where the plaintiff in ſuch action ſhall obtain a verdict, and the judge ſhall in open court certify on the back of the record, that the injury for which ſuch action was brought, was wilfully and maliciouſly committed, the plaintiff ſhall have double coſts. § 7.

If a juſtice will not, on complaint to him made, execute his office, or, if he miſbehave in his office, the party grieved may move the court of King's Bench for an information, and afterwards may apply to the court of Chancery to put him out of the commiſſion. Crom. 7. 2 Atk. 3.

And a magiſtrate forfeits the protection of the law in the execution of his office, by beginning a breach of the peace himſelf. Rex v. Symonds, Ca. temp. Hardw. 240

Leaſes and Terms for Years, Page 295

(*A leaſe for years*) 1 Term Rep. 598-9.

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(*And though*) Long terms, as for 2000 years, are conſidered (at leaſt after part of the time has paſſed) not as leaſes, but as terms to attend the inheritance. Cowp. 597.

(U) Leaſes when forfeited.

(X) Of the Renewal of Leaſes, by whom and for whoſe benefit.

(A) Of

(A) Of what Things Leaſes may be made for Years.

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(*And although*) But ſee 11. 8 & 9 W. 3. c. 27 and 27. G. 2. c. 17, with reſpect to this office.

By the 27 G. 3. *c.* 26. the lord treaſurer, or commiſſioners of the treaſury for the time being are empowered to let to farm for any term, not exceeding three years, the duties upon poſt-horſes.

(B) Of the Perſons who may make Leaſes: And herein, firſt, of Leaſes made by Infants.

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(*Others opinions*) This opinion hath been confirmed by what fell from the court in the caſe of Zouch v. Parſons, 3 Burr. 1806.

The father of an infant leaſed his ſon's lands for 20 years, and at full age the ſon, upon the back of the indenture, releaſed all his right to the defendant: it was holden by *Wray*, J. that this leaſe was made by the father, as guardian, and voidable by the ſon; and that the indorſement by the ſon was a good aſſignment.

(C) Of Leaſes made by Huſband and Wife: And herein,

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(*Huſband*) This caſe was never decided, for, in conſequence of Lord Hobart's doubts, a ſpecial verdict was found, and the matter was afterwards ended by arbitrament.

Page 327 (E) Of Leaſes for Lives or Years by Eccleſiaſtical Perſons: And herein,

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(*Alſo it is ſaid*) (*a*) In the caſe itſelf, Leon. 306., the objection was, that this was not found by the ſpecial verdict; in the reference to the caſe, Leon. 333., the objection is ſtated to be as in the text; but that reference is faulty in another reſpect, inaſmuch as it ſtates the judgment to have been arreſted for this reaſon.

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(*But a diverſity*) The argument from this oppoſition is drawn entirely from Noy's report: In Godbolt, the right of the *parſon* to demiſe his tithes without deed is expreſsly negatived by Dodderidge, J.; and in Latch, no more is ſaid, than that "the parſon may diſcharge the pariſhioner of tithes by parol, or leaſe the rectory, conſiſting of glebe and tithes, by parol for years."—Although in the diſcuſſion of this queſtion in the caſes in the text, a *parol* demiſe be generally uſed in oppoſition to one by *deed*, yet the queſtion is not, whether tithes may be leaſed by *parol merely*, but whether they may be leaſed *without deed?* And the reſult of all the caſes ſeems to be, that to paſs an intereſt in tithes, to convey them to a ſtranger, a deed is abſolutely neceſſary: but that a compoſition with the pariſhioner by way of retainer is good without deed. This latter point receives a confirmation, if indeed it want any, from the Kenſington caſe (Adams v. Hewit, Dom. Proc. 1782.;) for in that caſe the compoſition was without deed; but when the lords held that the notice there given to determine the compoſition was not a ſufficient notice for that purpoſe, they neceſſarily admitted the compoſition itſelf to be valid, for there could be no queſtion about the determination of a thing that was void.—In Keddington v. Bridgman, Bunb. 2. a difference is taken between a compoſition by way of retainer by parol, and an agreement between the parſon and his pariſhioners by parol; the latter, Baron Montague thought would be good for years, being only an agreement that the parſon would not ſue his pariſhioners for ſo many years for tithes; the former, Bury and Price, Barons, held was good only for one year, being by way of contract. But where is the difference between the compoſition and the agreement in this caſe? The agreement on the part of the parſon, is, that he will not demand tithes in kind for a limited time; on the part of the pariſhioners, that they will, during that time, pay a ſum of money in lieu thereof: but what elſe is this but a compoſition? But if a compoſition be good for one year, it may alſo be good for more than one year; for the objection is, that tithes, being an incorporeal hereditament, cannot paſs without deed, the more or leſs time for which they are agreed to be ſo retained cannot be material. See Noy, 121. Yelv. 96.

2. Such

2. Such Leaſes as have a good date, and are delivered on the ſame day: in what caſes the day of the date or delivery is to be taken incluſive, and in what caſes excluſive.

So, where under a power to make leaſes for twenty-one years, or three lives, *in poſſeſſion*, and not in reverſion, a leaſe was made to one for three lives, *habendum* from the day of the date thereof, at the uſual rent, *&c.* which leaſe had all the formal circumſtances required by the power; for the demiſe being *habendum from the day of the date*, the leaſe was a freehold to commence *in future*, and *therefore* void.

Denn v. Fearnſide, 1 Wilſ. 176. See to the ſame effect, Freeman v. Weſt, 2 Wilſ. 165. Doe v. Watton, Cowp. 189.

The diſtinction made in the preceding caſes, and in ſeveral of thoſe in the next diviſion, hath been levelled by the deciſion in the Court of King's Bench in *Pugh* v. Duke of *Leeds*. In that caſe, a leaſe under a power to make leaſes in poſſeſſion was made to commence "*from the day of the date*," and on a caſe made for the opinion of the court on the validity of that leaſe as a leaſe in poſſeſſion, it was holden to be good, upon the ground that the particle *from* might, in the ſtricteſt propriety of language, be taken either incluſive or excluſive. Cowp. 714. This deciſion, it ſhould be remarked, hath not been generally aſſented to in Weſtminſter-hall. The reader will find it examined, and commented upon in a very able manner by Mr. Powell in his Eſſay on the Learning relating to the Creation and Execution of Powers.

3. Such Leaſes as have a good Date, but are not delivered till a Week or Month, *&c.* after, when they are to begin, and how the Declaration on ſuch Leaſes is to be framed.

The dean and chapter of *Worceſter* being ſeiſed in right of their church of one of the manors of *Charlton*, by indenture bearing date the 26th *November* 1750, for a valuable conſideration granted the ſaid manor, of which the premiſes in queſtion were part, to the leſſor of the plaintiff, to hold to him and his heirs from the day of the date thereof for the lives of three perſons, under the yearly rents, *&c.* In the leaſe, power was given by the dean and chapter to their attorney, to take poſſeſſion of the premiſes, and to deliver ſeiſin thereof to the leſſee, *according to the tenor, effect, and true meaning of the ſaid leaſe*; and in purſuance of ſuch power, ſeiſin was delivered of the premiſes by the attorney to the leſſee, on the 28th day of *May* 1751. The queſtion was, whether this leaſe being made to commence from the day of the date thereof, and ſeiſin delivered the 28th of *May* following, was good? The court held that it was: that till livery was made, the freehold remained in the dean and chapter: that they could preſume that the power given to the attorney was to make livery at any day ſubſequent to the leaſe, which, they ſaid, was the true meaning of the deed; for by the warrant of attorney to deliver ſeiſin in the preſent caſe, the deed ſhould be ſubſtantiated by the livery. Freeman v. Weſt, 2 Wilſ. 165.

But if a man make a leaſe of land to hold for life from the day of the date, and make livery by attorney the ſame day *ſecundum formam chartæ*, this is a void leaſe. Bull v. Wyatt, 1 Roll. Abr. 828. Butler v. Fincher, 2 Bulſtr, 302. 1 Roll. Rep. 229.

(*Another rule*) The leſſor of the plaintiff, being a prebendary of Sarum, brought an ejectment to avoid a leaſe made by his predeceſſor, as not being conformable to the above proviſo in the

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the ſtat 32 H. 8. His objection was, that the ſurrender made of the former leaſe was with a con dition, that if the then prebendary did not within a week after grant a new leaſe for three lives the ſurrender ſhould be void; whereby, as it was contended for the plaintiff, the old term w not abſolutely gone, but the leſſee reſerved a power of ſetting it up again. But the court, afte two arguments, gave judgment for the defendant; this being within the intent of the ſtatute which was, that there ſhould not be two long leaſes ſtanding out againſt the ſucceſſor. Here, th new leaſe was made within the week, and from thence it became an abſolute ſurrender both i deed and law. And the whole was out of the leſſee, without further act to be done by him.—I the proviſo in this act, there is the word *ended* as well as ſurrendered; and can any one ſay th firſt leaſe is not at an end? This was no more than a reaſonable caution in the firſt leſſee, t keep ſome hold of his old eſtate, till a new title was made to him. Wilſon *ex dem.* Eyres v. Ca ter, 2 Str. 1201.

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(*If a Biſhop ſolely makes a leaſe*) 1 Bl. Rep. 626.

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(*But after ſuch leaſe for years*) See 5 Geo. 3 c. 27.

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(*So, if a leaſe*) This point was made and argued at the bar in the caſe referred to, but th court gave no opinion upon it.

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(*But this*) This diverſity is no longer of any importance; for the 5 Geo. 3. c. 17. makes leaſ of tithes and other incorporeal hereditaments by eccleſiaſtical perſons, whether for lives or fo years, as if the leaſes were of corporeal hereditaments, and gives action of debt to the ſucceſſo for rent reſerved on freehold leaſes.

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(*As to this*) Where the leaſes, on which the rent has been reſerved within the twenty year have been ſometimes with fines, and ſometimes without, Lord Cowper's rule ſeems the beſt: i any other circumſtances Lord Holt's rule appears to be the more proper one. See Pow. on Power 549.

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(*In ſome caſes*) Com. Rep. 312. Coventry v. Coventry.

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(*Fitton Gerard was tenant for*) 1 Burr. 121.

Audley v. Audley, 2 Ch. Rep. 82.

So, where a power was given to leaſe, provided that two parts in thre of the improved value be reſerved as a rent, and the reſervation was mad in the very terms of the power; it was holden that the leaſe was neverthe leſs good; and that unleſs proof were made of a greater value than ha been conſtantly paid and accepted of by the remainder-man, ſuch ſum mu be taken as two parts in three of the full value of the premiſes at th time of making the leaſe, which, or the greater value, if ſo proved, w to be continued to be paid, whether the premiſes roſe or fell in value.

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(*The books*) But according to the Touchſtone, p. 279. if tenant in tail of land let a part it that hath been accuſtomably let, and reſerve the rent *pro ratâ*, or more than after the rate this is not a good leaſe. And it ſeemeth to be exceedingly doubtful, whether biſhops, &c. ha the power of dividing their eſtates, and leaſing them out in ſmaller parcels: for as the whole eſta is no longer anſwerable for the *whole* rent, the ſecurity is leſſened by ſuch a diviſion; and the may poſſibly be an entire deficiency of remedy for portions of the rent, by reaſon of the failu of tenants, deficiency of diſtreſs, produce, &c. of the parcels out of which they are payable When therefore a diviſion is deemed neceſſary, it hath been judged ſafeſt, on account of this *poſſible* injury to the ſucceſſor, to apply for the aid of the legiſlature. See two acts to this purpoſe the 34th and 35th of the preſent king empowering the Biſhop of Ely to grant out eſtates belon ing to his ſee in ſeveral ſmaller parcels. However, in point of fact, partitions have been ma without the ſanction of parliament, and that, under the opinion of ſome of the ableſt lawyers the profeſſion. *Ideo quære.*

(F) C

(F) Of Leaſes by Parſons, Vicars, and others, with reſpect to other Qualifications.

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(*And yet*) This caſe in Bulſtrode hath been ſince denied to be law; ſuch a conſtruction would entirely defeat the ſtatute, for at this rate an incumbent need be reſident only five days in one year. Quilter v. Muſſendine, Gilb. Eq. Rep. 228.

(*By this*) This allegation is clearly unneceſſary. Mills v. Ethridge, Bunb. 210.

(*And note*) In ſuch caſe it is merely void, and the leſſee cannot maintain an ejectment even againſt a ſtranger, who enters without any colour of title. Doe v. Barber, 2 Term Rep. 749.

(*Alſo, it muſt*) But it is now ſettled, that it is not neceſſary to aver that the abſence was voluntary, for if it be otherwiſe, it is matter of excuſe, which it lies upon the parſon to ſhew.—Mills v Etheridge, Bunb. 210. Quilter v. Muſſendine, Gilb. Eq. Rep. 228. Note; A ſequeſtration of a benefice under a *fieri facias* is no impediment to the ſerving of a cure; ſo that the non-reſidence of the incumbent in ſuch a caſe is a clear avoidance of any leaſe he may have entered into, Doe v. Meais, Cowp. 129.

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(*In debt upon*) As the full ſtatutable time had not incurred at the commencement of the action, and the ſtatute could therefore not *then* attach, this plea would *now*, it ſeems, be adjudged bad upon that ground. Evans v. Proſſer, 3 Term Rep. 188. Whether, *at law*, a clergyman may plead his non-reſidence in order to diſcharge himſelf of the obligation of his contract, is a point which doth not appear to have been yet judicially determined. Whether, *in equity*, he ſhall come forward as plaintiff, and inſiſt upon the breach of a poſitive law, and a neglect of his paſtoral duties, in avoidance of an agreement fairly entered into, is a point, one would think, too clear to admit of a doubt. And yet an attempt of this kind was not long ago made by Mr. Wm. Atkinſon, the parſon of Hillington in Norfolk, who filed a bill in the Exchequer for an account of tythes, and to ſet aſide a compoſition he had entered into with his pariſhioners, (among whom was his patron,) upon the ground that ſuch compoſition was void, becauſe in the words of his bill, "*he was abſent from Hillington and without being reſident therein or ſerving the ſaid cure for "above four-ſcore days in one year after the ſigning of the agreement of the 14th of October* 1784;" (the compoſition he had entered into with his pariſhioners;) "*and that he was abſent above four-ſcore days "in* 1785, *and before the* 10*th of October in that year, and had not any other benefice during all that time.*" His bill was diſmiſſed with coſts. Atkinſon Clk. v. Sir Martin Browne Folkes, and others, July 13, 1792.

(G) Of the Conſent or Confirmation of others to Leaſes made by Eccleſiaſtical Perſons: And herein,

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(*As to the perſons*) It is ſaid by Jones, J. *in argument*, that a recuſant though diſabled to preſent, ſhall yet be patron to confirm the leaſe of the incumbent. Sir W. Jones, 22.

(H) Of void or voidable Leaſes by Eccleſiaſtical Perſons: And herein,

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(*But as to things*) But by 5 Geo. 3. c. 17. Debt will now lie upon ſuch leaſes for lives.

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(*But this acceptance*) Acceptance of rent alone, unaccompanied with any other circumſtances, is not a ſufficient confirmation of a leaſe. It cannot be a confirmation, unleſs done with a knowledge of the title at the time; or, unleſs the remainder-man lies by, and ſuffers the tenant to lay out his money in improvements, in confidence of continuing tenant, *Per* Lord Mansfield, Cowp. 483.

(I) Of Leaſes made by thoſe who have but a particular Eſtate or Intereſt in the Lands leaſed: And herein,

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(*Tenant for life*) His leaſes are merely void upon his death, and therefore cannot be ſet up againſt the remainder-man by his acceptance of rent, and ſuffering the tenant to make improvements after his intereſt veſts in poſſeſſion. Doe v. Butcher, Dougl. 50. But *qu.* whether in ſuch caſe equity would not relieve? Stiles v. Cowper, 3 Atk. 692.

Ludford v. Barber, 1 Term Rep. 86.

A. tenant for life, and *B.* the reverſioner: *A.* only executes a leaſe, in which they are both named: upon *A.*'s death, this leaſe is totally void. And though *B.* ſhould execute it afterwards, it will not bind the leſſee; for it is not his covenant.

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(*But ſuch a derivative*) Holford v. Hatch, Dougl. 183. Hence a derivative leaſe cannot have the effect of working a forfeiture under a proviſo not to aſſign. Cruſoe v. Bugby, 3 Wilſ. 234. 2 Bl. Rep. 766.

Palmer v. Edwards, Dougl. 187. note. But ſuch a departure with the whole term, if bad as an aſſignment, not being in writing, would be ſupported as an under-leaſe againſt the grantor. Poultney v. Holmes, 1 Str. 435. Dougl. 186.

When the whole term is made over by the leſſee, although in the deed by which that is done, the rent and a power of entry for non-payment are reſerved to him, and not to the original leſſee, this is an aſſignment, and not an under leaſe: and therefore, the original leſſor, or his aſſignee of the reverſion, may ſue or be ſued on the reſpective covenants in the original leaſe: and this, although new covenants are introduced in the aſſignment.

6. Of Leaſes made by Copyholders.

Doe v. Clare, 2 Term Rep. 739.

In ejectment for a copyhold, the defendant produced a paper-writing, written upon an agreement ſtamp, under the hand and ſeal of *T. Tidd*, of whom the leſſor of the plaintiff purchaſed, made between *T. Tidd* and *T. Clare* (the defendant), reciting, that *M. S.* was ſeiſed of the premiſes in queſtion for her life; and that *Tidd* had agreed with *Clare*, that *in caſe he ſhould be ſeiſed of the premiſes on the death of* M. S. *he would immediately on her death demiſe and let them to* Clare, on the terms and conditions mentioned: "Now therefore the ſaid *Tidd doth hereby agree to demiſe and* "*let* unto the ſaid *Clare* all, &c. and all ſuch copyhold premiſes as he ſhall "or may be entitled to on the death of the ſaid *M. S.*, to hold *from and* "*immediately after the death* of M. S. *for the term of* 21 *years*, at the "yearly rent of 12*l.* 12*s* And the ſaid *Tidd* doth hereby promiſe and "agree to and with the ſaid *Clare*, that he the ſaid *Tidd*, on the death "of the ſaid *M. S.*, and on his becoming entitled to the ſaid premiſes, "*ſhall and will procure a licence to let the ſaid premiſes.*" Lord *Kenyon* was of opinion, at the trial, that the inſtrument amounted to a leaſe, there being words of preſent demiſe contained in it, and therefore non-ſuited the plaintiff. But on the motion for a new trial, his lordſhip ſaid, that having conſulted with the other judges, he was clearly convinced he was miſtaken in the opinion which he had holden at the trial; and that they were all of opinion, that the inſtrument in queſtion was an executory agreement only, and not a leaſe, for two reaſons: firſt, becauſe, if this were holden to be a leaſe, a forfeiture would be incurred; whereas that would be

be contrary to the intent of the parties, who had cautiouſly guarded againſt it by the inſertion of a covenant, that a licence to a leaſe ſhould be procured from the lord: and ſecondly, the ſtamp is conformable to the nature of an agreement for a leaſe, and not to a leaſe itſelf.

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(*As in the*) And note, that the rules of law adopted in caſes of eccleſiaſtical leaſes, and of leaſes made by tenant in tail under the ſtatute of 32 H. 8. apply equally to leaſes made by virtue of powers in ſettlements.

Lord *Ferrers* was tenant for life under a ſettlement, in which there was the following power, *viz.* "That it ſhould be lawful for the tenants for life "reſpectively, from time to time, and at all times during their reſpective "natural lives, and when they ſhall reſpectively come into, and be in, *the "actual poſſeſſion of the aforeſaid manors and premiſes*, by virtue of the "limitations aforeſaid, by indentures under their hands and ſeals, to de"miſe all or any of the ſaid manors, meſſuages, lands, tenements, and "hereditaments hereinbefore mentioned, or any part thereof, to any per"ſon or perſons whomſoever, in poſſeſſion, but not by way of reverſion "or future intereſt, for the term of twenty-one years abſolute, or any "leſs abſolute term; or for any term or number of years determinable "upon one, two, or three lives, ſo as upon every ſuch leaſe or leaſes reſ"pectively, there be reſerved and made payable during the continuance of "ſuch leaſe or leaſes reſpectively, to be incident to, and go along with "the immediate reverſion or remainder of the premiſes ſo leaſed, ſo much "or as great yearly rents as, or more than now is, and are paid and "yielded, or agreed to be paid and yielded for the ſame, or proportion"ably for any part thereof." Lord *Ferrers*, under this power, granted "a leaſe to the defendant for ninety-nine years, if ſhe ſhould ſo long live. Part of the premiſes compriſed in the leaſe, conſiſted of manors and manerial rights which had never been leaſed before, and alſo of a fiſhery which had been let before, but was not at the time of the ſettlement. Since that time, it had been let again at 15*s*. It was objected, that the manors and fiſhery were not demiſable under the power. The manors had never been let; the fiſhery was not let at the time of the ſettlement; and the power required the rent then paid, or *more*, to be reſerved. Things then for which *no* rent was *then* paid, could not be meant to be comprehended. This would avoid the whole leaſe; for one entire rent was reſerved, and it could not be apportioned. But, by the court, the power is expreſs to demiſe the manors and fiſhery. They are particularly mentioned in the ſettlement, and the power goes to the whole. They pay under this leaſe as great a yearly rent, as at the time of the ſettlement, for they paid nothing then. The words, therefore, are complied with, and this objection could only ſtand upon *intent*. But no ſuch *intent* appears. The manors are nominal,-- of no value,—no object of yearly income; the fiſhery worth only 15*s*. a year. They are convenient to the leſſee living on the land, and of no uſe to the remainder-man. The intent was to give leave to demiſe all, reſerving as much rent in the whole, as had been reſerved before. Beſides, the words at the end of the power, "or proper"tionably for any part thereof," ſhew that it was the intent that the *quantum* of the rent, and not any particular part of the premiſes included in the ſettlement, was to guide the perſon in executing the power.

Goodtitle v. Funucan, Dougl. 565.

3 Term Rep. 677.

A., tenant for life under a ſettlement, in which there was a power, that any perſon who ſhould be actually ſeiſed of the lands by virtue of the ſettlement might make a leaſe or leaſes for three lives, or for twenty-one

Bagot v. Oughton, 8 Mod. 249. 381. Foſt. 332.

one years, of all or any part of the premiſes therein compriſed, *at ſuch yearly rents, or more, as the ſame were then let out*, granted a leaſe of the capital meſſuage for twenty-one years, but reſerved no rent. The queſtion was, whether the capital meſſuage was demiſable under this power? and the court held, that it was not. For the qualification annexed to the power of leaſing, that *the ancient rent muſt be reſerved*, manifeſtly excludes the manſion-houſe, and grounds about it, *never let*. No man could intend to authorize a tenant for life to deprive the repreſentative of the family of the uſe of the manſion-houſe; therefore, the words in ſuch a caſe ſhew, that the power was meant to extend only to what had been uſually let. By that means the heir enjoys all the premiſes in the ſettlement, juſt as they were held and enjoyed by his anceſtor, the tenant for life. He has the occupation of what was always occupied, and the rent of what was always let. The nature of the thing ſpoke the intent as forcibly as the moſt direct words would have done. It was demonſtration.

Doug 574.

Pomeroy v. Partington, 5 Term Rep. 665.

So, where a tenant for life under a will, with a power to let *all* or *any* part of the premiſes, *ſo as the uſual rent* be reſerved; and ſo as there ſhould not be at any one time any greater or larger eſtate upon any one *tenement*, or part of a tenement ſo leaſed, than for three lives, or for ninety-nine years, determinable on lives, either in poſſeſſion or reverſion; and ſo as ſuch leaſe or leaſes ſhould not be made diſpuniſhable of waſte; granted a leaſe *of tithes which were never leaſed before the making of the will*; the court held that ſuch leaſe was not warranted by the power, and therefore void. It was moſt manifeſtly the intent of the deviſor, that nothing ſhould be let, but what had been let before; that thoſe who were to enjoy the eſtate after him, were to enjoy it in the ſame manner as he had done. In all caſes on the conſtruction of powers, the ſingle point to be conſidered is, the intention of the creator of the power: that alone muſt govern.

1 Burr. 120.

Right v. Thomas, 3 Burr. 1441. 1 Bl. Rep. 445.

Lands were conveyed on a marriage to truſtees and their heirs, to the uſe of one for life, remainder to his firſt and every other ſon in tail male, *&c.* with a proviſo, "that it ſhould be lawful for the tenant for "life, and his wife, during their reſpective lives, and the ſon and ſons "of their reſpective bodies, and the heirs male of ſuch ſon and ſons, "and the heirs male of tenant for life, as they ſhould be ſeverally and "ſucceſſively in poſſeſſion of the freehold by virtue of the limitations "aforeſaid; and for the ſaid truſtees, and the ſurvivors and ſurvivor of "them, and the heirs of ſuch ſurvivor, *during the minority* of any ſuch "ſon or ſons, or iſſue male, at any time or times, by any deed or deeds "to be ſigned and ſealed by him or them reſpectively, in the preſence of "two or more credible witneſſes, to demiſe, leaſe, *&c.* to any perſon, "*&c.* either in poſſeſſion or reverſion for one life, or for two or three "lives, *&c.* all or any part of the premiſes, which *had been uſually ſo let-"miſed and letten*, ſo as there ſhould be no more than three lives in being "at one time," *&c.* A leaſe was afterwards made by indenture *&c.* bearing date the 24th of *June* 1742, between the truſtees named in the ſettlement, (there being then a minority,) and *J. S.* of part of the premiſes in conſideration of a fine paid, a certain yearly rent, and a ſpecific ſum for a harriot. Several old leaſes of the premiſes were ſhewn, ſome in Queen *Elizabeth*'s time, and others in that of *Henry* 8th; ſome for years, and others for ninety-nine years, determinable upon three lives: and among the reſt, an indenture *tripartite* bearing date the 15th of *December* 1638, whereby one of the anceſtors of the preſent tenant for life, ſeiſed in fee, in conſideration of natural love and fatherly affection to his ſecond

ſon,

ſon, and for his better advancement, livelihood, and maintenance, covenanted to ſtand ſeiſed to the uſe of himſelf for life, then of his ſecond ſon, his executors, *&c.* for ninety-nine years, if his ſaid ſon, or any woman he ſhould marry, or any iſſue of his body, ſhould ſo long live, paying unto the heirs and aſſigns of the father the yearly rent of 4*l.* payable quarterly; with covenants on the part of the ſon to pay the rent, and repair the premiſes. The queſtion was, whether a covenant to ſtand ſeiſed could be conſidered as an evidence of the uſual manner of demiſing? And by the court, it ſhould. There is no doubt, but that theſe lands had been uſually leaſed for lives; and the uſual profits made by fines. A covenant to ſtand ſeiſed entered into by the owner of an eſtate, is *a leaſe:* and the objection, that the covenant to ſtand ſeiſed in queſtion is by way of proviſion for a younger child, is of no weight; for it is every day's experience; nothing being ſo common as the making of theſe leaſes for the benefit of younger children.

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(*And yet where*) Lord C. J. Treby, in his argument in Bath and Montague's caſe, aſſigns the ſame reaſon for ſupporting the leaſe.

One ſeiſed in fee, on his marriage with a ſecond wife, ſettled lands on himſelf for life, then on his wife for life, then on the iſſue of that marriage, then to the uſe of his eldeſt daughter by his former wife, and to the heirs of her body, *&c.* There was a proviſo, that it ſhould be lawful for the wife, *during her life*, to demiſe the premiſes to any perſon for ſuch term, with and under ſuch conditions, rents, and reſervations, in ſuch manner to all intents as tenant in tail may do by ſtatute 32 *H.* 8. for the term of one, two, or three lives, upon and under ſuch reſervations and rents, and in ſuch manner as tenant in tail was enabled to do by that ſtatute. The huſband died, and the wife married again, and ſhe and her ſecond huſband demiſed the premiſes purſuant to the power. Two queſtions were made; firſt, whether the leaſe made by the huſband and wife, when the power was given to the wife alone, were a good execution of the power, or whether it were not ſuſpended by the marriage? Secondly, whether this leaſe by the huſband and wife ought not to have been made by fine? As to the firſt queſtion, the court held, that this was a good execution notwithſtanding the power. As to the ſecond, that no fine was neceſſary; for the eſtate of the leſſees was not derived from the leſſors, but aroſe out of the eſtate of the feoffees or releaſees named in the original ſettlement: that therefore, nothing more was requiſite to the raiſing of an eſtate to the leſſee, than what was required by the deed creating the power; which was only an indenture ſigned by the party making the leaſe, and made in ſuch manner as the 32 *H.* 8. requires in leaſes by tenant in tail. Bayley v. Warburton, Com Rep. 494.

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(*Yet in a late*) The widow afterwards filed her bill in Chancery; and Lord Talbot held the leaſe to be warranted by the power, ſaying, that it was not *a defective*, but *a blundering execution*, and he decreed the defendant to pay all the coſts both at law and in equity. 2 Burr. 1147. 2 Vez. 644. And note, in the caſe of Zouch v. Woolſton, 2 Burr. 1147. the court of King's Bench were of opinion, that whatever is an equitable, ought to be deemed a legal execution of a power.

So, tenant for life of the reverſion of lands that were in leaſe for lives, by virtue of a power under a ſettlement, (providing "that it ſhould "be lawful for every perſon who ſhould be actually ſeiſed of the free-"hold of the premiſes limited in uſe, to make leaſes of any part thereof "which Coventry v. Coventry, Com. Rep. 312.

" which had been uſually letten for lives or years, of which he ſhould " be ſo actually ſeiſed by virtue of the limitations aforeſaid, by indenture, " for any term not exceeding twenty-one years, or determinable on one, " two, or three lives, *&c.* ſo as there were not in any part of the pre- " miſes ſo leaſed at any one time, any more or greater eſtate or eſtates " than for twenty-one years or three lives, or for any number of years " determinable upon three lives,") made ſeveral leaſes for ninety-nine, to commence from the death of a remaining life in a former leaſe. And the queſtion was, if theſe leaſes were purſuant to the power? It was objected, that they were leaſes in reverſion. But it was anſwered, that when a man made a ſettlement of the *reverſion* of lands *demiſed* for life or years to the uſe of one for life, with power to make leaſes *generally*, he may make a leaſe during the continuance of a former leaſe, to commence after the former, as otherwiſe his power would be ineffectual.

Baynes v. Belſon, Sir T. Raym. 247. But this caſe did not receive a deciſion, but was adjourned,

However, where *C.* under a power to make leaſes for one, two, or three lives, or for twenty-one years, reſerving the ancient rent, demiſed to *B.* for twenty-one years, to commence after the death of *I.* and *M.* who were tenants for life at the time of making the ſettlement, and who lived for ſeveral years after; it was holden, that the power was well executed, this leaſe being to commence *in futuro*.

other queſtions ariſing therein. And it is obſervable, that the court are ſtated by the reporter, to have founded their reſolution on this point on the caſe of Slocomb v. Hawkins, as reported in Yelverton, 222., and on that of Suſſex v Wroth, as cited 2 Roll. Abr. 261 and 6 Co. 33., both of which caſes, as cited in the reporters referred to, apply only where reverſionary leaſes are made under a power *attaching* upon eſtates in *poſſeſſion*. Pow. on Powers, 419

Goodtitle v. Funucan, Dougl. 565. See the power at large *ſupra.* 146.

Lord *Ferrers* was tenant for life under a ſettlement in which there was a power, for the tenants for life, *reſpectively*, when they ſhould reſpectively come into and be in actual poſſeſſion of the premiſes ſettled, by indentures under their hands and ſeals, to demiſe all or any of the ſaid premiſes, or any part thereof, in poſſeſſion, but not by way of reverſion or future intereſt *&c.* Part of the premiſes ſubject to the power were let by the agent for the tenant for life by agreement in writing, from the 15th *March* 1775, to occupy till the 10th *March* 1776, to three perſons, and the reſt was at the time of the leaſe in the occupation of tenants at will. Afterwards, on the 17th of *Auguſt* 1775, Lord *Ferrers*, by indenture, reciting the power, demiſed part of the premiſes to the defendant for ninety-nine years, from *Lady-day* then laſt, if ſhe ſhould ſo long live, at the yearly rent of, *&c.* It was objected to this leaſe upon motion for a new trial, (the defendant, the leſſee, having gotten a verdict in ejectment brought by the remainder-man to recover the premiſes leaſed) that it was a leaſe in reverſion, and therefore, contrary to the power and void; for it was contended that Lord *Ferrers*, at the time of this demiſe, could not grant an immediate leaſe in poſſeſſion, becauſe part of the premiſes were then let, under an expreſs agreement, for a term, of which ſeveral months were then to run; and though the reſt was ſtated to have been in the hands of tenants at will, yet, as the law then ſtood, they muſt be conſidered as tenants from year to year, and entitled to ſix months notice. Lord *Ferrers*, it was inſiſted, could not have brought an ejectment againſt any of them at the time of the demiſe, and therefore had no immediate poſſeſſory right; ſuch right, and the right to recover in ejectment being convertible. It made no difference to this

queſtion,

queſtion, that the ſubſiſting leaſes were not by deed, ſince a parol leaſe for three years, or leſs, was equally effectual with a leaſe by indenture; and the court could not draw the line, and ſay, that a leaſe granted under a power like the preſent, ſhould be good although there was a ſubſiſting term of *ſeven months* at the time of granting it; but ſhould be void if there was a ſubſiſting term for *ſeven years*: the legiſlature only, or the parties could draw ſuch a line. Sir *Orlando Bridgman*, the father of conveyancers, and who probably invented theſe powers, laid it down, it was ſaid, that all leaſes, where there was a particular eſtate out, were leaſes in reverſion. And the interpoſition of the legiſlature in 4 *Geo.* 2. c. 28. § 6. to enable landlords to renew leaſes for lives, although the under-tenants ſhould not likewiſe ſurrender, corroborated this doctrine. But it was anſwered by the other ſide; firſt, that the tenants aſſented to this leaſe, and ſurrendered their poſſeſſion before the execution of it, in order to make it valid. This had been expreſsly left by the judge to the jury, who found that the defendant was in poſſeſſion at the time of the execution. Secondly, that if the jury had not found the leſſee to have been in poſſeſſion, *ſtill this would be good as a concurrent leaſe*: for this *Read* v. *Haſk* was cited, and the reaſon there given for ſupporting the leaſe was ſaid to be a ſtrong one; namely, that the inheritance was not charged in the whole with more than twenty-one years. No authority, it was ſaid, had been cited againſt this caſe, nor any anſwer given to the reaſoning in it. Thirdly, that, in reſpect of the power, all the ſubſiſting leaſes were leaſes at will; there was no outſtanding leaſe as againſt the remainder-man; he would not have been bound to give the tenants notice to quit, but might have entered upon them immediately; for, except in the caſe of leaſes under the power, (and theſe were not in many reſpects according to it,) the poſſeſſion would devolve upon him the inſtant of the death of the tenant for life. And for theſe reaſons, the court unanimouſly held the leaſe to be good, notwithſtanding this objection.

Tenant for life of eſtates ſituate in *Ireland*, with full power of making leaſes for any term not exceeding thirty-one years *or* three lives, *to commence in poſſeſſion*, at the beſt improved rent that could be had for the ſame, made a leaſe "*from the date for and during the natural life and lives of three perſons and the longeſt liver of them, or, for the term, time, and ſpace of thirty-one years, to commence from the date, which ſhould laſt longeſt, from thenceforth next enſuing fully to be complete and ended.*" On ejectment brought, in the Court of Exchequer in *Ireland*, by the heir at law and remainder-man, and a ſpecial verdict returned thereon, the queſtion was, whether this leaſe was good within the terms of the power? On argument before the barons, it was adjudged that it was good, which judgment was affirmed on a writ of error in the Exchequer-chamber there, before the Lord Chancellor of *Ireland*, aſſiſted by Lord *Annaly*, the Chief Juſtice of the court of King's Bench, the conſtituent members of that court. But Lord *Annaly* having delivered his opinion for reverſing the judgment, a writ of error was brought in parliament. It was there argued on the part of the remainder-man, that the leaſe was bad, for that it was in manifeſt oppoſition to the power; becauſe, inſtead of making a leaſe for one or other of the terms expreſsly, as the power directed, it was a leaſe for the one or the other as chance ſhould direct; and that he, being a purchaſer for the moſt valuable of conſiderations, had a clear right to exact a ſtrict performance of the condition annexed to his father's power of leaſing. But it was contended on the other ſide, that,

Commons v. Marſhall, 7 Br. P. C. 111.

that, in cases of this kind, all a remainder-man could reasonably expect was, that an estate, when it came to him, should not be charged beyond what it was the intention of the settler to allow those who stood before him to charge it. That it would not be so by the lease in question, if it were construed as a good lease for three lives, and no longer. That courts of law, who, in modern times, had adopted the same rules of construction which prevailed in courts of equity, in the construction of powers and of the instruments by which they were executed, would, when they had been exceeded, correct the excess, and support the execution *so far* as it was warranted by the power. That the lease in question, so far as it was a lease for three lives, was clearly warranted by the power; and this was apparently the primary object of the parties. Besides this, they had a second object in view, which was to secure the estate to the lessee for thirty-one years, in case the lease for lives should determine sooner. But this, whether it was considered as concurrent or contingent, was not warranted by the power.—The lease was adjudged good; and the judgment affirmed.

Earl of Cardigan v. Montague, 6th June 1765, cited in 1 Burr. 142.

The Duke of *Montague* was tenant for life, without impeachment of waste, with power to lease "reserving ancient and accustomed rents, heriots, boons, and services," under which power he granted several several leases. In the former leases, the tenants covenanted "to keep in repair:" in those granted by the duke that covenant was omitted. The Lord Chancellor, after taking some days to consider of it, was of opinion, that that covenant was a boon, and beneficial to the remainder-man; and held these leases void for want of it. He said, that he was clear upon the argument; but he took time, because there was no case in point. The more he thought of it, the more he was convinced. The principle he rested upon, was, "*that the estate must come to the remainder-man in as "beneficial a manner, as ancient holders held it.*"

Taylor v. Horde, 1 Burr. 125.

Under a power requiring the best rent that can be reasonably gotten, to be reserved payable during the term, there must be a covenant for payment; for under a mere reservation, it is not payable till entry; and therefore, in fact, may never be payable during the term. Besides, if there be no covenant to pay the rent, the lease may be assigned to a succession of beggars. There must also be a clause of re-entry; else the ground may be unoccupied without any, or at least a sufficient distress upon it, so that the remainder-man can neither have his rent nor his land. The want of a counterpart too is an unusual omission, and very prejudicial.

Pow. on Powers, 579. Goodtitle v. Funucan. Dougl. 505. *Supra*, 146.

But if the covenants be upon the whole such as leave the parties on the same footing as under former leases, their differing in trifling circumstances will not be material. Thus, it was objected to the covenants in the lease from Earl *Ferrers* to Mrs. *Funucan*, (by one of which she covenanted, that she would pay half the land-tax, amounting to 7*l.* 10*s.* by the other of which the earl covenanted for himself, his heirs, *&c.* to free her from tithes and from levies and payments to the church,) that the covenants in the lease were not so beneficial to the remainder-man, as those in the ancient leases; for that in the former leases, the tenants covenanted to pay all duties and taxes, except the land-tax; that church dues were particularly, by law, chargeable on the occupier; but by that lease the landlord covenanted to free the tenant from tithes and all levies and payments of the church. The new covenants were therefore less beneficial to the remainder-man, than those in the former leases. By the court,

court—The power made no mention of covenants. The *ground*, therefore, muſt be, that the preſent covenants were a fraud on the power, by leſſening the value of the reſervation; but on conſidering them fully, it appeared, that what is thrown on the landlord was compenſated by what was paid by the tenant. She was to pay half the land-tax. As to the church-dues, the covenant ſeems to be collateral, and not to go with the land, or to bind the remainder-man, reſembling a covenant for quiet enjoyment. But if it did go with the land, there was no pretence of fraud on the power; the 30*l.* were, *bonâ fide*, reſerved as an ancient rent. What was ſtipulated with regard to tithes was of no conſequence, ſince none were payable.

As under a power to leaſe *reſerving the uſual covenants*, the omiſſion of a uſual covenant will vacate the leaſe, ſo the introduction of an unuſual covenant in ſuch caſe will have the ſame effect. Thus, where a tenant for life made a leaſe under a power in thoſe terms, containing a proviſo, "that in caſe the premiſes were blown down or burned, the leſſor, or "the perſons who for the time being ſhould be entitled to the freehold "and inheritance, ſhould re-build, otherwiſe the rent ſhould ceaſe," the leaſe was adjudged to be void; the jury having expreſsly found ſuch covenant to be unuſual. Doe v. Sandham, 1 Term Rep. 705.

It is no objection to a leaſe under a power "that it is in truſt for him "who executes the power," provided the *legal* tenant be bound, during the term, in all requiſite covenants and conditions. Lord Mansfield, Burr. 124.

By the ſtatute of the 12th of *Car.* 2. the Maſter of the Rolls for the time being is enabled to grant leaſes of the ground and tenements belonging to the rolls, under theſe reſtrictions (among others) that after the premiſes ſhall have been once lettten, he do not grant or make any *new* or *concurrent* leaſe, until within *ſeven years of the expiration of the leaſe then in being*; nor for any leſs rent than was reſerved upon the former leaſe; nor for any longer term than for the term of *one and twenty years from the making of ſuch leaſe*. Mr. *Verney*, Maſter of the Rolls, made a leaſe for 21 years from the 18th of *March* 1740, which would conſequently expire on the 18th of *March* 1761. Sir *Thomas Clarke*, his ſucceſſor, made a leaſe of the ſame premiſes on the 9th of *June* 1755, for 21 years, in truſt for himſelf: and on the 5th of *January* 1762, he made another leaſe of the ſame premiſes for 21 years in truſt for himſelf. On the 5th of *June* 1764 there was an actual ſurrender duly executed and accepted of the leaſe of 1755. On the death of Sir *Thomas Clarke*, his ſucceſſor, Sir *Thomas Sewell*, diſputed the validity of each of theſe leaſes of 1755 and 1762; inſiſting, 1ſt, that they were a fraud upon the truſt, as being made in truſt for the grantor himſelf. 2d, That the leaſe of 1762 was bad, becauſe at the time it was granted, there were more than ſeven years to run of the leaſe of 1755. 3d, That if the leaſe of 1762 was void, then the leaſe of 1755 was abſolutely gone, either by the *implied* ſurrender in 1762, or the *expreſs* ſurrender in 1764. But the court over-ruled every objection. It is immaterial to the ſucceſſor, who may be beneficially intereſted in the leaſe, ſo long as he receives the accuſtomed rent, and the leaſe is in other reſpects regular. The reſtriction as to a former leaſe is not to be confined to expiration merely *by effluxion of time*, but extends to ſurrenders, and regrants may be made *toties quoties* upon proper ſurrenders, provided that the reverſion be not charged for a longer time than 21 years in the whole. But the acceptance of a new leaſe implies a ſurrender of the old one, provided the new leaſe be, as the leaſe of 1762 was in this caſe, a good one. Wilſon v. Sewell, 4 Burr. 1975. 1 Bl. Rep. 617. S. C.

By

Clements v. Waller, 4 Burr. 2154.

By an *Iriſh* ſtatute of 10 and 11 *Car.* 1. *c.* 3. § 2. governors of colleges in *Ireland* are empowered to demiſe for 21 years, reſerving ſo much yearly rent or profits, or more, *at the peril of the* LESSEES *who ſhall take the ſame*, as the moiety of the true yearly value of the ſaid lands, &c. *(communibus annis,)* at or immediately before the time of making ſuch leaſe ſhall amount unto. A leſſee ſurrendered an old leaſe, and took a new one, upon which the rent reſerved did not amount to a moiety of the true yearly value of the premiſes demiſed. This leaſe is void againſt the ſucceſſor.

Doe v. Lady Cavan, 5 Term Rep. 567. Dom. Proc. *Mail* 7, 1795. Lady Cavan v. Pulteney, 2 Vez. jun. 544.

A. tenant in tail with power to grant leaſes, remainder to *B.* the wife of *C.* in tail, conceiving himſelf to have obtained the fee under a void execution of a power, granted leaſes exceeding his leaſing power, reciting in them that he was ſeiſed of the freehold and inheritance, and covenanting for quiet enjoyment againſt any act or default of himſelf or thoſe claiming under him. *A.* deviſed the demiſed eſtates with others to *B.* for life, remainder to truſtees to preſerve contingent remainders, remainder to *B.*'s firſt and other ſons in tail male, remainder to her daughter and her firſt and other ſons, remainder to *D.* and his firſt and other ſons ſucceſſively in the ſame manner; he alſo gave to *B.* and *C.* other benefits by the will, and gave the reſidue to *D.* *D.* filed a bill to have the will eſtabliſhed. *B.* elected to take her eſtate-tail in oppoſition to the will, which the Maſter reported to be for her benefit. After her death *C.*, her huſband, who had taken under the will, claimed as tenant by the courteſy, and brought ejectments againſt the leſſees under the leaſes granted by *A.*, ſome of whom had expended conſiderable ſums upon their eſtates. Theſe leaſes not complying with the conditions impoſed by the power are abſolutely void; for powers muſt be executed ſtrictly, where the intereſts of remainder-men are affected. Nor can a court of equity, it ſhould ſeem, relieve the leſſees, or reſtrain *C.* from availing himſelf of the full effect of his ejectment ſuits. The leſſees cannot ſay that *C.* ſhall not diſturb their poſſeſſion, becauſe he has a part of thoſe aſſets out of which they are entitled to ſatisfaction under the covenant againſt eviction; for if it is plain, that tenant in tail has made leaſes not warranted by the ſtatute, and the eſtate-tail has deſcended, the iſſue in tail, though poſſeſſing large aſſets both real and perſonal, may eject the tenants; and there is no equity to compel him to confirm the leaſes. He may at his pleaſure aſſume the poſſeſſion; and the only remedy for the leſſees will be an action of covenant. A court of equity cannot interfere, for a court of equity cannot meaſure the damages that may be given upon ſuch an action. The leſſees have truſted to a legal ſecurity, and can have no more. Nor are the leſſees in this caſe entitled to put *C.* to his election: they ſtand merely in the ſituation of creditors; but parties claiming to put a perſon to his election muſt claim ſpecifick rights under the ſame inſtrument.

Fitzg. 219.

Campbell v. Leach, Ambl. 740.

A tenant for life under a marriage ſettlement of an eſtate in mines which were opened, with a power inſerted in ſuch ſettlement of leaſing the *meſſuages, lands, tenements, and hereditaments* therein contained, except the manſion-houſe and warren, under the uſual reſtrictions, that the leaſe ſhould not exceed 21 years ſhould be made in poſſeſſion and not in reverſion, reſerve the beſt rent to be *incident to the immediate reverſion*, &c. granted a leaſe for *twenty-ſix* years of the mines both *opened* and *unopened*, without reference to the power, and *before the expiration of a former leaſe*, reſerving *ore as rent to him, his heirs, and aſſigns*. This new leaſe was granted to one of the two leſſees in the former leaſe. The mines, it appeared, had been worked to very little advantage under the former leaſe, and as it would

No new mines were opened under this leaſe, ſo that this queſtion did not ariſe.

require

require new levels and other works which would be attended with a great expence to work them to more advantage, this leſſee had propoſed to execute them at his own expence, provided he had an additional term for 21 years. Upon this conſideration the new leaſe was granted, and upon the faith of that leaſe extenſive improvements were made by the leſſee at a very great expence. Shortly after the new leaſe was granted, *A.* the tenant for life died, leaving an infant ſon, who then became tenant in tail in poſſeſſion under the ſettlement. The guardian of this ſon permitted the original leſſees to continue tenants of theſe mines, and received the rent reſerved by the new leaſe for three years, when a bill was filed againſt the leſſee under that leaſe to ſet it aſide as not conformable to the power. Upon the hearing of the cauſe the bill was ordered to be retained for a year, with liberty for the infant to proceed to law to recover poſſeſſion. The infant brought an ejectment, and the leſſee being adviſed, that the leaſe could not be ſupported at law, made no defence, but brought a bill to have the benefit of the leaſe to the extent, and as far as it could be warranted by the power. This laſt bill was diſmiſſed at the Rolls, and an account directed of the produce of the mines from the death of the tenant for life. But upon appeal from this decree, the Lord Chancellour, aſſiſted by *De Grey*, C J, and *Smythe*, C. B., held, that under the circumſtances of this caſe, if the rent ſhould be found to be a fair rent, the leaſe, though clearly bad at law, ought to be executed in equity: and therefore directed an iſſue to try, whether the rent reſerved were the moſt improved rent that could reaſonably be gotten. As to the reſervation of ore by way of rent, inſtead of money, ore, it was ſaid by the court, was analogous to money, and a reſervation of it will go to the remainder-man as money, though made payable to the *leſſor, his heirs and aſſigns*. Though it was not in proof that the old leaſe was actually ſurrendered, yet, ſaid the court, it muſt be preſumed to have been ſo, the new leaſe having been acted under. As to the power of the leſſee to enforce the contract againſt the remainder-man, they ſaid, the objection that the remainder-man is neither party nor privy to the leaſe may hold, where the leaſe is made by a mere tenant for life; but under the power of leaſing, there was a referable privity given by the ſettlement; and ſuch tenant has a qualified power of contracting to bind the remainder-man. If the bill had been brought againſt the tenant for life in his lifetime, the leaſe would have been executed, and would then have bound the remainder-man. It muſt be underſtood the parties meant to execute it legally.

(K) By what Form of Words Leaſes may be made.

So, where the owner of a houſe and brew-houſe, entered into partnerſhip, and aſſigned one-fifth, and covenanted that the partner ſhould reſide in the houſe, *&c.* it was holden, that he could not maintain an ejectment againſt the partner contrary to his own agreement. Beſides, that as a licence to inhabit, it amounted to a leaſe. Right v. Proctor, 4 Burr. 2208.

On the 28th of *Nov.* 1760, *John Abrahall* and *P. Lloyd* entered into an agreement (ſtamped with a two ſhillings and ſixpenny ſtamp) with the defendant *Browne*, whereby they agreed, "with all convenient ſpeed to grant to him a leaſe of, and they did *thereby ſet and let to him*," the premiſes in queſtion, to hold for twenty-one years, at the rent of 290*l.* *per ann.* payable half-yearly "*to the leſſors*:" the leaſe to contain the uſual covenants, and certain ſpecial ones, in one of which the words "*this demiſe*" occurred. The defendant entered in purſuance of the agreement, and paid rent up to the 1ſt of *March* 1774. The court held, that this was a good Baxter v. Browne, 2 Bl. Rep. 973.

a good leaſe *in præſenti*, with an agreement to execute a more formal and perfect leaſe *in futuro*. The operative words *let* and *ſet* are in the preſent tenſe. A reference is alſo made to *this demiſe*. There have been fourteen years uninterrupted occupation under it, and five or ſix of them ſince the title of the leſſor of the plaintiff accrued. He has accepted rent, and thereby given the defendant every reaſonable hope of acquieſcence. Under ſuch circumſtances, if the words of this leaſe can import an *immediate* legal demiſe, the court will ſupport it as ſuch; and that they will, is evident from the caſes cited, *viz.* 1 *Roll. Abr.* 847. *Moor*, 459. *Noy*, 57.

Bury v. Nugent, 5 Term Rep. 165. in error from Ireland.

In ejectment, the leſſor of the plaintiff derived title from the defendant, under an inſtrument, purporting to be a demiſe for twenty-one years of the premiſes in queſtion. The inſtrument was as follows: "Be it remembered that *J. B* (the defendant) hath let, and by theſe preſents "doth demiſe, *&c.* unto *R. F. &c.* for twenty-one years to commence "the 5th of *May* or 1ſt of *November*, which ever firſt happens after the ſaid "*J. B.* recovers the ſaid lands from *M. O.* The ſaid *R. F.* covenanting "and agreeing on the foregoing conditions to pay *J. B.* 100*l.* yearly and "every year during the ſaid term *&c.*; *leaſes* with power of diſtreſs, "and clauſes for re-entering, and all other clauſes uſual between landlord "and tenant, to be drawn and ſigned at the requeſt of either party as "ſoon as *J. B.* recovers theſaid lands from *M. O.*" *J. B.* recovered the lands from *M. O.* and was then in poſſeſſion of them. The court were clearly of opinion, that the inſtrument operated as a preſent demiſe, and that the agreement for a more formal leaſe was merely in further aſſurance.

Goodtitle v. Way, 1 Term Rep. 735.

On the trial of an ejectment the defendant produced in evidence a leaſe, as he ſtated, of the premiſes in queſtion, but which appeared to be an agreement upon paper, *unſtamped*, and not under ſeal, between the Earl of *Abingdon*, under whom the leſſor of the plaintiff claimed, and the defendant's father. In the ſubſequent part of it were theſe words, *viz.* "And "further the ſaid Earl of *Abingdon* doth hereby agree to let, and the "ſaid *Richard Way* agrees to rent and take for the term of ſeven, four-"teen, or twenty-one years, in caſe the ſaid Earl ſhall ſo long live, at "and for the rent of 1400*l.* a year, to be paid half-yearly, (the ſaid "Earl to pay or allow all manner of tithes and taxes, both ordinary and "extraordinary,) all his eſtate, *&c.* at *Rycot*. It is agreed the ſaid "*Richard Way* ſhall enter on all the ſaid premiſes immediately, but not "commence payment of rent until *Lady-day* next. It is further agreed, "that leaſes with the uſual covenants *ſhall be made and executed* by the "parties on or before *Michaelmas* next." On the production of this, it was contended, that this being produced as a leaſe, and not being ſtamped, could not be read in evidence; and the judge being of that opinion, the plaintiff had a verdict. But on a motion for a new trial, the court were of opinion, that it was *not* a leaſe. The caſe in *Noy*, 128. of *Sturges* v. *Paynter*, they ſaid, is in point. In the preſent caſe, there is alſo an expreſs ſtipulation that leaſes *ſhould be* drawn before *Michaelmas*: therefore, it plainly was not the intention of the parties that ſuch agreement ſhould operate as a leaſe, but only that it ſhould give the defendant a right to the immediate poſſeſſion, till a leaſe could be drawn. Had it been a leaſe, the court thought it ought to have been ſtamped (*b*).

(*b*) So now if only an agreement under 23 G. 3. c. 58.

Roe v. Aſhburner, 5. Term Rep. 163.

Articles of agreement were drawn in the following manner: "Articles "of agreement between *T. S.* and *D. J.*, entered into in regard to his "fulling mills, dry-ſalting mills, and other conveniencies for carrying on "the ſaid trades: that the mills and conveniencies, with the iſlands and "ground

" acre of land mintsfeet, called *Asnacre, he shall enjoy*, and *I engage to give* " *him a lease in*, for the term of 31 years from *Whitsuntide* 1784, at the " rent of 110*l.*: and that I will purchase one yard in breadth to be laid " to the *Race* from the *High Clews*, the length of *Charles Close:* and " that if it be bought, *&c.*" Here, though the words *shall enjoy* are sufficient to give the legal interest, yet the latter words restrain their operation, and clearly shew it was the intent of the parties, that there should be some *further* assurance. It was in *fieri* at the time: and if a bill had been filed in a court of equity for a specifick performance of the agreement, that court would not have told the party that he had a legal and executed contract, but would have decreed a lease according to the agreement. By the subsequent part of the agreement, the landlord was to acquire an additional piece of ground to be laid to the mill, without which the lease was not be granted: this shews that there was to be some future instrument to give title to the party.

Although no specifick words are necessary to create a lease, yet there must be words used which shew an intent to demise. Therefore, where a lessee of tithes agreed with the owner of lands for certain collateral considerations not to take tythes in kind from the tenants of the lands for twelve years, but to accept a reasonable composition not exceeding 3*s.* 6*d.* per acre, this was adjudged to be no lease. 1st, The rent affected to be reserved is uncertain: under this agreement it is at the option of the party either to pay tythes in kind, or to tender the reasonable value of the tythes, which may be under 3*s.* 6*d.* per acre. And 2d, The owner of the lands, the person with whom the agreement is made, is neither to enjoy any thing, nor to pay any rent. It cannot therefore be a demise to him. The tenants are not parties or privy to the transaction: it cannot therefore be a demise to them. It can, at the utmost, amount to no more than a mere covenant with *A.* that *B.* shall enjoy, and creates no lease to either. Brewer v. Hill, Anstr. 413.

(L) What certainty is requisite to Leases for Years as to their Beginning, Continuance, and Ending: And herein,

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(*So where*) In two of the cases put, the period of time at which it is the intent of the parties that the lease should begin is manifest, and therefore in reason the leases ought to commence from such time. To suppose that they referred to an event which happened about two thousand years ago, or had in view an event which never will happen, is to suppose them not in a capacity to contract.

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(*If an indenture of demise bears teste 4 May*) That a lease may commence at one day in point of computation, and at another in point of interest is manifest from the case of Enys v. Donnithorne, 2 Burr. 1192. where it is holden, that a lease, *to hold from a day past for fifty years, thence next ensuing, the said term to commence and begin from and immediately after the surrender, forfeiture, or other determination of an existing lease of the same premises*, was not uncertain in its commencement.

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(*If A., reciting that*) See Preston on Estates, ch. " Estates for Years."

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(*Copyhold land*) Adjourn, according to both reporters.

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(*Error of a*) 2 Show. 31. S.C. reports it a lease for 21 years to the same person, and after in the same lease a covenant that the lessee shall have the lands for 21 years more after the expiration of the said term, and so from 21 years until 99 years be complete and ended; and adjudged good, and to be two leases, and not one, viz. for 21 years, and also for 99 years besides.

(And

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(*And yet there*) A leaſe was granted "to hold from Michaelmas day for one whole year, and "ſo for two or three years, or any ſuch further term of years as the parties ſhould think fit and "agree, on yielding and paying for the ſaid one year, and from thence yearly and every year "during ſuch term or terms as ſhould be thereafter granted, 35*l. per annum.*" According to Wilſon's report, this was adjudged to be a leaſe for *two* years. Harris v. Evans, 1 Wilſ. 262. But according to Ambler, who was of counſel in the cauſe, it was holden to be a leaſe for *one* year only without a ſubſequent agreement; for if it had been doubtful under the words of the *habendum*, thoſe under the reſervation fully explained them. Ambl. 329. If we ſuppoſe the court to be alluding to different periods of time in theſe reports; in the former, to the time paſt, to the time the tenant had actually occupied; in the latter, to his eſtate at the commencement of the leaſe; both reports may be correct, and there will be no contradiction between them. For it is now clear that a leaſe *for a year, and ſo for ſuch further term as the parties ſhall agree upon*, or, *from year to year, as long as both parties ſhall pleaſe*, is, with a view to its preſent extent, a leaſe for a year certain, and no more; though with a view to the time which has elapſed, to the number of years the tenant has occupied it is conſidered as an eſtate for all that time including the current year. In the caſe of Agard v. King, *ſupra*, where the court are made to ſay, that ſuch a leaſe was a leaſe certain *at firſt* for *two* years, it is to be remembered, that they were not conſidering the preſent, but the paſt eſtate which the tenant had: what they ſay therefore muſt be taken to be with reference to that, and to import nothing more than that it was at firſt, that is, upon the expiration of the two years, a leaſe for thoſe two years, whatever it might be as to the third year which the tenant had entered upon, and upon which only the queſtion in that caſe aroſe. And ſo in the caſe of Bellaſis v. Burbridge, referred to in Salk. 413. and fully reported in Lutw. 213. the leſſee under a demiſe for a year: and ſo from year to year, &c. had occupied one year, and part of another; and the court ſay, that this was a good leaſe for two years at leaſt; that is, that the tenant having continued the occupation part of another year, the leaſe was thereby become a good leaſe for that year; not that the leaſe by the terms of it was originally and in its creation a leaſe for two years certain. And notwithſtanding the puzzle and contrariety of opinion in the books with reſpect to theſe running leaſes, the law is now conſidered as ſettled agreeably to the caſe of Legg v. Hacket or Strudwick, above reported. They are leaſes for one, two, or more years, according to the form of the leaſe, dependent for their further continuance upon the will of the parties. If it be the will of the parties that they ſhould have a further continuance (and that ſuch is their will, the law will preſume, unleſs the contrary be evinced by a regular half year's notice to quit given by the one to the other,) the tenant ſo continuing in poſſeſſion is not a mere tenant at will, but a tenant for years: it is the will of the parties that he ſhould continue the tenancy another year: his precarious intereſt is for ſuch further term become certain; but he has ſtill the ſame kind of eſtate which he formerly had. Birch v. Wright, 1 Term Rep. 380. Preſt. on Eſtates, ch. Eſtates, for Years. (*a*) 1 Term Rep. 162. (*b*) But this notice may vary according to the cuſtom of the country, and the nature of the hereditaments in leaſe. Roe v. Wilkinſon, Co. Lit. 278. b. note 14th edit. 2 Salk. 414. 3 Burr. 1609.

Ferguſon v. Cornish, 2 Burr. 1032. more accurately in 2 Term Rep. 463. (*c*) Goodright v. Richardſon, 2 Term Rep. 462.

A leaſe was granted for ſeven, fourteen, or twenty-one years, as the leſſee ſhould think proper. And by Lord *Mansfield*, this was at leaſt a leaſe for ſeven years; then if the leſſee continues, it is for fourteen years; if at the end of that time he ſtill continues, it is for twenty-one years. And agreeably to this deciſion, it hath been lately determined (*c*), that a leaſe for three, ſix, or nine years, determinable in 1788, 1791, 1794, is a leaſe for nine years, determinable by either of the parties at the end of the firſt three or ſix years, on giving reaſonable notice to quit.

Ut de ſupra, vol. iv. pag. 174.

If the parſon of *D.* make a leaſe of his glebe for ſo many years as he ſhall be parſon there, this leaſe is ſaid to be void for the uncertainty of its continuance, becauſe none can ſay how long the leſſor will be parſon; and then it cannot be a leaſe for years, when by no poſſibility the number of years can be aſcertained. But, ſaith our author, it ſhould ſeem, that if livery were made, the leſſee will be tenant during the incumbency of the leſſor, and ſo have the freehold in him, though for want of certainty in the number of years, he cannot be ſaid leſſee for years. This obſervation of our author has been ſanctioned by the judgment of the court of Exchequer in a recent caſe: for the court after citing it, and acknowledging its juſtneſs, ſay "But of rents or other things which lie in grant, "the mere delivery of the deed has the ſame force as livery has in the caſe "of

Brewer v Hill, Anſtr. 419.

"of land; and therefore any demiſe of uncertain duration gives an eſ-"tate for life determinable on the particular event." They therefore held, that a leaſe of tythes "for all the time the leſſor ſhould continue "vicar," was good without livery, and conveyed an eſtate for life to the leſſee during the incumbency of the leſſor.

Where the duration of a leaſe is not preſcribed by the terms of the contract, but is left ſubject to the will of the parties, the law, for the ſake of convenience, and that neither of the parties may be ſurpriſed or diſtreſſed by the caprice of the other, will not permit the tenancy to be determined without a regular notice. What ſhall be a regular notice muſt depend upon the nature of the letting: hence, if the letting be originally for a month or week, a month's or week's notice will be ſufficient. But, where there is a clear tenancy from year to year, the notice muſt be of half a year, not ſix months, at the leaſt, and determinable with the year. This notice being required for the ſake of convenience, it muſt, conſequently, extend to a tenancy in houſes as well as in lands; it may be waived by the party giving it; or it may be wholly diſpenſed with by the conſent of both parties. But no collateral conſiderations, ſuch as a reſervation of the rent quarterly, ſhall be conſtrued to be a diſpenſation with it. What ſhall be a waiver of a notice is a queſtion of fact to be determined by the conduct of the party who has given it (*a*). The receipt of rent due after the expiration of the notice, *eo nomine* as rent, or the taking of a diſtreſs for ſuch rent, have both been holden to be a waiver of it (*b*).

1 Term Rep. 162. Eſpin. Ni. Pri. Ca. 94. 267.

(*a*) *Vide* Shirley v. Newman, Eſpin. Ca. 266.

Oakapple v. Copons, 4 Term Rep. 361. (*b*) Goodright v. Cordwent, 6 Term Rep. 219. Zouch v. Willingale, 1 H. Bl. 311.

Where the tenant denies the right of his landlord, no notice from the landlord is neceſſary. The tenant controverts the right out of which the notice is to ariſe: he diſclaims the relation of landlord and tenant: it is an inſtant determination of the tenancy on his part.

Although a leaſe granted by a tenant for life under a limited power of leaſing, if it exceed that power, is abſolutely void, and therefore incapable of confirmation by the remainder-man; yet, if the remainder-man accept rent, as rent, after the death of the tenant for life, he thereby admits that the leſſee is *his tenant*, and therefore entitles him to a notice to quit.

Doe v. Watts, 7 Term Rep. 83.

A tenant for life made a leaſe for years, to commence on a certain day, and died (before the expiration of the leaſe) in the middle of the year. The remainder-man received rent from the leſſee, (who continued in poſſeſſion, but not under a freſh leaſe, for two years together, on the days of payment mentioned in the leaſe. This is evidence from which the court will preſume an agreement between the remainder-man and the leſſee, that the latter ſhould continue to hold from the day, according to the terms of the original demiſe: ſo that *notice to quit ending on that day* is proper.

Roe v. Ward 1 H. Bl. 97.

The notice, except where the leſſor means to proceed under the ſtatute for double rent, need not be in writing: but, if it be in writing, a ſlight inaccuracy, where the intention of the party giving is apparent upon the face of it, will not vitiate it. Therefore, a notice delivered to a tenant at *Michaelmas* 1795, to quit at "*Lady-day which will be in the* "*year* 1795," was holden to be good.

Doe v. Kightley, 7 Term Rep. 63.

(Q) How far, and by what Means, Leaſes for Years in Truſt to attend an Inheritance may be barred or deſtroyed.

Hanmer v. Eyton, Comb. 67. See alſo 1 Ch. Rep. 27, 33.

So, where *A.* had a term of years veſted in him for ſecuring children's portions, and *B.* being in poſſeſſion levied a fine, and five years paſſed without any claim being made; it was reſolved by the Court of King's Bench, that, admitting the term was in truſt, it was barred by the fine.

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(*A ſeized in fee makes a leaſe*) See *acc.* 2 Vez. 482.

(R) Leaſs for Years, when merged by Union with the Freehold or Free.

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(*My Lord Coke lays it down*) 3 Term Rep. 401.

Saunders v. Bournford, Fin. Rep. 424.

A leſſee for 1000 years aſſigned the term to the leſſor in truſt for his wife and children, and the leſſor accepted the truſt, and declared the purpoſes of it. The Court of Chancery ſupported the truſt, notwithſtanding the merger of the term in the inheritance, and decreed the heir of the leſſor to make a further aſſurance of the remainder of the term to a purchaſer from the ſon of the leſſee.

Doniſthrope v. Porter, Ambl. 600. (*a*) *Ibid.* Cheſter v. Willes, *id.* 246. (*b*) Though the owner were a lunatick, yet as between his mere, abſolute real and perſonal repreſentatives, the term ſhall merge, for as between theſe no equity can exiſt. Lord Compton v. Oxenden, 2 Vez. jun. 261. (*c*) Duke of Chandois v. Talbot, 2 P. Wms. 601. (*d*) Wyndham v. Earl of Egremont, Ambl. 753. (*e*) Powell v. Morgan, 2 Vern. 90. Thomas v. Kemiſh, 2 Vern. 354. 2 Freem. 207. (*f*) Ambl. 602. 2 Vez. jun. 264.

A court of law cannot merge eſtates unleſs it finds them in the ſame perſon, and acquired, ſubject to ſome exceptions, in the ſame right. But courts of equity look into the beneficial intereſts and views of parties, and do not regard whether the eſtates are ſtrictly in the ſame perſon, or in different perſons. Hence it is a general rule (*a*) with theſe courts, that where the owner of an eſtate becomes entitled to a charge upon it (*b*) ſecured by a term of years, ſuch term ſhall ſink for the benefit of the heir. But exceptions to this rule are admitted in ſeveral inſtances: as, where the perſon entitled to the charge takes only an eſtate tail (*c*) in the eſtate, and not the fee ſimple. So, where by reaſon of a limitation (*d*) to truſtees to preſerve contingent remainders, the owner does not take the fee. So, where the owner of the fee (*e*) has manifeſted his intention, that the charge ſhould ſtill ſubſiſt. So, in favour of creditors, (*f*) and of infants. The caſes of infants turn upon a ſuppoſed intent; and the courts ſink or preſerve the term, as they find to be moſt beneficial for the intereſts of the infant.

Beſt v. Stamford Pr. Ch. 252. 1 Salk. 154 2 Freem. 288.

Analogous to the caſe of merger at law, where the term and the fee come into the ſame hands, is the doctrine of courts of equity, that, whenever a man is owner of the inheritance, and entitled to a truſt term of the ſame eſtate, the term ſhall be attendant upon the inheritance.

(S) Of Surrenders of Leaſes for Years: And herein,

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(*So if leſſee*) But a releaſe of the leſſee for life or years to the leſſor does not amount to a ſurrender, for the words are repugnant; for the leſſee is in poſſeſſion, and the releaſe ſuppoſes the leſſor in poſſeſſion, Jenk. 195. Ca. 2.

So, where a leaſe came into the hands of the original leſſor, by an agreement entered into between him and the aſſignee of the leſſee, "that "the leſſor ſhould have the premiſes as mentioned in the leaſe, and "ſhould pay a particular ſum over and above the rent annually towards "the good-will already paid by ſuch aſſignee," it was adjudged, that this agreement operated as a ſurrender of the whole term. Smith v. Mapplebeck, 1 Term Rep. 441.

(*But now*) This note in writing, it hath been adjudged, need not be ſtamped: Farmer v. Rogers, 2 Wilſ. 26 Beck v. Phillips, 5 Burr. 2827. However, a ſtamp ſeems now to be rendered neceſſary by ſtat. 23 Geo. 3, c. 58.

Since this ſtatute, ſaith our author in another place, a leaſe for years cannot be ſurrendered by cancelling the indenture, without writing, becauſe the intent of the ſtatute was, to take away the manner they formerly had of transferring intereſts in lands by ſigns, ſymbols, and words only; and therefore, as a livery and ſeiſin on a parol feoffment was a ſign of paſſing the freehold before the ſtatute, but is now taken away by the ſtatute, ſo, he takes it, the cancelling of a leaſe was the ſign of a ſurrender before the ſtatute, but it is now taken away, unleſs there be a writing under the hand of the party; and the words, viz. *by act and operation of law*, are to be conſtrued a ſurrender in law, by the taking of a new leaſe, which, being in writing, is of equal notoriety with a ſurrender in writing. Magennis v. Mac-Cullogh, Gilb. Eq Rep. 236.

Although the ſtatute directs that the deed or note in writing ſhall be ſigned by the ſurrenderor, yet where an agreement was entered into between the leſſor and leſſee, at the inſtance of the former, for the ſurrender of a leaſe, an aſſignment actually prepared, the key delivered up and accepted, and a long acquieſcence on the part of the leſſor, without any claim or demand upon the leſſee, it was decreed in equity that the leſſee ſhould be diſcharged of the rent from the time he had delivered up the key. Natchbolt v. Porter, 2 Vern. 112.

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(*But if ſuch*) No ſurrender, expreſs or implied, in order to, or in conſideration of, a new leaſe, will bind, if the new leaſe is abſolutely void; for the cauſe, ground, and condition of the ſurrender fails. *Per* Lord Mansfield, Zouch v. Parſons, 3 Burr. 1807. Lloyd v. Gregory, Sir W. Jon. 405-6. Wilſon v. Sewell, 4 Burr. 1980. Daviſon v. Stanley, *Id.* 2210.

(T) Leaſes, when determined by cancelling the Deed.

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(*And though*) But a leaſe by parol for leſs than three years to commence *in futuro*, is good. Ryley v. Hicks, 1 Str. 651. Bull. N. P. 177. S. C.

(U) Leaſes when forfeited.

HERE it is to be obſerved, that any act of the leſſee by which he diſaffirms or impugns the title of his leſſor, occaſions a forfeiture of his leaſe. For to every leaſe the law tacitly annexeth a condition, that if the leſſee do any thing that may affect the intereſt of his leſſor, the leaſe ſhall be void, and the leſſor may re-enter. Beſides, every ſuch act neceſſarily determines the relation of landlord and tenant: ſince to claim under another, and at the ſame time to controvert his title; to affect to hold under a leaſe, and at the ſame time to deſtroy that intereſt out of which the leaſe ariſeth, would be the moſt palpable inconſiſtency.

A leſſee may thus incur a forfeiture of his eſtate by act *in pais*, or by matter of record. By matter of record—where he ſues out a writ, or reſorts to a remedy, which claims or ſuppoſeth a right to the freehold; or where in an action by his leſſor grounded upon the leaſe he reſiſts the demand under the grant of a higher intereſt in the land; or where he acknowledges the fee to be in a ſtranger: for having thus ſolemnly proteſted againſt the right of his leſſor, he is eſtopped by the record from claiming an intereſt under him. By act in *pais*, as where he aliens the eſtate in fee (*a*). But then this alienation muſt be by ſuch mode of conveyance as diſplaces or diveſts the eſtate of the reverſioner (*b* : for if it have not this effect, the law will not adjudge it a forfeiture. It muſt be, therefore, by feoffment with livery; for this only operates upon the poſſeſſion, and effects a diſſeiſin. It cannot be by a grant, or any conveyance in the nature of a grant, ſuch as leaſe and releaſe, bargain and ſale, &c. conveyances of this kind operating only on the grantor's intereſt, and paſſing only what he may lawfully depart with. And as it cannot be by grant, of courſe no forfeiture can by this way be incurred of an eſtate of thoſe things which lie merely in grant.

Co. Lit. 251. a. Hawk. Abr. Co. Lit. 339. Dixey v. Spencer, 3 Leon. 220. Moor, 211. Gouldſ. 40. S. C. Godb. 105. ſeems to be S. C.'s Barkhouſe's caſe, 4 Leon. 3 Dy. 209. pl. 21. *in marg.* 2 Lev. 52. (*a*) Co. Lit. 251. b. 1 Burr. 92 Co. Lit. 251. (*b*) But if tenant for years, the reverſion, or remainder being in the king, make a feoffment in fee. this is a forfeiture; and yet no reverſion or remainder is diveſted out of the king; and the reaſon is, in reſpect of the ſolemnity of the feoffment by livery, tending to the king's diſheriſon. Co. Lit. 251. b.

And if an attempt to alienate by thoſe modes of conveyance which affect, but are not operative enough, to paſs a fee, occaſion no forfeiture, a leaſe by the tenant for a greater number of years than he has in the land muſt be ſtill more venial; becauſe it is only a contract between him and his under-leſſee, which cannot poſſibly prejudice the intereſt of the original leſſor, and does not even pretend to uſurp or touch the freehold and inheritance.

Eaſtcourt v. Weeks, 1 Salk. 187.

Forfeitures are alſo incurred by the breach of *expreſs* or *conventionary* conditions. For the leſſor, having the *jus diſponendi*, may annex whatever conditions he pleaſes to his grant, provided they be not illegal, or repugnant to the grant itſelf, and upon the breach of theſe conditions may avoid the leaſe. A condition, that if the rent be behind by the ſpace of any given time after the day preſcribed for payment, the leſſor ſhall re-enter, is good; and ſuch condition is not ſaved by the attendance of the leſſee with the rent merely on the firſt day of payment; for, if the leſſor be not then there to receive it, the leſſee muſt equally attend on the laſt day (*a*). Conditions in reſtraint of alienation are legal and uſual; but whether ſuch conditions extend to aſſignees in law, is a point which doth not yet ſeem to be ſettled (*b*). But the courts have always held a ſtrict hand over theſe conditions for defeating leaſes, and have countenanced very eaſy modes for putting an end to them. Where, therefore, the words of the condition were (*c*), that the leſſee, "his executors or adminiſtrators, ſhall not, at any time or times, during this demiſe, aſſign, transfer, or ſet over, or otherwiſe do or put away this preſent indenture of demiſe, or the premiſes hereby demiſed, or any part thereof," the court held, that this condition was not broken by an under-leaſe; for that *aſſign*, *transfer*, and *ſet over* are mere words of aſſignment; that *otherwiſe do or put away* ſignify any other mode of getting rid of the premiſes entirely; and cannot extend to the making of an under-leaſe.

(*a*) 10 Co. 129. a. Plow. 70. a. b. (*b*) Cro. Eliz. Dy. 45. b. 4 Leon. 5. 3 Leon. 67. Styl. 483. 3 Wilſ. 234. 2 Bl. Rep 767. S. C. Doe v. Skeggs, Tr. 21 G. 3. B. R. cited in 2 Term Rep. 428. (*b*) Cruſoe v. Bugby, 3 Wilſ. 234. 2 Bl. Rep. 767. S. C. But where the words of a proviſo were, that the leſſee, "his executors or adminiſtrators, ſhall not ſet, let, or aſſign over the ſaid hereby demiſed meſſuage "or dwelling-houſe, or any part thereof," an under-leaſe by the leſſor's adminiſtratrix was holden to be within the meaning of the proviſo. Roe v. Harriſon, 2 Term Rep. 425.

And

And as the courts adhere ſtrictly to the preciſe words of the condition in order to prevent a forfeiture, ſo, where a forfeiture hath manifeſtly been committed, they will not allow the leſſor to take advantage of it, if they find that he has afterwards done any act which amounts to a waiver of it. Acceptance of rent hath been adjudged to be an act of this kind; but then, in order to give it this effect, it muſt appear, that at the time the leſſor received the rent he had notice of the forfeiture: for it would be abſurd, and a moſt unwarrantable concluſion, to infer from the mere receipt of the rent that he meant to remit a forfeiture he had never heard of. However, when we ſay that a forfeiture may be waived, we muſt be underſtood to confine ourſelves to thoſe caſes, where by the terms of the contract, the eſtate, upon the tenant's doing or failing to do what he has ſtipulated to do, or abſtain from, is only determinable, not where it abſolutely determines; where the leaſe is only voidable, not where it is merely void (*d*). In the one caſe, the forfeiture is incomplete, ſome act of the leſſor is neceſſary to perfect it; that is, to ſpeak more correctly, no forfeiture is actually incurred at the inſtant, only a right of avoiding the leaſe accrues to the leſſor, which right he may waive as he may any other right that is merely perſonal and conventional. In the other caſe, the contract is at an end, the leaſe is determined; it is a nullity; the leſſee has no intereſt upon which the will of the leſſor can attach.

3 Co. 65. a. b. 2 Term Rep. 431. Co. Lit. 215. a. Plowd. 131. 3 Co. 64. b. Cro. Eliz. 220.

(*d*) In ſuch caſe, it ſhould ſeem, the forfeiture may be taken advantage of even by a wrong doer. But ſee Kinnerſley v. Orpe Doug. 56. *contra*.

By ſtat. 4 *G.* 2. *c.* 28. § 2. every landlord, who hath by his leaſe a right of re-entry, in caſe of non-payment of rent, when half a year's rent is due, and no ſufficient diſtreſs is to be had, may without any previous demand of the rent, or re-entry, ſerve a declaration in ejectment for the recovery of the demiſed premiſes; and a recovery in ſuch ejectment ſhall be final and concluſive, both in law and equity, unleſs the rent and all coſts be paid or tendered within ſix calendar months afterwards. But if the tenant, at any time before the trial in ejectment, pay or tender to the landlord the whole rent in arrear, with the coſts, or pay ſuch arrears and coſts into court, the proceedings in ejectment ſhall ceaſe, and the tenant ſhall be relieved in equity, and hold the lands demiſed according to the old leaſe without any new leaſe.

In Archer v. Snapp, Andr. 341. Lord C. J. Lee obſerves, that both the courts of law and the courts of equity had, before this ſtatute, exerciſed a diſcretionary power of ſtaying the leſſor from proceeding at law, in caſes for forfeiture of non-payment of rent, by compelling him to take the money really due to him. See Bull. N. p. 97. and 2 Str. 900. *acc.*

Under a power of re-entry in caſe of non payment of rent, the landlord cannot recover in ejectment at common law, unleſs he prove a demand on the very day on which the rent became due; nor under the ſtatute of 4 *G.* 2. *c.* 28. unleſs he prove that there was not a ſufficient diſtreſs on the premiſes.

Doe v. Wandlaſs, 7 Term Rep. 117. In conſequence of this deciſion, it is adviſable to provide in the clauſe for re-entry, that in caſe the rent ſhall be demanded, on the expiration of the extra time uſually allowed for the payment of it, or at any time afterwards, and ſhall not then be paid, it ſhall be lawful, &c.

(X) Of the Renewal of Leaſes, by whom, and for whoſe Benefit.

A LEASE, we muſt have obſerved, is a contract, by which, in conſideration of ſome pecuniary or other recompence, the *tempora-*

See the very learned and ingeni-

ous argument for the appellant in the case of Lee v. Vernon, 7 Br. P. C. 438. and see also Mr. Butler's note in his edition of Co. Lit. 293. b.

ry possession of lands or tenements is granted to another; for if the grantor parts with his whole interest in the estate, the contract is not a contract of lease, but of sale; it being essential to a contract of lease, that there should be a reversion left in the grantor. But a practice has prevailed, particularly in leases from the crown, from the church, and from other corporations, of granting a further term to the old tenants, in preference to strangers; and as this expectation of renewal is rarely disappointed, such tenants are considered as having an ulterior interest beyond their subsisting term. This interest is generally, but improperly, called their *tenant-right of renewal*. For it has happened in this case, as it has happened in many others, that long indulgence has been made a ground of claim; a preference repeatedly given has, in process of time, been insisted upon as a prescriptive privilege; and attempts have been made to enforce that as a right, which was, in truth, a pure voluntary curtesy. But though such attempts have failed of success, there being, as between landlord and tenant, abstractedly from any express contract to that effect, no obligation upon the former to renew with the latter, yet the almost invariable recurrency of the grant to the same objects, has begotten an idea of something like property, and men have been so far from treating this ulterior interest as precarious, that they have acted upon it, as if it were fixed and certain. Hence, leases of this sort are become a fund for settlements of every kind, for mortgages and other securities; and are subjected to the same limitations, and applied to the same provisions with the most permanent interests.

2 Atk. 597. 2 Br. Ch. Rep. 248.

This tenant-right, as it is called, is recognized and protected by courts of equity in many instances. Hence, where a trustee, executor, or guardian, avails himself of his situation, and gets a renewal of a lease for his own benefit, the courts will direct it to be for the use of the *cestuy que trusts*, or persons beneficially interested in the old lease. So, where a person who has only a partial interest, as tenant for life, mortgagee, or mortgagor, from the circumstance of being in possession, takes the opportunity of renewing, such renewal shall be for the benefit of the person entitled to the reversion. And according to the broad principles of equity, it should seem, that wherever a grant of a reversionary term is obtained, to the prejudice of the old tenant, by undue means, whether by *suggestio falsi*, or *suppressio veri*, the party so obtaining it, though an entire stranger, shall not be permitted to hold it to his own use.

Keech v. Sandford, or Rumford Market case, 2 Eq. Ca. Abr. 741. Sel. Ca. in Chan. 61. S. C.

A lease of the profits of a market was devised to a trustee, in trust for an infant: before the expiration of the term, the trustee applied to the lessor for a renewal for the infant's benefit, which he refused, in regard that it being only the profits of a market, there could be no distress, and it must rest solely on covenant, which the infant could not bind himself in, on which the trustee got a lease to himself. It was decreed by Lord Chancellour *King*, that the lease should be assigned to the infant; that the trustee should be indemnified from the covenants of the lease, and should account for the profits since the renewal. His lordship said, he must consider this as a trust for the infant; for if a trustee, on refusal to renew, might have a lease to himself, few trust-estates would be renewed to *cestuy que trust*: that the trustee should rather have let it run out, than to have had the lease to himself: that it may seem hard, that the trustee is the only person of all mankind who may not have the lease: but it is very proper that the rule should be strictly pursued, and not in the least relaxed; for it is very obvious what would be the consequence of letting trustees have the lease, on refusing to renew to *cestuy que trust*.

A lessee

A leſſee for years, ſubject to a truſt, deviſed *reſiduum bonorum*: the eſtate, if all ſold, would but pay the debts: the executor paid the debts, and renewed the leaſe for a further term, it being a church leaſe, and offered to account, if any profits ſhould ariſe out of the old term. It was inſiſted, that by paying debts to the value, the property was altered, and veſted in him in his own right. But the Lord Keeper decreed the executor to account for the new as well as the old leaſe; and aſked, if the executor acquainted the church with his caſe, and declared that he would renew and take it for the time of the old term, to the benefit of the creditors and executorſhip, and the reſt for himſelf? By the *French* law, his lordſhip ſaid, no churchman can make a leaſe to any but the old tenant, unleſs it firſt be refuſed by the old tenant. Anon. 2 Chan. Caſ. 207.

An executor in truſt for an infant of a leaſe for 99 years, determinable on lives, renewed the eſtate for lives abſolutely. It was holden that the renewed leaſe, though for lives only, ſhould follow the nature of the original leaſe, and go to the perſonal repreſentatives of the infant. Whitter v. Whitter, 3 P. Wms. 99.

If a biſhop makes a leaſe for 21 years, and the leſſee creates a truſt thereupon, and the biſhop dies, and his ſucceſſor for a fine renews the leaſe; though he were not compellable to do ſo, and though there be no truſt of the ſecond leaſe, yet equity will ſubject it to the former truſt. *Per* Serjeant Powis, in Canc. 6 Mod 57. Anon.

A. mortgaged a college leaſe to *B.* for 4000*l*, and ſecured the money likewiſe by ſtatute to *B.*; *A.* died, and made *C.* executor. The executor renewed in his own name ſeveral times, until the original mortgage leaſe expired by efflux of time. It was decreed, that *B.* paying the ſeveral fines, gratuities, and charges which *C.* had expended on account of the renewal, ſhould hold the premiſes until the debt were ſatisfied. Luckin v. Ruſhworth Finch's Rep. 392. 2 Ch. Rep. 113. S. C.

One of three leſſees under a dean and chapter ſurrenders, and gets a renewal to himſelf. *Per* Lord Keeper *North*, It is a truſt for all. Palmer v. Young, 1 Vern. 277.

John Coombe, poſſeſſed of ſeveral leaſehold houſes holden of the crown; and having a daughter, *Joanna*, married to *Samuel Clarke*, deviſed unto ſuch child or children, as his ſaid daughter had, or ſhould have, by *Samuel Clarke*, two of his leaſehold houſes, and directed, that the rents and profits ſhould be applied for bringing them up, and educating them, and for placing them out, and ſetting them up, in ſuch proportions as *Samuel Clarke* and his wife ſhould think fit; and that they, and the ſurvivor, ſhould have power to divide the profits between their ſeveral children, when and in ſuch parts as they ſhould think fit. Part of the leaſe being expired, *Samuel Clarke* obtained an additional term from the crown for 25 years from the expiration of the term then in being. *Samuel Clarke* and *Joanna* his wife had two children, and on the marriage of *Coombe Clarke*, their ſon, to *Martha Dethie*, aſſigned one of the leaſehold houſes to truſtees, for the remainder of the term then in being, and of the renewed term of 25 years, upon truſt, to permit *Coombe Clarke* to receive the rents and profits for life, and then to permit *Martha* to receive the rents and profits for her life, and after her death to apply the rents and profits for the ſon of the marriage, for his education, and to convey the premiſes to him at 21. *Coombe Clarke* died, leaving *Martha* ſurviving, and ſeveral children, of whom *Samuel Clarke* was the eldeſt, who attained his age of 21, and ſurvived his mother. *Martha*, after her huſband's death, obtained an additional term of 28 years from the expiration of the exiſting leaſe, and afterwards made her will in 1748, and gave the reſidue of the eſtate in truſt for her daughter *Mary Clarke*, an infant, and died Taſter v. Marriott, Ambl. 668.

died in 1751. Upon her death, *Samuel Clarke* took poſſeſſion of the houſe. He mortgaged it to the plaintiff in 1755, and died in 1756 inteſtate. *Coombe Clarke*, the next ſon, took out adminiſtration to his brother *Samuel*. *Mary*, the daughter, having married the defendant, *Marriott*, they got the tenant to attorn, and pay the rent to them. On a bill by the plaintiff to have an aſſignment of the 28 years term, and to be paid his mortgage money, or foreclоſe, *Marriott* and his wife ſet up title to the renewed term, as being obtained by *Martha* for her own benefit, and derived title to themſelves under her will. The queſtion therefore being, whether the additional term was to be conſidered as an intereſt acquired by *Martha* for her own benefit, or whether it ſhould follow the uſes of the ſettlement? Sir *Thomas Sewell*, maſter of the rolls, was of opinion, that the additional term was to be conſidered as an engraftment upon the old term, on the principle which prevailed in the caſe of *Rumford* Market and other caſes; and followed the uſes of the ſettlement and deed. Lord *Camden*, upon the appeal, was of the ſame opinion, and decreed accordingly.

Rawe v. Chicheſter, Ambl. 715. 1 Br. Ch. Ca. 199. n. S. C.

Richard Rawe ſeiſed of the real eſtate, and poſſeſſed, among other things, of a leaſe of lands and houſes in *Suffolk*, originally granted by *Cha.* 2. in right of the duchy of *Cornwall*, for 31 years, renewable from time to time, upon petition by the tenant in poſſeſſion, for a further number of years, to fill up the term of 31 years, made his will 20th *December* 1761, and reciting his being poſſeſſed of leaſehold houſes at *Lambeth*, and of ſeveral eſtates in land in *Cornwall*, for unexpired terms of years, gave and deviſed the ſaid ſeveral leaſes to his wife, for as many years of the term as ſhe ſhould live, and after her deceaſe, (if the terms ſhould be then in being,) he deviſed them to *William Rawe* for life, and after his deceaſe, among ſuch of the children of *William Rawe* as ſhould be then living, and made his wife executrix and reſiduary legatee. The teſtator had renewed this leaſe juſt before his death, and the widow, during her life, renewed it ſeveral times, ſtating herſelf as widow and executrix of *Richard Rawe*, and continued in poſſeſſion till her death in 1761, in which year ſhe made her will, and diſpoſed of theſe leaſes, as her own property. The queſtion was, whether theſe renewed leaſes were the property of *Richard Rawe*, and to go according to the limitations of his will; or were the abſolute property of the widow? Lord *Bathurſt* thought, ſhe renewed as executrix, ſubject to the truſts, in the will of *Richard*, and that the plaintiffs had a right to the renewed leaſes, repaying to the widow's eſtate the ſum ſhe had paid for the fine, deducting the value of her chance in the renewed leaſe.

Owen v. Williams, 1 Br. Ch. Ca. 199. n. Ambl. 734. S. C.

William Williams deviſed leaſehold eſtates to Sir *William Burnaby*, in truſt to renew the ſame, then to his wife for life, remainder to his brother *John Williams* for life, remainder to *Bennet Williams*, ſon of *John*, and the heirs of his body, and made his wife executrix. Several years of the leaſe being to come, Lord *Groſvenor* petitioned for a leaſe of the reverſion. Mrs. *Williams* diſcovering this, preſented her petition as executrix, giving notice of it to the remainder-man, and got a report from the ſurveyor-general, that ſhe was in poſſeſſion, and that the fine ought to be about 1200*l.* or 1400*l.* Lord *Groſvenor* got a warrant from the Treaſury for a leaſe, but was to pay her a compenſation for her right. *John* and *Bennet Williams* then preſented petitions for renewal. Lord *Groſvenor* made ſeveral offers to Mrs. *Williams*, who communicated them to *John Williams*; but it appeared both Lord *Groſvenor* and Mrs. *Williams* conceived

conceived them to be for her own benefit. At length they ſettled the terms at 3000*l.* Mrs. *Williams* gave notice to *John* and *Bennet* of the probability of their agreeing, and adviſed them to take care of their own intereſts.—It was contended on the part of Mrs. *Williams*, that this 3000*l.* was abſolutely her property; and that *John* and *Bennet* had no claim upon her for any part of it. But Lord *Bathurſt* held, that in caſe ſhe had renewed, it would have been a renewal as executrix; that wherever a partial tenant renews, it is for the benefit of the whole: and therefore that the 3000*l.* given by Lord *Groſvenor* as a recompence for her not renewing, was ſubject to the truſts in the will.

John Pickering, the plaintiff's father, previous to his marriage with *Ann*, the plaintiff's mother, gave a bond to truſtees in the penalty of 400*l.*, conditioned to be void if he ſhould aſſign to them, or to other perſons to be nominated by *Ann*, a leaſehold eſtate for the term of 99 years, or ſuch term as he ſhould have therein, for three lives, of which *Ann*'s ſhould be one, to the uſe of himſelf for life, remainder to *Ann* for life, remainder to the iſſue of the marriage. *Ann* died under coverture, leaving the plaintiff and another child. The eſtate was conveyed to *John*, *Ann*, and another life. In 1776 *John* died, having made his will, and thereby given to *Henry*, his iſſue by a ſecond marriage, all the reſt and reſidue of his eſtate. It did not appear how many renewals of the eſtate had taken place, or for what lives, but that *John*'s being the laſt original life, they were all exhauſted in 1776. —For the executors of the huſband, and *Martha*, the ſecond wife, it was contended, that all the original lives falling in 1776, there was no obligation on the father, or his eſtate, to renew, and that the expence of renewal, having been his, it ſhould be for his benefit. On the contrary, it was argued for the plaintiff, that this bond was purely a contract for a marriage ſettlement, and that the uſual mode of executing it would be to inſert a covenant to renew to the ſame uſes, the object of the parties being to give as large an intereſt to the children as to the parents. For this was cited *Lawrence* v. *Maggs*, before Lord *Northington*, 26th *Nov.* 1759, that the uſual form of the covenant being to keep the leaſe fully eſtated, the ſettlement muſt be ſo executed. In that caſe, the party had, while ſolvent, frequently renewed the leaſe, and conveyed it to the uſes of the ſettlement; the creditors inſiſted, that the leaſe was part of his aſſets, and the conveyances fraudulent. But the court thought, that having conveyed according to the ſettlement, it was not fraudulent, but the ſettlement muſt be carried into execution. By Lord Chancellor *Thurlow*.—The queſtion is, whether the father, having renewed, ſhall be conſidered as having ſo done for the benefit of the ſettlement, or for his own benefit? He did not, by the marriage ſettlement, or by any ſubſequent act, expreſs any intent to do it for the benefit of the ſettlement, and by his will, he has given it, by ſufficiently expreſs words, to his ſon. If a man has eſtates of his own, and alſo pure truſts, and gives the reſidue by will, only his own eſtates will paſs by the reſiduary clauſe; but if he has an intereſt, as well as a truſt, the clauſe will paſs both. But this is the caſe of a tenant-right, as it is called, which, though an improper, is become a technical term. In the Weſt many eſtates derive their value from renewals. The crown alſo has many eſtates of the ſame nature. It has long been held, that where a truſtee or an executor renews ſuch an eſtate, it ſhall be for the uſe of the *ceſtuy que truſt*. The rule has obtained with reſpect to a tenant for life, who has the opportunity of renewal from being in poſſeſſion, that he ſhall not obtain the reverſion for his own uſe. The court therefore obliged him to ſtand ſeiſed as a truſtee to the uſes of the ſettlement: that was determined

Pickering v. Vowles, 1 Br. Ch. Rep. 197.

mined in *Rawe* v. *Chicheſter*, before Lord *Bathurſt*. This is that caſe; for though *John* was author of the ſettlement, it was intended that the leaſe ſhould be fully eſtated, and that he and ſhe ſhould have life eſtates, and that ſo fully eſtated, it ſhould go to the children. The renewal therefore muſt be to that purpoſe. The ſon is entitled to the eſtate, paying the expence of the renewal.

Lee v. Vernon, 7 Br. P. C. 432.

In 1661 a leaſe was granted by *Cha.* 2. under the ſeal of the Duchy of *Lancaſter*, of the parks of *Hanbury* and *Tutbury* in the county of *Stafford*, to *Edward Vernon* for 31 years from *Michaelmas* in that year. In the following year another leaſe of theſe parks was granted by the king to Sir *Thomas Morgan*, to commence immediately after the expiration of the preceding leaſe. This leaſe becoming veſted in *Edward Vernon*, he in 1678 obtained another reverſionary term from the crown for 63 years from the expiration of the leaſe to Sir *T. Morgan*.

In 1687 *Edward Vernon* died, leaving iſſue two daughters, both of whom died without iſſue and unmarried. After his death the laſt-mentioned leaſe became veſted in the appellant's father, who was accordingly in poſſeſſion thereof until the time of his death, which happened in *Oct.* 1748. He left a widow, and the appellant, his only ſon, then about five years old. The widow, as executrix of her huſband, and legatee of his perſonal eſtate, entered upon the premiſes compriſed in the leaſe, and held them until her death in 1763. By her will ſhe gave the appellant, her ſon, all the reſt and reſidue of her perſonal eſtate, to be delivered up to him at his age of 21 years, or marriage; and under that bequeſt, he enjoyed the leaſehold premiſes. Theſe premiſes lying contiguous to the lands and caſtle of *Tutbury*, held by the reſpondent by leaſe from the crown, under the Duchy ſeal, he, in the year 1755, applied to Lord *Edgecumbe*, then Chancellor of the Duchy of *Lancaſter*, and repreſented to him, that he, (the reſpondent) was the heir-male of the ſaid *Edward Vernon*, and in poſſeſſion of the family ſeat by inheritance from *Henry Vernon*, his great-grand father, and that the ſaid leaſehold eſtates had been diſpoſed of out of the family by the ſaid *Edward Vernon*, or his repreſentatives, and were very deſirable to be enjoyed with the reſpondent's ſaid ſeat; and therefore he requeſted of Lord *Edgecumbe*, as a matter of favour, that a reverſionary leaſe of the ſaid parks might be granted to him, to commence on the expiration of the leaſe then ſubſiſting. With this requeſt Lord *Edgecumbe* complied; and accordingly a leaſe of theſe premiſes was granted on the 12th of *May* 1755 to the reſpondent for nine years and a half to commence in *Mich.* 1776, when the term of 63 years, granted by the leaſe of 1678, would expire: and for this leaſe the reſpondent paid a fine of 200*l.* In the year of 1765, the reſpondent preſented a petition to Lord *Strange*, then Chancellor of the Duchy of *Lancaſter*, praying a grant to him of the ſaid parks and premiſes for ſuch further term, as, together with the terms then ſubſiſting, would make up 21 years. And in the years 1766 and 1768, two petitions were preſented by the appellant to Lord *Strange*, praying, that a leaſe might be granted to him of the ſaid parks for ten years and a half, to commence from the 5th of *April* 1786, when the leaſe now in queſtion would expire, or for ſuch other term as to his Lordſhip ſhould ſeem meet. In purſuance of an order made by Lord *Strange*, the matter of theſe petitions, on the part both of the appellant and reſpondent, came on to be heard before his Lordſhip, in the preſence of counſel for the parties, on the 8th of *April* 1768, when his Lordſhip declared, that the tenant-right or lord's favour of renewal of the leaſe was in the appellant; and diſmiſſed the reſpondent's petition, but ſuſpend-

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ed for the preſent all proceedings upon the matter of the appellant's petition, ſo far as the ſame reſpected the new leaſes prayed. In *Hilary* term 1773, the appellant filed a bill againſt the reſpondent in the Exchequer, by which he prayed, that the reſpondent might be declared a truſtee for him, as to the leaſe granted in 1755, and might be decreed to aſſign the ſame to the appellant for his own uſe and benefit; the appellant thereby offering to pay the reſpondent the fine of 200*l.* and all reaſonable expences incurred in obtaining that leaſe, together with intereſt for the ſame from the reſpective times of payment. And as a ground for ſuch relief, the bill charged, that when the ſaid leaſe was obtained, the appellant was an infant of ſeven years of age; that the reſpondent had preſented the petition, upon which that leaſe was granted, without the privity of the appellant's mother, in whom the poſſeſſion of the premiſes then was; that no mention was made in that petition, as uſual in ſuch caſes, of any term or intereſt ſubſiſting in another perſon, nor any notice given to the appellant's mother of the application for ſuch leaſe, but, on the contrary, the whole tranſaction was induſtriouſly concealed from her; and that the petition for obtaining ſuch leaſe had unduly ſtated, that the reſpondent would have been entitled to the premiſes, if *Edward Vernon* had not diſpoſed thereof; but the appellant charged, that the reſpondent was not of kindred to *Edward Vernon*. To this bill the reſpondent filed a demurrer; on the argument of which, two of the barons were of opinion, that the demurrer ſhould be allowed, and the other two were againſt the allowance of it, thinking, that the appellant ought to have the ſatisfaction of an anſwer to the bill, eſpecially to ſuch part thereof as ſought a diſcovery of facts. Upon this the reſpondent put in an anſwer, in which he admitted, that when the leaſe was granted to him, the appellant was an infant; and that he did not give notice to the appellant's mother, when he applied to Lord *Edgecombe* for a grant of the leaſe; but he denied that he had induſtriouſly concealed the tranſaction from her, and inſiſted, that he was not in any reſpect bound to diſcloſe it to her, or to inform Lord *Edgecumbe* that ſhe had at that time any intereſt in the premiſes; for that he had been informed, and believed, that until Lord *Strange* became Chancellor of the Duchy, no certain rules had ever obtained with reſpect to granting leaſes of Duchy lands; but that the Chancellour of the Duchy for the time being had always been uſed to grant leaſes of eſtates held thereof to ſuch perſons as he thought fit, without regard, and without giving notice to the leſſees or tenants in poſſeſſion thereof; and though the reſpondent believed, that previous to the grant of the ſaid leaſe to him, and after his perſonal application to Lord *Edgecumbe*, and his compliance with the reſpondent's deſire, a petition had been preſented to Lord *Edgecumbe*, to the effect ſtated by the appellant, yet that ſuch petition was prepared as a matter of courſe, and in compliance with the forms of the office, without the reſpondent's direction or privity, and to the beſt of his remembrance was not ſigned by him: and he declared by his anſwer, that he never did aſſert, either to Lord *Edgecumbe*, or any other perſon, that he ſhould have been entitled to the ſaid leaſehold premiſes, had they not been diſpoſed of by the ſaid *Edward Vernon*, nor did he obtain the ſaid leaſe on any ſuch or the like ſuggeſtion, but merely as being heir-male of the ſaid *Edward* and *Henry Vernon*, and of the ſenior branch of the *Vernon* family, and in poſſeſſion of the family ſeat and eſtates in the neighbourhood of the ſaid leaſehold premiſes, and as a matter of friendſhip from Lord *Edgecumbe*, and a favour from the crown to the reſpondent, whoſe relation *Edward Vernon*, originally obtained the grant of the ſaid parks from King *Charles* the Second

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in consideration of many acceptable services, and in particular of money, to a considerable amount, advanced to the king during his exile at *Breda*. To this answer the appellant replied, and passed publication, but did not examine any witnesses. Upon the hearing of the cause, *Feb.* 24th 1775, the court was equally divided, the Lord Chief Baron *Smythe* and Mr. Baron *Eyre* being of opinion, that the bill should be dismissed; Mr. Baron *Perrot* and Mr. Baron *Burland* being of opinion, that the respondent should be declared a trustee of the lease in question for the benefit of the appellant. In consequence of this equal division, the cause was to have been heard before the Chancellor and Barons of the Exchequer, but before it came on Mr. Baron *Perrot* died, and therefore it was recommended by the court to the parties, that the bill should be dismissed without farther argument, in order that the appellant might appeal; and the bill was thereupon ordered to be dismissed, but without costs. Upon the appeal, the Lords affirmed the order of dismissal, but without prejudice to any application which the appellant had made, or might make, to the officers of the crown, as to the manner of their executing, in this case, the trust reposed in them by his Majesty.

Where a lessor has *expressly* covenanted to renew, what shall be the extent of such covenant, whether it shall be satisfied by the lessor's once renewing, or whether it shall amount to an engagement for a perpetual renewal, is a question, the decision of which must depend upon the words in which the covenant may be expressed, and the conduct of the parties, and particular circumstances of each case.

Bridges Hitchcock, 1 Br. P. C. 522.

In a demise of corn-mills for 21 years, there was a covenant on the part of the lessor, that "if the lessee, his executors, &c. should, before the "expiration of the term, be minded to renew, then, upon application, "&c. the lessor, his heirs or assigns, should grant such further lease, as "should by the lessee, his executors, &c. be desired, without any fine to "be demanded therefore, *and under the same rents and covenants only* as in "the then lease." The question was, whether there must be a covenant for renewal again in the second lease? The court of Exchequer were of opinion, that under the words *the same rents and covenants*, the covenant for renewal ought to be inserted; and on appeal to the House of Lords, their decree was affirmed.

Furnival v. Crewe, 3 Atk. 83.

Again, in a lease for three lives, the lessor covenanted, that he, his heirs, &c. should and would (in consideration of a certain sum to be paid to him, &c. at *Crewe Hall*, or at the place where the said Hall then stood, in the name of a fine, for adding one life to the remaining lives therein before mentioned) execute one or more leases, *under the same rents and covenants* which were expressed in the then lease, *and so to continue the renewing of such lease or leases* to the lessee or his assigns, paying as aforesaid to the lessor, his heirs or assigns, the sum before mentioned for every life so added or renewed from time to time. Lord *Hardwicke* held this to be a covenant for perpetual renewal, and decreed a new lease to be granted to the assignee of the original lessee with a covenant inserted in it to that effect.

Cook v. Booth, Cowp. 819.

Again, in such a lease, the lessor had covenanted, that if the lessee, his heirs, &c. should be minded, upon the falling in of any of the lives, to surrender the demise and take a new lease; and thereby add a new life to the then two in being in lieu of the life so dying, that he, the lessor, his heirs, &c. upon payment of so much for every life so to be added, in lieu of the life of every of them so dying, would grant a new lease for the lives of

the two perſons named in the former leaſe, and of ſuch other perſon, as the leſſee, his heirs, &c. ſhould nominate in lieu of the perſon named in the preceding leaſe, as the ſame ſhould reſpectively die, under *the ſame rents and covenants. There had been ſucceſſive renewals from the time of the firſt leaſe; and in every leaſe the like covenant for renewal had been inſerted.* The court of King's Bench held, that the leſſors, *by their own acts* had conſtrued this to be a covenant for perpetual renewal.

But where a leſſor covenanted to renew the leaſe at the ſame rents and upon the ſame covenants on the requeſt of the leſſee within the term, Lord *Macclesfield* held, that though the new leaſe was to be made on the ſame covenants, yet that ſhould not take in the covenant for the renewing of the new leaſe, foraſmuch as then the leaſe would never be at an end. Hyde v. Skinner 2 P. Wms. 196.

So, where in a leaſe for years determinable upon lives, the covenant was, that the leſſor would, upon the death of any of the appointees (by name,) add a new third life upon payment of 200*l.* within ſix months; or upon the death of two of them (by name) within ſix months add two new lives upon payment of 500*l.*; or upon the death of all of them (by name) would, upon payment of 1150*l.* make a new leaſe or grant for any three new lives to be nominated and appointed by the leſſee, his executors, &c. for the like term as was thereby demiſed, *at and under the like rent, covenants, and agreements therein contained*: Lord *Camden* was of opinion, that the leſſors were not under any obligation to grant any farther leaſe than for three lives only, and that the leſſee was not entitled to have any covenants inſerted for a farther renewal; the words of the covenant not requiring the leſſor to grant a new leaſe, but upon the death of ſome one of the perſons named in that leaſe, and when they were all dead, no further renewal could be claimed. Ruſſell v. Darwin, 2 Br. Ch. Rep. 639. n.

So, under a covenant in a leaſe for 21 years, that the leſſor, his executors, &c. would, at the end and determination of the ſaid term for 21 years, execute a new leaſe of the demiſed premiſes, for the further term of ſeven years, to commence from the end of the ſaid term of 21 years, thereby demiſed, *ſubject to the ſame rents, and purſuant to the ſame exceptions, covenants, reſervations, conditions, and agreements in all reſpects, as were in and by the then granted indenture of leaſe mentioned and expreſſed*, in caſe the leſſee, his executors, &c. ſhould deſire the ſame; the leſſee, his executors, &c. firſt giving twelve months notice in writing to the leſſor, his heirs or aſſigns, of his or their deſiring ſuch farther term of years as aforeſaid; Lord *Thurlowe* held the leſſee entitled to a leaſe for ſeven years only, it appearing that the leſſee himſelf had put that conſtruction upon it. Tritton v. Foote, 2 Br. Ch. Rep. 636.

Sir *A. Langford* Bart. being ſeiſed in fee of ſeveral farms and lands in the county of *Meath*, on the 22d of *March* 1697, demiſed the ſame to *John Charles*, his heirs, executors, adminiſtrators, and aſſigns, during the lives of *Alice Charles* his wife, *Richard Charles* their eldeſt ſon, and *John Ward*, and the longeſt liver of them, at the rent of 366*l.*, payable half-yearly, with the following clauſes of renewal, *viz.* "That if the ſaid *John Charles*, "his heirs, executors, adminiſtrators, and aſſigns, within one full year "next after the deceaſe of any of the ſaid perſons for whoſe lives the "preſent demiſe and leaſe is taken, ſhall pay 100*l.* of good and law-"ful money, within the like ſpace and time next after ſuch deceaſe as "aforeſaid, by way of fine, to the ſaid Sir *A. Langford*, his heirs and "aſſigns, he the ſaid Sir *A. Langford*, his heirs or aſſigns, to whom "ſuch payment of 100*l.* ſhall be made as aforeſaid, having then the im-

"mediate Vipont Charles v. Rowley, Ca. in the Houſe of Lords, 1774.

" mediate inheritance of the ſaid lands and premiſes, and ſuch perſon or " perſons that ſhall make ſuch payment of the ſum of 100*l.* by way of " fine, then having two lives ſtill in being, and undetermined of this de- " miſe; and the ſaid perſon or perſons then paying the ſum of 100*l.* by " way of fine as aforeſaid, then likewiſe tendering to the ſaid Sir *A. L.* " his heirs, and aſſigns, having the immediate inheritance of the ſaid lands " and premiſes, a pair of deeds of indenture of leaſe, fairly drawn and " ingroſſed on parchment, purporting a deed of all and ſingular the ſaid " lands and premiſes, for the ſaid two ſurviving lives, mentioned and con- " tained in theſe preſents, and for the life of ſuch other perſon as ſhall be " nominated and appointed by ſuch perſon and perſons, paying ſuch ſum of " 100*l.* by way of fine, and for the natural life of the longeſt liver of " them, and under ſuch reſervations of rent, covenants, conditions, agree- " ments and clauſes of renewal, as in the ſaid indented deeds are ſpecified " and contained;—that then, and in ſuch caſe, he the ſaid Sir *A. L.*, his " heirs or aſſigns, having the immediate inheritance of the ſaid lands and " premiſes, and having received the ſaid fine of 100*l.*, ſhall ſeal, deliver, " and perfect ſuch new indenture of leaſe, ſo to be preſented as aforeſaid. " Provided, that the perſon or perſons paying the 100*l.* fine as aforeſaid " ſhall, at the ſame time, deliver and perfect, as his act and deed, a " counter-part of ſuch new indenture of leaſe, and make ſufficient ſurren- " der of the remaining intereſt hereby granted, and deliver up this pre- " ſent indenture to be cancelled. And it is further concluded and agreed " by and between the ſaid parties to the ſaid indented deed, that the ſaid " Sir *A. L.*, his heirs and aſſigns, having the immediate inheritance of the " ſaid lands and premiſes, ſhall, from time to time, and at all times for " ever hereafter, make all ſuch further and other renewals and leaſes of " the ſaid lands and premiſes, unto the ſaid *John Charles*, his executors, " adminiſtrators, and aſſigns, for three lives, *viz.* the two remaining lives, " and one other life to be nominated, at and under the reſervations of " rents, covenants, conditions, agreements, and clauſes of renewal, as " in the ſaid indented deed are ſpecified and contained. Provided, that " the parties requiring ſuch renewal pay unto the ſaid Sir *A. L.*, his heirs or " aſſigns, having the immediate inheritance of the ſaid lands and premiſes, " the ſum of 100*l.* by way of fine, for every and each renewal, within " the year next after the deceaſe of each of the ſaid lives reſpectively. " And provided, that all former leaſes thereof be then ſufficiently ſur- " rendered and cancelled." There was no covenant on the part of the leſſee to pay the fine on renewal, or to accept a new leaſe *toties quoties*: nor was any fine paid on the execution of this leaſe. *John Charles* entered and had poſſeſſion under the leaſe. On the 9th of *March* 1710, *Alice Charles*, one of the *ceſtuy que vies*, died, but no application was made for a renewal within the year, or for many years afterwards, though the leſſee was frequently preſſed by Sir *A. L.* to clear his arrears of rent, and take a renewal. In 1716 Sir *A. L.* died, having deviſed the eſtate to his nephew *Hercules Rowley*, the reſpondent's late father. In 1719 the leſſee *John Charles* firſt made application for a renewal of the leaſe, and he then tendered to Mr. *Rowley* 100*l.* as a fine for the renewal, with intereſt from the 9th of *March* 1711, being after *Alice Charles* the *ceſtuy que vie*'s death, together with a further 100*l.* for a ſecond renewal, (upon a ſuppoſition that if the leaſe had been regularly renewed on the 9th of *March* 1711, and a life then inſerted, ſuch life would have ſubſiſted no longer than ſeven

years,

years,) and intereſt alſo upon that laſt ſum. He at the ſame time tendered a pair of leaſes, purporting a renewal for the life of *Thomas Hendrick* in the room of *Alice Charles*. Theſe tenders being refuſed, and the renewal denied. *John Charles* immediately filed a bill againſt Mr. *Rowley* in the court of Exchequer in *Ireland*, *inter alia*, to compel him to renew. By a decree of that court of the 21ſt *February* 1723, this bill, ſo far as it related to a renewal of the leaſe, was diſmiſſed. No motion was made to re-hear the cauſe; nor was there any attempt to reverſe the decree. In 1746 *Richard Charles*, another of the *ceſtuy que vies* named in the leaſe, died, and within a few days of the expiration of the year after his death, a propoſal was made to the reſpondent on the behalf of the appellant, who was the grandſon of *John Charles* the original leſſee, and entitled to an eſtate-tail in this leaſehold eſtate under his will, for a renewal. This propoſal the reſpondent refuſed to accede to, but apprehending from it that the appellant intended to purſue his claim to renewal, and being deſirous that ſuch claim ſhould be brought to an early deciſion, he wrote to the appellant, offering to do every reaſonable act to contribute to bring the matter to a concluſion with all poſſible diſpatch. The appellant, however, acquieſced above ſix years longer, till 17th *September* 1754, when he filed a bill in nature of a bill of revivor of the ſuit which had been diſmiſſed in 1723. But this bill, after ſeveral amendments and demurrers, was diſmiſſed at the appellant's own requeſt in *Trinity* term 1759; and in the *Michaelmas* term following he filed another bill as a new original bill, praying, that the reſpondent might be compelled to renew the leaſe of the premiſes, by executing a new leaſe thereof for the lives of the ſaid *John Ward*, his preſent majeſty and the duke of *York*, with ſuch reſervations, conditions, covenants, clauſes, and agreements as ſpecified in the leaſe made to *John Charles*, upon the appellant's making ſuch compenſation or ſatisfaction to him for the ſame as to the court ſhould ſeem juſt and equitable; and that the appellant might have an allowance for the coſts and expences ſuſtained by *John Charles*, and might be quieted in the poſſeſſion of the lands; and that the reſpondent might be enjoined from proceeding at law concerning the premiſes till the hearing. To ſo much of this bill as ſought a renewal of the leaſe; that the appellant might be quieted in the poſſeſſion of the premiſes; and the reſpondent be enjoined from proceeding at law; or a diſcovery of ſuch matters as were, or might have been in iſſue in the former cauſe, on certain particulars, which were afterwards anſwered, the reſpondent pleaded in bar the former bill and decree in the court of Exchequer in 1719 and 1723. This plea came on to be argued before the court of Exchequer on 30th *December* 1763, when the court allowed the plea, but without prejudice to ſuch other methods of proceeding as the appellant might be adviſed to take, in order to obtain the relief ſought by his bill. This order however was reverſed by the Houſe of Lords in *England*, and the plea was directed to ſtand for an anſwer, with liberty to except and to ſave the benefit thereof to the hearing. On the 20th of *May* 1765 *John Ward*, the laſt *ceſtuy que vie*, died, and the bill being amended in order to put that in iſſue, the cauſe came on to be heard on the 12th of *November* 1772, when it was decreed by the court of Exchequer that the bill ſhould be diſmiſſed, but without coſts. From this decree the appellant appealed to the Houſe of Lords, where it was affirmed. Apr. 14th, 1764.

By articles in writing of 4th *October* 1734, *James Hamilton* demiſed to *Guſtavus Hamilton* the reſpondent's father, lands and mills in the county of *Monaghan*, Kane v. Hamilton, Ca. in the Houſe of Lords, 1776

Monaghan, to hold for the lives of the ſaid *Guſtavus Hamilton* and his two eldeſt ſons, the reſpondent and *George Hamilton*, and the ſurvivor of them, at the yearly rents therein mentioned, which the ſaid *Guſtavus* covenanted to pay: and it was agreed, that leaſes ſhould be perfected at the requeſt of either party, containing a covenant of re-entry and diſtreſs, as alſo *a covenant of renewal for ever, paying half a year's rent as a fine in ſix months after the fall of every then named, and thereafter to be named.* At the time when this demiſe was made, the fee of *James Hamilton*'s eſtate was in fact in *Nathaniel Kane*; a mortgagee of it, to whom it had been conveyed abſolutely, by under-tenant leaſe and releaſe in 1729: but Mr. *Kane* had permitted Mr. *James Hamilton* to continue in poſſeſſion of it, and verbally promiſed to re-convey it to him, upon his re-payment of the purchaſe-money and intereſt within five or ſix years. Mr. *J. H.* however, not having re-paid the money within that time, Mr. *Kane* entered into poſſeſſion, and ſhortly afterwards to *G. H.* to attorn tenant. In anſwer to this application *G. H.* ſaid, that the rent was too high, and that he would give up the lands unleſs Mr. *K.* let them to him at a lower rent. Mr. *K.* thereupon conſented to refer the yearly value of the lands to the conſideration of two perſons, who valued them at 30*l.* a year; in conſequence of which Mr. *K.* conſented to *G.*'s continuing tenent at will at that rent. About the year 1752, *G. H.* being in arrear for the rent of the ſaid premiſes, requeſted Mr. *K.* to take them off his hands, and to forgive him the arrears; upon which Mr. *K.* directed his agent, *John Speer*, to conclude this buſineſs with *G H.* on his own terms. *Speer* and *Hamilton* accordingly ſettled matters between themſelves, and the latter, about *November* 1752, gave up the poſſeſſion of the lands to Mr. *K.*, either by a formal ſurrender, or by ſome writing purporting in ſubſtance to be a ſurrender, of which *Speer* ſoon after informed Mr. *K.*, who reſted ſatisfied with his account of the tranſaction without making any further inquiry. Soon after this, *G. H.* came to *England*, where he reſided till *Auguſt* 1755, when he died inteſtate, leaving the reſpondent his eldeſt ſon and heir. In 1757 Mr. *Kane* died, and the appellant his ſon and heir entered, and continued in quiet poſſeſſion of the premiſes from that time till the year 1763, when the reſpondent applied to him for a renewal of the leaſe, purſuant to the articles. This being the firſt intimation the reſpondent received of the articles, or that any perſon claimed any intereſt in the eſtate under *G. H.* he communicated the ſame to his agent *Edmund Weld* in *Ireland*, he being himſelf at that time in *England*, and directed him to make ſtrict inquiry into the reſpondent's claim. *Weld* accordingly wrote to *Speer*, informing him of the claim; and received an anſwer from him, in which he ſtated, that *G. H.* had made an actual ſurrender of the leaſe, which he (*Speer*) had given to Mr. *Kane*, and that he (*Speer*) had another actual ſurrender of it to Mr. *K.* A copy of this letter was ſent by the appellant to the reſpondent, who never made any further claim during *Speer*'s life, but ſoon after his death he filed a bill againſt the reſpondent in the Exchequer, praying to be reſtored to the poſſeſſion of the premiſes, and that the appellant might be obliged to perfect leaſes thereof to him, renewable for ever, at the yearly rent of 30*l.*, and to account with him for the rents and profits ſince the death of *G. H.*, and pay him what ſhould appear to be due on ſuch account. The reſpondent having put in his anſwer, and the iſſue being joined, the appellant filed a croſs bill, praying that the reſpondent in the original bill might ſearch the papers, books, and entries of the ſaid *Guſtavus Hamilton*, and if there was any copy or entry of the ſaid ſurrender, or any

letter

letter or acknowledgment from the appellant of his acceptance thereof, or relative thereto, that he might ſet forth the ſame in *in hæc verba*, and might bring the ſame into court. It appeared, and was ſo admitted by the reſpondent's anſwer to the croſs bill, that upon the death of *George Hamilton*, one of the *ceſtuy que vies*, 1747, no application was made to Mr. *K.* for a renewal, nor was any ſtep taken to enforce a ſpecifick execution of the articles, or to have a life inſerted in his ſtead. It was alſo admitted by the reſpondent in his anſwer, that the great riſe in the value of lands in *Ireland* ſince the year 1752, was the main inducement with him to attempt the recovery of the poſſeſſion of this eſtate. But the reſpondent ſaid, that he had been informed by *G. H.* that he never had made any ſurrender of the leaſe; in anſwer to which the appellant offered in evidence ſeveral letters of *Speer* to prove the fact of ſurrender; but theſe letters the court rejected, and decreed, that the reſpondent was entitled to a leaſe for three lives renewable for ever, and diſmiſſed the croſs bill with coſts. Upon appeal to the Houſe of Lords in *England*, this decree reverſed, and the reſpondent's original bill was diſmiſſed. Feb. 7th, 1776.

Edward Edwards being ſeiſed in fee of the manor of *Haſtings*, and the lands therein compriſed, ſituate in the county of *Tyrone*, by indenture bearing date the 28th *October* 1685, gave, granted, enfeoffed, and in fee-farm let unto *Thomas M'Cauſland*, his heirs and aſſigns, the two town-lands of *Claraghmore* and *Seagully*, being part of the lands compriſed in the ſaid manor, to hold the ſame to him, his heirs and aſſigns, in fee-farm for ever, *viz* for the term of his natural life, and the natural lives of his two ſons, *Andrew* and *John M'Cauſland*, and the longeſt liver of them, at the clear yearly rent of 15*l.* ſterling, with two year old bullocks and one fat mutton. In the indenture there was contained (*inter alia*) a power of entry and diſtreſs for the rent, when in arrear, and an agreement, *that upon payment to the grantor or his heirs or aſſigns, of the ſum of* 7l. 10s. *ſterling, within three months after the fall of each of the ſaid lives, he or they would add another life inſtead thereof, by a new indenture, continuing three lives for ever;* and a further agreement, that the ſaid *Thomas M'Cauſland*, his heirs and aſſigns, ſhould make appear, at every *Eaſter* court-leet, and view of frankpledge, to be holden for the ſaid manor, by two ſufficient witneſſes duly ſworn, that the ſaid three lives were then in being, in default whereof, it ſhould be lawful for the ſaid *Edward Edwards*, his heirs or aſſigns, to diſtrain for the ſaid fine, although all the ſaid lives ſhould be then in being. But there was not any power of re-entry reſerved to the grantor, in caſe of non-payment of the ſaid rent or fines, nor was there any clauſe which declared the rent void, if the grantee ſhould neglect to renew. In the year 1708, the original indenture and the lands therein compriſed having become veſted in the reſpondent's grandfather *James Murray*, and it being doubtful whether two of the lives, named in that deed, had not fallen, the eſtate was renewed by *Thomas Edwards*, the ſon and heir of the grantor, according to the terms of the original, and two new lives were inſerted in the room of thoſe ſuppoſed to be fallen. In 1724 *James Murray* conveyed his intereſt in the eſtate to his ſon *George Murray*, by virtue of which he entered into poſſeſſion, and enjoyed the lands till his death; and during all that time paid the reſerved rent. The ſaid *Thomas M'Cauſland*, one of the lives named in the deed of renewal of 1708, died in the year 1741; *James Murray*, another of the ſaid lives, died in the year 1746; and the ſaid *George Murray*, the other of the ſaid lives, died in 1763 inteſtate, leaving the reſpondent Bateman v. Murray, Caſes in the Houſe of Lords, 1779

Sophia his widow, and the reſpondent *William* his eldeſt ſon and heir, then a minor, who thereupon became entitled to the ſaid lands, under a marriage ſettlement, ſubject to a jointure to the reſpondent *Sophia* his mother. At this time, the appellant, the Counteſs of *Roſs*, who was the grand-daughter of *Thomas Edwards*, under whom the leaſe was renewed, and who was entitled to theſe lands under her father's will, reſided in *England*, where ſhe continued till ſome time in the latter end of the year 1763, or the beginning of 1764. Soon after her return to *Ireland*, the reſpondents cauſed deeds of renewal to be prepared, purſuant to the covenants for that purpoſe in the original indenture of *October* 1685, and ſent the ſame to the counteſs, with a ſum of money, as they alledged, ſufficient to pay her all the renewal fines, with intereſt, which would be due to her on her executing ſuch deeds of renewal. Inſtead of complying with this application, the counteſs brought an ejectment, in *Eaſter* term 1763, for the recovery of the premiſes in queſtion; upon which, before any judgment was obtained, the reſpondents in *June* 1765 filed their bill in the court of Chancery in *Ireland* againſt the appellants, PRAYING, That ſhe might be compelled to execute a new leaſe of the premiſes in queſtion, purſuant to the covenant for renewal in the ſaid original indenture of *October* 1685, under the rents and with the covenants in the ſaid indenture contained; and that ſhe might be reſtrained in the mean time by injunction from proceeding in the ſaid ejectment. The appellant, Lady *Roſs*, by her anſwer inſiſted, that the reſpondents were not entitled to a renewal upon two grounds; the one was, an agreement made between *James* and *George Murray* with her father *Hugh Edwards*, and in part carried into execution, for the purchaſe of their intereſt in the premiſes; the other was, that neither *George Murray* nor the plaintiffs had complied with the terms of the covenant for renewal, by not paying or tendering the fine within three months after the death of the lives. Iſſue being joined, ſeveral witneſſes were examined on each ſide. The cauſe came on to be heard before the Chancellor of *Ireland* on the 20th of *July* 1772, when the following iſſues were directed to be tried, *viz.* Whether any, and what agreement was entered into by the ſaid *James* or *George Murray* for a ſale of their intereſt in the ſaid lands, and of the ſaid leaſe thereof? And in caſe there was any agreement, whether the ſame was carried into execution, or whether the ſame was varied, or departed from, by the parties thereto, or either of them? The jury, by their finding, negatived any ſuch agreement at all. The cauſe afterwards came on to be heard on the judge's certificate and merits, when the reſpondents' right of renewal was conteſted on the ground of laches in having neglected to renew; but the Chancellor was pleaſed, on the 22d *April* 1777, to order and decree, that the reſpondents were entitled to a renewal of the ſaid leaſe, according to the true purport and intent of the ſaid deeds of *October* 1685 and *November* 1708, upon payment of the ſeveral fines and intereſt; and of the rent and arrears of rent and duties become due. From this decree, and the ſaid decree or order of 20th *July* 1772, the appellants appealed to the

Feb. 18th 1779. This reverſal though perfectly conſonant to Engliſh principles, gave great diſſatisfaction, and occaſioned conſiderable alarm in Ireland. It was ſaid to claſh with a *local equity, the old equity of that kingdom*, where theſe leaſes were conſidered on both ſides as a kind of inheritance; where they had been introduced ſoon after the country was recovering from the convulſions of the great rebellion in the laſt century, for the purpoſe of raiſing an uſeful and reſpectable tenantry, and the improvement of agriculture, and where, upon that policy, they had ever been protected and preſerved by the courts of equity, whoſe practice it had invariably been, to fill up the lives, upon the tenant's neglect to renew, provided there was one life ſtill ſubſiſting, that is, provided there was a legal eſtate for the equity to attach upon. In conſequence therefore of this alarm, an act was paſſed in the 15th and 20th of the King, c. 30. which revives the *old equity*, and provides, that in all caſes of mere neglect where no fraud appears to have been intended, no dereliction on the part of the tenant, by neglecting or refuſing to renew after the landlord has demanded the fine, court of equity ſhall relieve upon an adequate compenſation being made. See Vernon and Scriven's Reports of Caſes in Ireland p. 315 and the caſe of Magrath v. Lord Muſkerry in the ſame book. 166.

House

Houſe of Lords in *England*, when their lordſhips were pleaſed to order and adjudge that the decrees be reverſed, and the reſpondents' bill diſmiſſed.

In a leaſe granted in 1739, by the mayor and burgeſſes of *Leominſter* for 99 years, determinable on three lives, there was a covenant on the part of the leſſors, "that they and their ſucceſſors, when and as often as either of "the ſaid three lives ſhould die, and there ſhould be *only two lives remaining* "*in the premiſes*, if the leſſee, her executors, adminiſtrators, or aſſigns, "ſhould, within the ſpace of ſix months next enſuing the deceaſe of ſuch "life, or at the firſt or ſecond chamber which ſhall be held after the expi- "ration of the ſaid ſix months, apply for a new leaſe of the ſaid premiſes, "and pay a fine of 4*l.* for a new leaſe of the ſaid premiſes, and pay the "ſum of 4*l.* to the bailiff, &c. with ſix months intereſt for the ſaid 4*l.*, after "the rate of 5*l. per cent.* the ſaid bailiff, &c ſhould add a third life in the "ſaid premiſes, and grant to her or them a new leaſe of the ſaid premiſes "for 99 years, to commence from the time of ſuch payment, if the two "other lives, and ſuch other live as ſhould be nominated by the ſaid leſſee, "her executors, &c. or either of them, ſhould ſo long live, under the like "rents, covenants, and agreements, and to the ſeveral uſes and truſts "therein before declared, and ſo *from time to time ever after*, as often as the "caſe ſhould ſo happen." There were ſeveral renewals of this leaſe on account of the death of the *ceſtuy que vis*: the laſt was in the year 1763, and the lives for which the leaſe was then granted, were *Adam Ward* and *Mercy* his wife, and the plaintiff's. In 1764 *Adam Ward* aſſigned for a valuable conſideration the beneficial intereſt in the leaſe to the plaintiff, who entered under ſuch aſſignment. *Adam Ward* died in 1781 and his wife in 1789, and ſoon after her death, the plaintiff applied to the corporation for a new leaſe, offering to pay them 4*l.* with intereſt from the death of *Adam Ward*, and alſo 4*l.* as a fine for renewal, on the death of *Mercy Ward*, and a further ſum of 4*l.* upon a ſuppoſition, that if plaintiff had renewed the leaſe on the death of *Adam Ward*, by putting in another life, ſuch other life might have fallen in between the death of *Adam Ward* and *Mary Ward*. This the corporation refuſed, inſiſting, that no application having been made to renew till the falling in of the ſecond life, they were not bound to renew upon the terms of the covenant, but were at liberty to impoſe ſuch terms as they pleaſed. It was contended on the part of the plaintiff, that, although the covenant was only to renew on the falling in of one life, yet the ſpirit of the covenant extended to the caſe of two lives falling in: that the caſe lay in compenſation, and that no forfeiture is to be incurred when compenſation can be made. But Lord Chancellor ſaid, the caſes upon *Iriſh* leaſes in the Houſe of Lords went the whole length of this caſe; that the plaintiff was not bound to renew upon the falling in of one life; he had his election whether to renew or not, and has made that election; the corporation therefore are not bound now to renew. It has been determined over and over in the *Iriſh* caſes.

Bayley v. the corporation of Leominſter. 3 Br. Ch. Rep. 329.

However, where a compenſation can be made, where the tenant's neglect can be reaſonably accounted for, it is the general diſpoſition of courts of equity to relieve in a lapſe of this kind. The meaſure of compenſation introduced in *Ireland* by the Lord Chief Baron *Gilbert* was, by allowing the leſſor ſeptennial fines; that is, by giving him a fine for every ſeven years which had lapſed ſince the fall of a life, and intereſt upon each fine from the time of its being ſuppoſed to have accrued due, calculating from the probalities of human life, that if another life had been added at the regular period of renewal, the duration of ſuch life would not have exceeded

Sweet v. Anderſon, 2 Br. P. C. 430

the term of ſeven years. This was firſt done in one of the Duke of *Ormond*'s leaſes: the Duke had granted a leaſe in 1697 for the lives of the leſſee, and his nephew *John Anderſon*, and *V. B.*, and of the ſurvivor, and had covenanted, "that as often as any of the lives ſhould happen to fail "he would at the requeſt of the leſſee, his heirs or aſſigns, and upon payment of all rents of the ſaid premiſes, that ſhould be then in arrear "and advancing and paying, by way of fine, within twelve calendar "months next after the death of each life, 16*l.* 13*s.* 4*d.*, renew, and "make a new leaſe of the ſaid ſeveral lands, &c. to the leſſee, his heirs "and aſſigns, at and under the yearly rent and reſervations, and with the "covenants, conditions, and proviſos contained in the ſaid leaſe; with "the like clauſe for being diſpuniſhable of waſte, and the like covenant "for renewal of ſuch two lives, as ſhould be then in being, and alſo for "one other life, to be added in the place and room of ſuch of the three "lives as ſhould, from time to time, happen to fail. Provided, that, if "when ſuch new leaſe or renewal was to be made, more than one of the "*ceſtuy que vies*, beforementioned ſhould be dead, there ſhould be named "in ſuch leaſe ſo many other lives in their ſtead; and there ſhould be paid "to the perſon renewing a fine, of the value aforeſaid, for each of the "ſaid *ceſtuy que vies*, who ſhould be dead at the time of ſuch renewal." The leſſee himſelf died in 1714, and upon his death the reſpondent, who was the deviſee of his eſtate, applied to the appellants, who had purchaſed the Duke of *Ormond*'s reverſionary intereſt, for a renewal of the leaſe, and that another life might be inſerted in the room of that which had dropped; and at the ſame time tendered the fine of 16*l.* 13*s.* 4*d*, all rent and arrears being diſcharged; but the appellant refuſed to renew, inſiſting that *John Anderſon*, one of the *ceſtuy que vies*, had been abſent from *Ireland* ever ſince the year 1697, and therefore muſt be preſumed to be dead, and that no tender of a fine for renewal having been made within twelve calendar months after his abſence, the reſpondent had loſt his right of renewal. The reſpondent thereupon filed his bill in the court of Exchequer to oblige the appellant to renew the leaſe by inſerting a new life in the room of the leſſee's: but it appearing that *John Anderſon*, the other *ceſtuy que vie*, had been along time abſent from *Ireland*, and there being no poſitive proof of his being alive, the court ordered the bill to be amended by inſerting a tender of the fine for the ſecond life; and the reſpondent having made ſuch tender, and amended his bill accordingly, they decreed the appellant to renew, and make a new leaſe to the reſpondent for the lives named in the bill, and according to the covenant in the leaſe, on the reſpondent's paying the appellant 16*l* 13*s.* 4*d.*, with intereſt from the 19th *July* 1704; another ſum of 16*l* 13*s.* 4*d*, with intereſt from the 19th of *July* 1711; another ſum of 16*l.* 13*s.* 4*d*, and intereſt from the 19th *July* 1718; and on the reſpondent's alſo paying to the appellant the ſum of 16*l.* 13*s.* 4*d*, being the fine due on the death of the leſſee; and all rents in arrear, duties, &c. purſuant to the leaſe. And this decree, upon appeal to the Houſe of Lords, was affirmed.

Rawſtore v. Bentley, 4 Br. Ch. Rep. 415.

A leaſe was granted for 21 years, under the yearly rent of 1*l.* with a covenant on the part of the leſſor to renew before the end of the term for 21 years, and to renew from the end of ſuch term for 21, 21, and 15 years more, making in the whole a term of 99 years. It was in effect, and ſo underſtood by the parties to be, a leaſe for 99 years, but the eſtate being copyhold holden of a manor in which no leaſe could be granted for more than 21 years, this mode was neceſſarily adopted in order to avoid a for-

feiture

forfeiture. At the expiration of the first term, there being an arrear of rent due, and no application made for a renewal, the executor of the devisee of the lessor brought an ejectment, and obtained judgment and possession. But when this ejectment was brought, the lessee was under difficulties, he being then a bankrupt; as it did not appear that there was not a sufficient distress upon the premises, as on the contrary it appeared, that the lessee had laid out a large sum of money upon them; as it was also in evidence, that the person to whom the lessee had mortgaged them, had endeavoured to stop the suit, by a treaty for a new lease, which had been refused; as the covenant did not expressly require any request from the lessee for further terms;—under all these circumstances, the Master of the Rolls held the lessee entitled to renewal on payment of the arrears of rent with interest, and the costs both at law and in equity.

That this indulgence in the courts of equity in the case of a tenant's neglecting to renew, is not of modern date, and that it hath been long ago carried to a considerable extent, will appear from the case immediately following, but which is cited for another purpose.

A court of equity in decreeing a renewal, will not always adhere to the literal import of the clause upon which such renewal is directed to be granted, but will regulate the term according to what it conceives to be the spirit and sound reason of the clause; as in the following cases. An estate was devised for the purpose of founding an hospital: the trustees procured letters patent for that purpose, with power for them to make orders and constitutions for governing the hospital; under which they ordained, that no lease should be made for above 21 years, the rent not to be raised, nor above three years rent to be taken for a fine, or *gresson*. The estate was originally leased at 20*l. per ann.* On a bill by the Master and Hospital, Sir *Edward Phillips* decreed the lessee to enjoy, paying 120*l. per ann.* and afterwards the case was heard again by Lord *Ellesmere*, and although the lease was long before expired, his lordship decreed the lessee to account at 120*l. per ann.* only, and to have a new lease for 21 years at that rent, notwithstanding it appeared the estate was, by the tenant's improvements, then worth 250*l. per ann.* In 1663 it was decreed again by Lord *Clarendon*, assisted by *Hide*, C. J and *Hale*, C. B. that the lease, having been some time expired, the tenant should account from the expiration of the lese, at 120*l. per ann.* and that he should have a new lease on reasonable terms, and recommended it to the Archbishop of *York*, to call the parties before him, and to certify what terms were thought reasonable for a lease, who certified the hospital had agreed to accept a fine 100*l.* and 120*l. per ann.* The present tenant having purchased the lease, and laid out a considerable sum in improvements, filed a bill for renewal.—Lord Chancellor—The constitution that the rent should not be raised, is just and charitable, for the encouragement of the tenant to improve the estate; and he ought to find a benefit in it; and the hospital will also find an advantage in having the rent well secured by an estate of greater value and constantly paid. But the rule or constitution is not to be followed according to the letter, that no more rent is to be taken than what was at first reserved; but as times alter, and the price of provisions, &c. increases, so the rent ought to be raised, in proportion. The tenant is entitled to a beneficial lease, but not at any certain rent: the constitution is not to be regarded in the letter, but in the reason of it. His lordship therefore referred it to the Master to certify the value of what had been laid out in improvements, and when that was ascertained, he

Watson v. Hinsworth Hospital 2 Vern. 56

he referred it to the Archbiſhop of *York*, to certify what fine and what re he thought reaſonable.

Attorney-General v. Smith, 2. Vern. 746

So, where a decree had been made by the Lord *Coventry*, for granting leaſe of charity lands to *J. S.* (who had been at great expence in recove ing them) for 99 years, determinable upon lives, at the rent of one thir of the then improved value to be renewable from time to time for eve without fine according to the value of the lands ſettled by a commiſſion o ſurvey directed by the court for that purpoſe; it was decreed, that the leaſ ſhould be renewed *toties quoties* without fine, but that the rent was not t be computed according to the value of the land at the time of the decree but according to the real improved value of the eſtate at the time of every renewal.

In mortgages and ſettlements of leaſes of this kind, it is uſual to inſert proviſion for renewal. In mortgages, there is generally an agreement, that if the mortgagor neglects to renew, it ſhall be lawful for the mortgagee to renew, and that the fine and charges of renewal ſhall be a charge upon the premiſes, and bear intereſt. In ſettlements, there ſhould be a power authorizing the truſtees, from time to time, to renew the leaſes, and for that purpoſe, to raiſe money by mortgage.

Manlove v. Ball, 2 Vern. 84 Lucam v. Martins, 3 Atk. 4. 1 Wilſ. 34. S. C.

When ſuch a proviſion is not inſerted in a mortgage, the mortgagee cannot indeed compel the mortgagor to renew, but he may do it himſelf, and the money which he may ſo lay out ſhall be added to the principal of the mortgage, and carry intereſt.

2 Vez. 429. Ambl. 88. 2 Br. Ch. Rep. 244. 2 Vern. 666. 2 Vez. 429. 2 Vez. jun. 652.

Upon the omiſſion of ſuch a proviſion in a ſettlement, the expences of renewal are to be both by the ſeveral perſons intereſted in the eſtate in proportion to their reſpective intereſts. The old rule of aſcertaining this proportion was by making the tenant for life pay one-third of the expence or keep down the intereſt, and the remainder-man the other two-thirds. This rule perhaps may be proper where the nature of the eſtate, the will of the teſtator, or the circumſtances of the caſe compel a renewal; but as a general rule, it would frequently be wrong: for ſuppoſe the deviſee or grantee for life to be one of the perſons upon whoſe life the eſtate is holden, and a renewal to be made by him; in this caſe, as there is no obligation upon him to renew but on the truſts of the ſettlement, and as he cannot poſſibly in any way enlarge his own intereſts, the fine and expence of the renewal muſt, in juſtice, be paid entirely by the remainder-man. This is evidently the caſe, where the deviſee for life has the legal eſtate, and it ſhould ſeem, that it is the ſame, where he is a *ceſtuy que truſt*. Suppoſe again, an eſtate of limited duration, as an eſtate for years, or for the lives of ſtrangers, to be limited to one for life, without any obligation upon him to renew; if ſuch a perſon renew, it is manifeſt, that the contribution of a third muſt, in moſt caſes, be very unfair and unequal. The true rule therefore in ſuch caſe muſt evidently be, that the proportion follow the benefit; that the contribution of a perſon having ſuch limited intereſt in the eſtate, and voluntarily renewing, ſhall only be in proportion to the benefit which he actually derives from ſuch renewal.

Adds v. Clement, 2 P. Wms. 459. Nightingale v. Lawſon. 1 Br. Ch. Rep. 440.

Stone v. Theed. 2 Br. Ch. Rep. 245. If the eſtate be charged with annuities, the annuitants are not bound to contribute to the expence of renewal. Maxwell v. Aſhe, Nov. 6, 1752. 1. Br. Ch. Rep. 444. n.

END OF VOL. VI.